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Governmental Liability

The Newsletter of the Governmental Liability Committee

3/22/2016 Volume 22 Issue 1

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Leadership Note

Message from the Chair

by R. Jeffrey Lowe

Howdy, partners! I am pleased to report to you all (or should I say "y'all," or even better "all y'all") that our 2016 Annual Seminar in Austin, Texas was a rousing, crowd-pleasing success. We had record attendance, outstanding speakers, and great fellowship. Because of a trial that was scheduled to begin on February 1, 2016, that did not resolve itself until January 26, 2016, I was unsure until the last minute whether I would be able to attend the seminar. Luckily, my case settled and I was able to book a last-minute flight that permitted me to attend the seminar. The very real possibility of missing the seminar made me realize how much I value this Committee, the seminar, and the relationships I have built attending this seminar for the last 15 years. I consider myself extremely lucky to head what I feel is the preeminent collection of governmental defense attorneys in the country and cherish every opportunity I have to spend time with great legal minds to discuss governmental defense work. This year's seminar was no exception and we all owe Chris Heigele, Mark Hanna, David Karamessinis, and their planning committee a hearty pat on the back for planning the seminar. Austin was a great host city, and I look forward to our Committee's return to the Lone Star State. If you have any other suggestions or requests for the 2017 seminar, please do not hesitate to contact Mark Hanna, our seminar chair, Jody Corbett or Peter Archangeli, our seminar vice chairs.

Moving forward—to the final five months of my time as the Committee Chair—there are a couple of goals I would like to see the Committee strive to achieve. The first is to further the work of the Governmental Attorney Initiative. The goal of this subcommittee is to find ways to get more governmental attorneys, whether they are attorneys' general, law department attorneys, county attorneys, city attorneys, or town attorneys, to join our ranks. We would add a different perspective to our growing base (which by the way grew by over 100 new committee members in the last year) and provide another set of minds, thoughts, and issues to the discussion. This subcommittee is working to find a way to make DRI and Committee membership more feasible to this group of attorneys who traditionally tell us they just cannot afford the regular governmental rate for DRI membership. If you would like to participate in this discussion, please contact me and we can add you to the subcommittee.

The other goal is to incorporate into and give life to the DRI for Life initiative in our committee. DRI for Life is a new initiative by DRI to ensure that we can all be DRI members for life and not burn ourselves out and fade away. DRI recognizes, and I agree, that worklife balance is something with which we all battle, and if you are one of those people who does not struggle with it, then you can help the rest of us. Therefore, DRI wants each committee to come up with activities at seminars and meetings that recognize we all need time to balance our personal and professional lives. If you are interested in assisting our committee with DRI for Life initiatives that focus on health, well-being, and personal/professional life balance, please contact me and I will happily add your name to the subcommittee.

In conclusion, I would like to thank each and every member of our Committee's leadership for all the hard work you perform to make our Committee one of the fastest-growing and most well-respected Committees within DRI. Your efforts are well-appreciated by me, our Vice-Chair Casey Stansbury, and the rest of the Committee. I do not say thank you enough, but I do greatly appreciate all you do and want to say THANK YOU!

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Articles of Note

Balancing Jail Security with Arrestees' Constitutional Rights in Pre-Arraignment Strip Search Cases After *Florence v. Board of Chosen Freeholders*

by Yordana Wysocki, Michael Condon, & Mike Bersani

Constitutional strip search cases have become a cottage industry for the plaintiff's bar. In the last 10 years, multi-million dollar settlements have emerged in several high profile cases. Illinois' Cook County paid out $55 million in 2010; New York City paid $20-$50 million in 2006; Los Angeles paid $27 million in 2002; California's Sacramento County paid $15 million in 2005; and, Miami-Dade County paid $6.25 million in 2006. This is just a small sample of strip search settlements and judgments paid by cities and counties across the country before the U.S. Supreme Court seemingly ended the financial bloodbath in *Florence v. Board of Chosen Freeholders of the County of Burlington*, 132 S. Ct. 1510 (2012). This article will examine whether the floodgate is truly closed, or whether it may continue under limited circumstances left unresolved in *Florence*.

Florence upheld a jail strip search on a new inmate arrested on a warrant. The Court held that a blanket policy requiring all individuals arrested on a warrant—regardless of offense—to be strip searched before entering general population was constitutional. *Id.* at 1520. The Court did not rule on the issue of whether a blanket policy of strip searching inmates arrested on probable cause (rather than a warrant) is constitutional, leaving the question open. Since *Florence*, the trend in the lower courts appears to be an expansion, rather than a restriction, of the doctrine to include individuals arrested without a warrant and juvenile offenders.

The *Florence* decision was the first time the Supreme Court considered the constitutionality of strip searches of pretrial detainees since *Bell v. Wolfish*, 441 U.S. 520 (1979). In *Florence*, plaintiff was arrested on a bench warrant following a traffic stop and strip searched before he entered the jail's general population, and again when he was transferred to another facility. 132 S. Ct. at 1514. He alleged that these searches violated his Fourth Amendment rights because the crime for which he was arrested was minor and did not involve drugs or weapons and because there was no reasonable suspicion or probable cause to support such an invasive search. *Id.* The Supreme Court disagreed, emphasizing that "[t]he difficulties of operating a detention center must not be underestimated by the courts." *Id.* at 1515 (*citing Turner v. Safley*, 482 U.S. 78, 84–85 (1987)). County jails are dangerous institutions which require "the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face." *Id.* Thus, the Court noted that a regulation impinging on a detainee's rights must be upheld "if it is reasonably related to legitimate penological interests" and that courts should "defer to [the correctional officials'] expert judgment in such matters." *Id.* at 1515-16 (internal citations omitted).

The Court then turned to the specific issue before it: whether detainees arrested for minor crimes should be exempt from the general strip search requirements absent an individualized suspicion of concealed contraband. *Id.* at 1518-19. The Court laid out numerous reasons jails and other detention facilities require strip

searches as a standard part of the intake or booking process. *Id.* at 1518-20. The Court held that jail officials have a "substantial interest in preventing any new inmate, either of his own will or as a result of coercion, from putting all who live or work at these institutions at even greater risk when he is admitted to general population." *Id.* at 1518-20. In rejecting plaintiff's argument that detainees arrested for minor offenses not involving weapons or drugs should be exempt from strip searches, the Court noted that the seriousness of the offense is not always an indication of whether a detainee has concealed contraband or even if the detainee is a dangerous criminal. *Id.* Additionally, the Court stressed that it would be laborious and ineffective to require officers to make a case-by-case evaluation for each inmate. *Id.* Thus, the more reasonable solution is to strip search every incoming inmate being transferred to general population in order to minimize the dangers to everyone in the facility. *Id.* at 1522.

The Court did not "consider a narrow exception ... which might restrict whether an arrestee whose detention has not yet been reviewed by a magistrate or other judicial officer, and who can be held in available facilities removed from the general population, may be subjected to the types of searches at issue here." *Id.* at 1523 (joined only by Roberts, C.J., Scalia, J. and Alito, J.). Chief Justice Roberts and Justice Alito in their concurrences echoed this sentiment, noting that the Court has left "open the possibility of exceptions" *id.* at 1523 (Roberts, C.J., concurring), and that "the Court does not hold that it is *always* reasonable to conduct a full strip search of an arrestee whose detention has not been reviewed by a judicial officer and who could be held in available facilities apart from the general population." *Id.* at 1524 (Alito, J., concurring).

Since *Florence*, numerous suits have been filed challenging strip searches which fit into one or both of the exceptions identified by the Court. For the most part, courts have dodged ruling on the issue, deciding the cases on qualified immunity grounds. For example, the Fourth Circuit in *Cantley v. West Virginia Regulatory Jail & Correctional Facility Authority*, 771 F.3d 201 (4th Cir. 2014), granted qualified immunity to the officers who strip searched a pre-arraignment arrestee without making a determination on the constitutionality of the search. On the same day, the Fourth Circuit also issued an opinion in *West v. Murphy*, 771 F.3d 209 (4th Cir. 2014), in which the court granted the correctional wardens qualified immunity on the plaintiffs' claims that they were strip searched prior to arraignment. Several other circuits have also held that qualified immunity protected individual jail staff from liability from strip search claims. *See*, *e.g.*, *T.S. v. Doe*, 742 F.3d 632, 639-40 (6th Cir. 2014) ("Citation to *Florence* is, in large respect, a shorthand for the fundamental shift in the law that has taken place over the past three decades … It is thus wholly consistent with the principles of qualified immunity to give the defendants the benefit of the Court's ruling."); *Gonzalez v. City of Schenectady*, 728 F.3d 149, 158 (2d Cir. 2013) (granting correctional officers qualified immunity for a suspicionless strip search following arrest for felony drug possession); *see also Crump v. Passaic Cty.*, No. 14-cv-02365 (WHW)(CLW), -- F.Supp.3d – (D. N.J. Dec. 2, 2015) (granting individual defendants qualified immunity because strip search law still unsettled but finding that plaintiffs had stated a claim against the county itself for strip searches that took place in view of at least 10 other detainees); *Johnson v. D.C.*, 734 F.3d 1194 (D.C. Cir. 2013) (granting qualified immunity in a class action involving female arrestees strip searched prior to arraignment and not held in general population).

Few circuits have definitively ruled on the application of *Florence* to other circumstances. Last year, the Sixth Circuit in *Williams v. City of Cleveland*, 771 F.3d 945 (6th Cir. 2014), held that a putative class of pretrial detainees stated a claim that the strip search procedures at the city's jail for new detainees was unconstitutional. The plaintiffs alleged that they were strip searched in the presence of other same gender detainees and sprayed with a delousing solution from an exterminator can all over their nude body, including their genitals. The

court distinguished *Florence* because *it* did not involve a contact seizure (spraying delousing solution) and did not involve a strip search in the presence of other detainees. *Id.* at 952-53. Conversely, the Third Circuit unambiguously expanded *Florence* to include juvenile offenders in *J.B. v. Fassnacht*, 801 F.3d 336, 337 (3d Cir. 2015), this fall. Finding that the security concerns in juvenile detention facilities were the same as those in adult jails, the Court ruled that the juvenile's enhanced right to privacy must be subsumed by the facilities' "overarching security interests." *Id.* at 342, 347.

Several district courts post-*Florence* have held that blanket policies which require strip searching of all incoming detainees, regardless of arraignment status, is constitutional. For example, in August an Illinois district court decided *Fonder v. Sheriff of Kankakee, et al.*, No. 2:12-cv-02115 (C.D. Ill. Aug. 24, 2015), currently on appeal to the Seventh Circuit, upholding the jail's policy of strip searching all incoming detainees moved into general population, regardless of warrant status or offense. The court ruled that "a policy and practice requiring *all* new inmates to be strip searched before they enter general population is reasonable under the Fourth Amendment." Likewise, last March, a New Jersey district court granted summary judgment in favor of the county and sheriff in *Moore v. Atlantic County*, No. 07-5444 (RBK/AMD), 2015 WL 1268184 (D. N.J. Mar. 18, 2015). The court ruled that the county's policy requiring all incoming detainees to be strip searched even before it is determined whether the detainee would enter general population is constitutional. 2015 WL 1268184 at *1. The court concluded that the case did not fit into the narrow exception identified in *Florence*, which only exists "if two circumstances are true: the arrestee's detention has not yet been reviewed by a judicial officer, *and* the arrestee can be held apart from the general population." *Id.* at 8. The district court also found that the exception identified in *Florence* did not require the detainee to actually enter the general population but "was limited to circumstances where the detainee ' *can* be' held apart from the general population." *Id.* The Northern District of Iowa went further, upholding a policy of searching pre-arraignment arrestees even though they were not housed with other inmates in *Rattray v. Woodbury County, Iowa*, 908 F. Supp. 2d 976 (N.D. IA 2012); *but see*, *Ellsworth v. Wachtel*, No. 1:11-cv-0381 (N.D. N.Y. Jan. 11, 2013).

Although not conclusive, a trend expanding the *Florence* holding to include pre-arraignment detainees and juveniles who are destined for general population can be inferred from the current case law, which is an encouraging development for jail and prison officials. Applying a blanket strip search policy to all incoming arrestees who will be or could be placed in general population creates a bright line rule based on activity—general population housing—rather than an alleged crime, warrant-status, or another class. Strip searching everyone not only serves security concerns but also ensures that unconstitutional discrimination does not play a role. As noted by Chief Judge Alex Kozinski in his concurrence in *Bull v. City and County of San Francisco*, 595 F.3d 964 (9th Cir. 2010), a pre-*Florence* case, classifications based on activity (*i.e.*, housing in general population or contact visits) "trade the protection afforded by the individualized suspicion for protection derived from the fact that the government treats all similarly situated people in precisely the same way." *Id.* at 983 (J. Kozinski, concurring). The Supreme Court's decision in *Florence* encourages this clear-cut protection while safeguarding the security and related penological interests which govern jails and prisons. The reasoning espoused by the Supreme Court is applicable to both pre-arraignment and other detainees housed with other inmates. The same rules should apply across the board.

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Survey of Expanding Transgender Inmate Rights

by Michael T. Davis & Tina Cheng

The issue of whether the Eighth Amendment requires that transgender inmates receive hormone therapy or sex reassignment surgery has been frequently litigated. Many transgender inmates in jurisdictions throughout the country have filed lawsuits under 42 U.S.C. § 1983, alleging that prison officials violated their Eighth Amendment right to be free of cruel and unusual punishment by exhibiting deliberate indifference to their serious medical needs. To succeed on an Eighth Amendment claim, a plaintiff must show both an objectively serious medical need and that prison officials were subjectively (i.e., deliberately) indifferent to that need. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

Courts now almost universally accept that gender dysphoria is an objectively serious medical need deserving of treatment. *See, e.g.*, *Kosilek v. Spencer*, 774 F.3d 63, 86 (1st Cir. 2014) (*en banc*); *De'lonta v. Johnson* , 708 F.3d 520, 525 (4th Cir. 2013); *White v. Farrier*, 849 F.2d 322 (8th Cir. 1988); *Meriweather v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987). Gender dysphoria is a long-term condition in which a person experiences a marked difference between the individual's expressed/experienced gender and the gender others would assign to him or her. Although the terms transsexualism or gender identity disorder ("GID") have been used in the past to describe this condition, the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* replaced those terms with "gender dysphoria" to better characterize the experiences of affected individuals.

While circuit courts accept that gender dysphoria requires treatment, they are divided as to what the Eighth Amendment requires for that treatment, generally applying one of two overarching legal principles in their analyses. Some circuits abide by the general principal that, while the inmate has the right to treatment for gender dysphoria, the inmate is not entitled to their specific treatment of choice. *See, e.g.*, *Praylor v. Texas Dep't of Criminal Justice* , 430 F.3d 1208, 1209 (5th Cir. 2005); *Long v. Nix*, 86 F.3d 761, 766 (8th Cir. 1996); *Meriweather*, 821 F.2d at 413; *Supre v. Ricketts*, 792 F.2d 958, 962-63 (10th Cir. 1986). These courts tend to accept that, so long as the inmate is receiving some form of treatment for gender dysphoria, there is no deliberate indifference. *See, e.g.*, *Supre*, 792 F.2d at 963.

Other circuits temper this principle with recognition that the prison must provide constitutionally adequate medical treatment, which may be very specific in the context of gender dysphoria. *See Estelle*, 429 U.S. at 103-06. In 2011, the Seventh Circuit affirmed a district court's ruling that Wisconsin's Inmate Sex Change Prevention Act was unconstitutional because it denied the use of state funds for hormone therapy or sexual reassignment surgery which could be the only constitutionally adequate treatment. *Fields v. Smith*, 653 F.3d 550, 556, 559 (7th Cir. 2011). The court explained, "Just as the legislature cannot outlaw all effective cancer treatments for prison inmates, it cannot outlaw the only effective treatment for a serious condition like GID." *Id.* at 557. The Seventh Circuit also determined that the district court did not abuse its discretion in concluding that the prison officials' evidence failed to establish any security benefits associated with a ban on hormone therapy. *Id.* at 558.

In 2012, the World Professional Association for Transgender Health ("WPATH") issued specific recommendations for treatment of individuals with gender dysphoria. The Fourth Circuit Court of Appeals summarized the WPATH standards:

> The Standards of Care, published by [WPATH], are the generally accepted protocols for the treatment of GID. They establish a "triadic treatment sequence" comprised of (1) hormone therapy; (2) a real-life experience of living as a member of the opposite sex; and (3) sex reassignment surgery. The Standards of Care explain that although the first two treatment options provide sufficient relief

> for some patients, others with more severe GID may require sex reassignment surgery. Pursuant to the Standards of Care, after at least one year of hormone therapy and living in the patient's identified gender role, sex reassignment surgery may be necessary for some individuals for whom serious symptoms persist. In these cases, the surgery is not considered experimental or cosmetic; it is an accepted, effective, medically indicated treatment for GID.

De'lonta , 708 F.3d at 522-23. In *De'lonta* , the Fourth Circuit held that, even though the inmate was receiving hormone treatment, and mental health consultations, and was allowed to live and dress as a woman, she still stated a plausible claim for deliberate indifference because prison officials denied her sex reassignment surgery. *Id.* at 525. The court noted that officials had provided the inmate with the first two prongs of treatment under the WPATH standards. *Id.* However, "just because Appellees have provided De'lonta with *some* treatment consistent with the GID Standards of Care, it does not follow that they have necessarily provided her with *constitutionally adequate* treatment." *Id.* at 526 (emphasis in original). The court acknowledged that inmates do not have the right to treatment of their choice, but analogized sex reassignment surgery to a situation when prison officials prescribe painkillers to an inmate that requires surgery. *Id.* Thus, while prison officials "and the district court are correct that a prisoner does not enjoy a constitutional right to the treatment of his or her choice, the treatment a prison facility does provide must nevertheless be adequate to address the prisoner's serious medical need." *Id.*

Courts are trending toward accepting that hormone therapy and sex reassignment surgery may be constitutionally required because they may be the only medically adequate treatments for gender dysphoria. In fact, some courts have ordered defendants to provide sex reassignment surgery in response to motions for injunctive relief. In *Kosilek v. Spencer*, 889 F. Supp.2d 190 (D. Mass. 2012), the district court granted an injunction requiring the Massachusetts Department of Corrections to provide sex reassignment surgery to an inmate. However, the *en banc* First Circuit Court of Appeals ultimately reversed the district court after finding that the care provided to the inmate did not violate the Eighth Amendment, thus preventing the grant of injunctive relief. *Kosilek v. Spencer*, 774 F.3d 63, 89 (1st Cir. 2014) (*en banc*). The Northern District of California also recently granted an inmate injunctive relief and ordered the California Department of Corrections and Rehabilitation ("CDCR") to provide sex reassignment surgery to an inmate with gender dysphoria. *Norsworthy v. Beard*, 87 F. Supp.3d 1164, 1187 (N.D. Cal. 2015). The Court cited *De'lonta* for the proposition that providing some medical care did not preclude a finding of deliberate indifference, especially in light of the WPATH standards. *Id.* The Court ordered CDCR to "take all of the actions reasonably necessary to provide [the inmate] sex reassignment surgery as promptly as possible." *Id.* at 1195. CDCR appealed, but the inmate was released on parole one day prior to oral argument, rendering the appeal moot. *Norsworthy v. Beard*, 802 F.3d 1090, 1091-92 (9th Cir. 2015).

Because an inmate's right to hormone therapy or sex reassignment surgery is becoming more clearly established, the defense of qualified immunity is also becoming less viable. "[Q]ualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). The Supreme Court has established a two-part test for determining whether an officer is entitled to qualified immunity. *Id.* at 235-36. The court must determine "whether [the] plaintiff's allegations, if true, establish a constitutional violation." *Hope v. Pelzer*, 536 U.S. 730, 736 (2002) (citation omitted). The court must also determine whether the constitutional right allegedly violated was "clearly established." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If the plaintiff satisfies both parts of the test, the official is not entitled to qualified immunity.

In an unpublished opinion, the Eleventh Circuit rejected a qualified immunity defense because at the time of the inmate's incarceration in 2010, "the law was sufficiently clear to put [the official] on notice that refusing to provide [the inmate] with what she knew to be medically necessary hormone treatments was a violation of the Eighth Amendment." *Kothmann v. Rosario*, 558 F. App'x 907, 912 (11th Cir. 2014) (unpublished). At least one district court within the Eleventh Circuit has followed *Kothmann*. *See Diamond v. Owens*, ---F. Supp.3d ---, 2015 WL 5341015, at *18-19 (M.D. Ga. Sept. 14, 2015) (citing *Kothmann* and holding that "the law was sufficiently clear" to alert defendants that their refusal to

provide the inmate with treatment they knew was medically necessary or to refer her for treatment violated the inmate's Eighth Amendment right to adequate medical care).

As courts accept the WPATH standards as the medically accepted standard of care, it seems likely that they will continue to rule in favor of transgender inmates who seek specific forms of treatment, such as hormone therapy or sex reassignment surgery.

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Sheehan **and the Application of Title II of the ADA to Arrests**

by Kristy Waldron Dugan

Whether and how Title II of the Americans with Disabilities Act (ADA) applies to arrests is an evolving area of civil rights law. The six federal circuit courts to address this issue have split, with the majority declining to decide the question at all. Only the Ninth Circuit has recognized a claim against police officers for failure to accommodate the disability of an arrestee during arrest, in *Sheehan v. City & Cty. of S.F.*, 743 F.3d 1211, 1232 (9th Cir. 2014), *rev'd in part sub nom . City & Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765 (2015) (per curiam). The *Sheehan* decision raises the specter of ADA and 42 U.S.C. § 1983 liability for police officers whose actions are reasonable or who are entitled to qualified immunity under the Fourth Amendment.

Sheehan**'s Facts & Procedural History**

In August of 2008, Teresa Sheehan, a resident of a San Francisco group home for the mentally ill, stopped taking her medications, speaking with her psychiatrist, changing clothes, and eating. When the group home's social worker supervisor attempted to check on her, Sheehan threatened to kill him. Recognizing Sheehan needed "some sort of intervention," the supervisor completed an application to detain her for temporary mental evaluation and treatment and contacted San Francisco police for transportation assistance.

Officers knocked on Sheehan's door, announced themselves, and told Sheehan that they wanted to help her. Hearing no response, they entered Sheehan's room using a key provided by the supervisor. Sheehan grabbed a knife and approached the officers, threatening to kill them. The officers retreated. As they waited for back-up to arrive, the officers became concerned that Sheehan was gathering more weapons or escaping. Believing the situation required their immediate attention, officers re-entered Sheehan's room in an effort to subdue her. Sheehan refused to drop her knife, despite being pepper sprayed. The officers shot Sheehan several times before she fell and relinquished the knife.

Sheehan survived and brought suit alleging that San Francisco violated the ADA by subduing her in a manner that did not reasonably accommodate her disability. 42 U.S.C. § 12132 provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." She also sued the officers in their individual capacities under 42 U.S.C. §1983 for violating her Fourth Amendment rights.

The Ninth Circuit reversed the district court's award of summary judgment in favor of San Francisco, holding that because the ADA covers public "services, programs, or activities," the ADA's accommodation requirement should be read "to encompass 'anything a public entity does.'" *Sheehan*, 743 F.3d at 1232. The Ninth Circuit held that whether San Francisco should have accommodated Sheehan by, for instance, "respect[ing] her comfort zone, engag[ing] in non-threatening communications and us[ing] the passage of time to defuse the situation" was a jury question. *Sheehan*, 743 F.3d at 1233. It also reversed summary judgment in favor of the officers on the Fourth Amendment claim,

holding there was a fact question as to whether the officers had provoked Sheehan which precluded qualified immunity. *Id*. at 1211.

Circuit Split Re: Application of the ADA to Arrests

Despite claiming to have joined "the majority of circuits to have addressed the question that Title II applies to arrests," the Ninth Circuit alone has recognized an ADA claim arising from the failure to accommodate. *Sheehan*, 743 F.3d at 1232. Most circuits have assumed without deciding that the ADA applies, but found no violation of the duty to accommodate in the arrest context. For example, the Sixth Circuit, acknowledging that it is unclear whether an arrest is a "service, program, or activity" to which the ADA applies, found no ADA violation where arrestees were not provided a sign language interpreter during their arrests. *Tucker v. Tennessee,* 539 F.3d 526, 536 (6th Cir. 2008); *see also Roberts v. City of Omaha*, 723 F.3d 966, 972 (8th Cir. 2013)(holding the law does not clearly establish an arrestee's right to reasonable accommodation during an arrest); *Bahl v. Cty. of Ramsey*, 695 F.3d 778, 784 (8th Cir. 2012)(without deciding whether a traffic stop is a covered service under the ADA, holding that Title II did not require an officer to communicate with a deaf motorist in writing)*Waller ex rel. Estate of Hunt v. Danville, VA*, 556 F.3d 171, 175 (4th Cir. 2009)(affirming summary judgment entered on the theory that no duty of reasonable accommodation arose, but assuming arguendo, that such a duty existed, holding the accommodations proposed by the plaintiff were not reasonable under the exigent circumstances); *Bircoll v. Miami-Dade Cty.,* 480 F.3d 1072, 1086 (11th Cir. 2007)(holding a deaf DUI suspect was not entitled to an interpreter and that administration of field sobriety tests was not a failure to accommodate); *Rosen v. Montgomery Cty. Maryland*, 121 F.3d 154, 157-59 (4th Cir. 1997)(questioning whether arrests fall under the ADA's ambit and holding police owed no duty to provide an interpreter for a deaf man during his DUI arrest).

Only the Fifth Circuit has announced a bright line rule, sometimes called the "exigency-exception," that "Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life." *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000).

The SCOTUS Cliff-Hanger

Based on the split in circuit court authority, the Supreme Court granted certiorari to review whether and how the ADA applies. The Court also accepted review of the pendant qualified immunity question.

In an anti-climactic May 18, 2015 opinion, the Supreme Court dismissed the ADA question as improvidently granted. The Supreme Court was unpleasantly surprised by San Francisco's insistence in brief and oral argument that the issue was not whether Title II applies, but to what extent. San Francisco argued that the statutory phrase "qualified individual" excludes those posing a direct threat to the safety of others from protection under the ADA. "Contending that Sheehan clearly posed a 'direct threat,' San Francisco conclude[d] that she was therefore not 'qualified for the accommodation.'" *Sheehan*, 135 S. Ct. at 1773. Despite including the "qualified individual" argument in its certiorari petition, San Francisco "never hinted at it" in the Ninth Circuit.

The Supreme Court explained that it had granted certiorari to decide whether Title II of the ADA applies to arrests generally. The Court intended to determine whether an arrest is an "activity" in which the arrestee "participates" or from which the arrestee may "benefit" such that failure to accommodate a qualified individual's disability during an arrest constitutes "discrimination" pursuant to § 12132. *Id.* San Francisco's narrowly tailored "qualified individual" question was not appropriate for certiorari because it (1) was not presented to the court below and (2) assumed that an arrest is an activity governed by 42 U.S.C.A. §12132, avoiding the source of the circuit split. *Id.* at 1773-74.

The Court declined to decide the broader question of whether the ADA applies to the arrest context, citing lack of adversarial briefing on the issue. The Court further observed that both parties assumed that San Francisco could be vicariously liable for money damages under Title II for the purposeful or deliberately indifferent conduct of its employee, despite the fact that the Court had never decided that issue. Thus, the Court also declined to decide the vicarious liability question due to a lack of adversarial briefing. *Id*. at 1774. The only issue decided by the Court was the § 1983 qualified immunity claim, and it reversed the

Ninth Circuit's denial of summary judgment in favor of the officers.

San Francisco's arguments in *Sheehan* focused on accommodation problems specific to mentally ill subjects, emphasizing the inability of law enforcement to correctly diagnose or accommodate mental illness, particularly where the subject is violent and unpredictable. Many physical disabilities and their accommodations are more obvious, particularly where the subject communicates with police in a non-threatening manner. It is therefore worth noting that the *Bircoll, Rosen,* and *Bahl* courts declined to find a duty to accommodate non-violent, deaf arrestees requesting interpreters. The physical/mental disability dichotomy highlights the disconnect between the broad issue the Supreme Court granted cert to decide and the narrow issue San Francisco presented on the merits.

Justice Scalia's separate writing supplied some drama in an otherwise lackluster denouement. Concurring in the result, Scalia criticized the Court's failure to dismiss the qualified immunity claim. Scalia opined that reaching the merits of the independently "uncertworthy" claim served to "reward" San Francisco's "bait-and-switch tactics" and encourages future litigants to "snooker" the Court by "seek[ing] review on arguments they never plan to press, secure in the knowledge that once they find a toehold on this Court's docket, we will consider whatever workaday arguments they choose to present in their merits briefs." *Id*. at 1779 (Scalia, J., concurring in part, dissenting in part).

The Supreme Court's refusal to assume that (1) Title II of the ADA applies to arrest and that (2) public entities are subject to vicarious liability under Title II for the acts of individual officers, while vaguely encouraging, offers scant guidance to government and law enforcement agencies. Unfortunately, this author is unaware of any case involving a Title II ADA claim based on failure to accommodate during an arrest currently in the appellate hopper.

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Circuit Reports

Second Circuit Case of Note

by Molly M. Ryan

Lynch v. Ackley, 2016 U.S. App. LEXIS 1378 (Jan. 2016)—The plaintiff, a police officer and leader of the police union, filed suit under 42 U.S.C. § 1983 against his police chief, alleging that the chief violated his First Amendment rights by retaliating against him for various episodes of speech critical of the chief's performance. Over a period of several years, the officer spoke numerous times either publicly or in union meetings criticizing the chief and endorsing a mayoral candidate who was the chief's foe. The chief took various allegedly retaliatory actions against plaintiff, such as denying him overtime pay, denying paid leave, investigating his use of union-business leave, and encouraging a reporter to publish civilian complaints filed against the officer. The district court denied the chief's qualified immunity summary judgment motion. The Second Circuit reversed and dismissed the case.

Public employees are afforded First Amendment protection, but there are limitations. There are three circumstances in which public employee speech is not protected from retaliation by state employers. First, speech about personal matters, as opposed to matters of public concern, is not protected. Second, even speech on matters of public concern is not protected from retaliation unless the employee's First Amendment interests outweigh the state employer's legitimate interests in efficient administration. And third, an employee's speech made pursuant to official duties, rather than as a private citizen, is not protected from retaliation.

A state actor charged under section 1983 with violating an employee's First Amendment rights is entitled to dismissal on qualified immunity grounds if at the time of the challenged conduct there was no clearly established law that such conduct constituted a constitutional violation.

In applying these principles to the police officer's case, the Second Circuit held

that qualified immunity bars the case because there was no clear law establishing that the chief's conduct violated the First Amendment. The officer's strongest claim for protection from retaliation was his claim that the chief retaliated against him for endorsing the mayoral candidate. The chief's retaliatory acts amounted to efforts to defend herself against the officer's verbal attacks accusing her of incompetence. This was an exercise of her own First Amendment rights. There was no clear law that the chief's exercise of her free speech rights about a matter of public importance relating to employment in an effort to defend herself violated the officer's rights. Another of the officer's claims for protection from retaliation was his claim that the chief retaliated against him for filing a union grievance protesting the chief's presence at a union meeting. There was no clear law that the grievance asserted a matter of public concern rather than a personal grievance. The officer's remaining claims likewise failed because there was no clearly-established authority that the officer's interest in speech as a union officer attacking the chief's competence outweighed the chief's governmental interest in effective administration of her department.

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Third Circuit Cases of Note

by Charles Starnes

***Hassan v. City of New York*, 804 F.3d 277 (3d Cir. 2015).**

This case arose out of the City of New York's program of police surveillance of Muslims following the terrorist attacks of 9/11. Plaintiffs, including several Islamic-American organizations and individuals, alleged that the City's program violated their rights to free exercise and equal protection. The Third Circuit, reviewing the district court's denial of the City's motion to dismiss, determined both that plaintiffs had standing to bring their suit and that they stated valid claims under the First and Fourteenth Amendments.

The City's program, as alleged, sought to infiltrate and monitor Muslim life and targeted Islamic entities and individuals based solely on their religious affiliation rather than any evidence of wrongdoing. This included observation of mosques and placing undercover officers in student organizations, businesses, and neighborhoods seen as Muslim. The program also allegedly used ethnic background as a proxy for religion by listing 28 countries constituting 80% of world's Muslim population along with "American Black Muslim" as "ancestries of interest" while excluding non-Muslims from the same countries. The program also established a database of Muslim converts who took Arabic names and of Muslims who took Western names. The Plaintiffs claimed that public revelation of the program and statements by City officials stigmatized them by suggesting that Muslim identity was itself threatening.

The Third Circuit first determined plaintiffs had standing as they had allegedly suffered an injury-in-fact in the form of unequal treatment based on their religion and—although the injury was shared by potentially millions of other Muslim-Americans—was sufficiently particularized.

Regarding plaintiffs' equal protection claim, the court determined that they had alleged a *prima facie* claim as they had alleged that the City's policy was facially discriminatory as it used Muslim identity as a classification warranting surveillance. In response to the City's argument that the program was not motivated by any discriminatory purpose but merely intended to gather police intelligence post-9/11, the court stated that intentional discrimination need not be motivated by ill intent as "[a]ll you need is that the state actor meant to single out a plaintiff because of the protected characteristic itself."

The court then turned to the issue of which level of scrutiny applied, noting that the Supreme Court has not determined whether classification based on religion

triggers heightened (either intermediate or strict) scrutiny under the Equal Protection Clause. The Court looked to the *Carolene Products* framework and determined that heightened scrutiny was appropriate given the United States' history of religious discrimination but declined to state whether intermediate or strict scrutiny would apply. This heightened scrutiny required a strong justification and closer relationship between the means employed by the police and the City's goal of ensuring security. The Court also noted the similarity of the City's stated goals of safety and Japanese internment during World War II.

Attorneys representing law enforcement, especially in large cities, should make their clients aware that any surveillance program should avoid religious identity as a basis for suspicion. Given the Third Circuit's broad definition of standing and particularized injury, potential plaintiff classes could be very large and the expense of defending such claims—along with the harm to community relations with law enforcement—should be considered when developing police intelligence programs.

***J.B. v. Fassnacht*, 801 F.3d 336 (3d Cir. 2015).**

This case should be followed closely by those representing clients that may detain juveniles. It arose out of the detention and strip search of a twelve-year-old arrested weeks after he built a flamethrower and threatened multiple juveniles with a homemade knife during a neighborhood scuffle. Plaintiff was taken to a detention facility where officials had him remove his clothing for a visual inspection. Although he was asked to squat and cough, the Plaintiff was never touched and was unclothed for roughly a minute.

Plaintiff sued the county and officials of the juvenile detention facility under the Fourth Amendment for subjecting him to a strip search, allegedly without reasonable suspicion and pursuant to a blanket strip search policy. Defendants argued that the Supreme Court's decision in *Florence v. Board of Chosen Freeholders of the County of Burlington*, 132 S. Ct. 1510 (2011), allowing strip searches of all accused entering the general population of a holding facility without reasonable suspicion was not limited to adults but applied equally to minors entering juvenile detention facilities.

The Third Circuit held that *Florence* was not limited to adults, noting that the Supreme Court's decision referred to jails in the broad sense of the term including prisons and other detention facilities. In *Florence*, the Supreme Court identified three risks justifying a blanket strip search policy: (1) preventing the introduction of contagious infections and diseases; (2) identifying gang members (such as through visual identification of tattoos); and (3) detecting contraband such as weapons and drugs. Although minors were at a greater risk for psychological harm than adults from such searches, the Third Circuit found that the security concerns of juvenile detention facilities were similar to adult jails and prisons and noted that juveniles could be gang members or smuggle contraband as easily as adults.

The Court of Appeals also explained that officials charged with the care and safety of minors stood *in loco parentis* during the child's detention. As such, they have an "enhanced responsibility to screen for signs of disease, self-mutilation, or abuse in the home." While capable of finding contraband, less invasive searches such as pat-downs or electronic scans could not uncover evidence of abuse or injury.

The Third Circuit determined that the requirement for individualized suspicion failed for juveniles for the same reason it failed for adults: it is simply too difficult for officials of both jails and juvenile facilities to determine who meets the reasonable suspicion standard. This was particularly true given that officials often have no prior knowledge of the individuals they are charged to hold.

Recently, the Juvenile Law Center filed a petition for certiorari to the Supreme Court challenging the Third Circuit's extension of *Florence* to the juvenile context. The petition is currently pending at docket number 15-903 for those wishing to follow the case.

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Fourth Circuit Cases of Note

by Christopher A. Lauderman

Doe 2 v. Rosa, 795 F.3d 429 (4th Cir. 2015)—The Fourth Circuit held that to establish § 1983 liability based on a state-created danger theory, a plaintiff must show that the state actor created or increased the risk of private danger, and did so directly through affirmative acts, not merely through inaction or omission.

Beginning in 2005 and continuing through 2007, Skip ReVille abused two boys, John Doe 2 and John Doe 3. ReVille met Doe 2 in the summer of 2005 as a volunteer coach for his youth basketball team. ReVille became close with the Does and was invited to move into their home as a part-time caregiver for Doe 2 and Doe 3. ReVille had previously worked as a counselor at the Citadel's youth summer camp. Defendant John Rosa was the president of the Citadel during the relevant time period. In April 2007, his office received a phone call from the father of a former camper, who reported that a counselor at the summer camp, later identified to be ReVille, had molested his son in 2002. Rosa did not report the complaint and instead, the Does contend, took steps to conceal the allegations. The Does argue that Rosa's actions allowed ReVille to continue his abuse of Doe 2 and Doe 3 during the summer of 2007. The Does brought suit against Rosa under 42 U.S.C. § 1983, alleging that Rosa had violated an affirmative duty to protect them under the Due Process Clause of the Fourteenth Amendment. The district court granted summary judgment in favor of Rosa on the ground that Rosa had no duty to protect the Does from a pre-existent danger.

The Fourth Circuit affirmed. There is a Fourteenth Amendment substantive due process right against state actor conduct that deprives an individual of bodily integrity. State actor liability, however, is significantly limited. To establish § 1983 liability based on a state-created danger theory, a plaintiff must show that the state actor created or increased the risk of private danger, and did so directly through affirmative acts, not merely through inaction or omission.

The Court said the Does could not make a state-created danger claim against Rosa. The Does' claim failed because they could not demonstrate that Rosa created or substantially enhanced the danger which resulted in their abuse. ReVille began abusing the Does in 2005 and 2006, two years before Rosa could have been aware through the Camper Doe complaint that ReVille was a pedophile. Rosa could not have created a danger that already existed. The Does were placed in no worse position than that in which they would have been had Rosa not acted at all. There was nothing new about ReVille's abuse of the Does in the summer of 2007 that had not already been occurring for months. Rosa did not make the Does' danger any worse, and he had no constitutional duty to save them from ReVille's existing abuse. The Court said that the real affirmative act was committed by ReVille, not by Rosa. The state did not create the danger; it failed to provide adequate protection from it.

Cahaly v. LaRosa, 796 F.3d 399 (4th Cir. 2015)—The Fourth Circuit reaffirmed its holding that a law enforcement officer who obtains an arrest warrant loses the protection of qualified immunity only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable.

Robert Cahaly, a political consultant, was arrested for alleged violations of South Carolina's anti-robocall statute, which required only that a person make robocalls of a political nature. After the charges were dismissed, Cahaly sued the law enforcement officials involved in his arrest.

The Fourth Circuit concluded probable cause existed for Cahaly's arrest. Although the court ultimately agreed with Cahaly that the statute under which he was arrested is unconstitutional, at the time of the arrest, no controlling precedent existed that the statute was or was not constitutional. Thus, a prudent officer was not required to anticipate that a court would later hold the statute unconstitutional. The Fourth Circuit said its holding that the statute is unconstitutional had no bearing on whether the law enforcement officer had probable cause when he arrested Cahaly.

The court also noted that an arrest warrant is invalid only if the officer preparing the affidavit included a false statement with reckless disregard for its truth, and after that statement is redacted, the affidavit's remaining content is insufficient to establish probable cause. The Court said that even if there were false statements in the affidavits and the arresting officer acted with reckless disregard for their truth by including them, the court would still find probable cause. The affidavits alleged that Cahaly made robocalls of a political nature, and nothing more is required to violate the anti-robocall statute.

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Sixth Circuit Case of Note

by Thomas J. Antonini

Kent v. Oakland Cty., 810 F.3d 384 (6th Cir. 2016)—On this interlocutory appeal, the Sixth Circuit in a 2-1 decision affirmed the district court's denial of summary judgment sought by the county and its sheriff's deputies in an excessive force Taser case. Two of the deputies responded to a non-emergency call, and watched as EMTs attempted to resuscitate plaintiff Michael Kent's father with a defibrillator. Kent, who happened to be a physician, believed his father had already passed away (he had), and also understood that his father would not have wanted the life-sustaining efforts (he didn't). Kent began yelling at the EMTs, and refused the deputies' order to settle down, and which point he was tased. In rejecting the deputies' claim to qualified immunity against Kent's 42 U.S.C. § 1983 suit, the court concluded that the use of the taser was objectively unreasonable and violated clearly-established law. The court emphasized the very fact-specific nature of the inquiry , and acknowledged that "[w]e are keenly aware that, at the time of the incident, the deputies understood that they were obligated to secure the scene so that the EMTs could perform their perceived duties." However, the court ultimately concluded that Kent's Fourth Amendment rights outweighed the governmental interests at stake, especially considering that Kent was never told he was under arrest, Kent's agitated hand gestures did not rise to the level of an immediate threat to safety, and Kent at the last moment raised his hands in the air to demonstrate compliance.

Thomas J. Antonini *has extensive experience as lead trial counsel, primarily in defense of Class I railways, as well as casualty insurers and their insureds In addition, he has argued before the Ohio Supreme Court on behalf of a multi-state manufacturer in a product liability case, and on behalf of a property owner in a toxic mold case, as well as before the Sixth Circuit on several occasions in a variety of matters.*

Seventh Circuit Cases of Note

by Ryan Finlen

Nelson v. City of Chi., No. 12-3401, 2016 U.S. App. LEXIS 959 (7th Cir. Jan. 20, 2016)—This case offers a cautionary tale for defense attorneys facing plaintiffs with substantial arrest records. In *Nelson*, the four defendant officers could not remember stopping Mr. Nelson, primarily, the officers assumed, because the stop was likely uneventful. Mr. Nelson, on the other hand, described a terrifying account of threats and physical altercations.

In the sixteen year period ending a decade before his 2008 traffic stop giving rise to the lawsuit, Mr. Nelson was arrested nine times. All charges stemming from those arrests were dismissed. The trial court granted the plaintiff's motion in limine to exclude evidence of prior arrests. However, the district court clarified its ruling, stating that Mr. Nelson's prior arrests may be admitted for impeachment purposes only as to the issue of Mr. Nelson's "fear of the police" and only if Mr. Nelson opened the door by claiming he had no prior police interaction.

On direct examination, Mr. Nelson testified at length regarding his public-service background and his occasional work with police on community-outreach projects.

Mr. Nelson also testified that, even with the passage of time, he is still mad when he looks at the police.

The district court ruled that Mr. Nelson had gone too far and allowed defense counsel to impeach Mr. Nelson with his prior arrests.

On appeal, the Seventh Circuit held that the district court erred by allowing the defense questions. The appellate court found that Mr. Nelson's testimony did not go so far to include an admission that he "never had any contact with the police before." Accordingly, evidence of prior arrests could not be used to impeach Mr. Nelson on a fact he did not present.

Secondly, the defense argued that evidence of Mr. Nelson's prior arrests was relevant because his claim for emotional-distress damages (i.e. general fear of police) was related to prior arrests, not this subsequent arrest. Again, the Seventh Circuit found that Mr. Nelson carefully limited his claim of emotional injury to the instant traffic stop.

The Seventh Circuit remanded the matter due to the evidentiary error.

Burritt v. Ditlefsen, 807 F.3d 239 (7th Cir. 2015)—Before arresting Mr. Burritt, Deputy Sheriff Lisa Ditlefsen spent eight days investigating an eleven-year old girl's claim that Mr. Burritt, a driver for a medical transportation service, sexually assaulted the girl on the way home from a therapy session. Deputy Ditlefsen reviewed the girl's story, check the driver's route, examined medical evidence, and concluded that Burritt should be arrested.

The only problem: Evidence gathered after Burritt's arrest called the eleven year old's account into question and prompted her to admit that she made up the story because she did not want to go to therapy anymore. The charges against Burritt were dismissed.

Burritt then filed his § 1983 claim against Deputy Ditlefsen, alleging Fourth and Fourteenth Amendment violations. Deputy Ditlefsen won summary judgment on qualified immunity grounds, and the Seventh Circuit affirmed.

Burritt claimed that he was arrested without probable cause. Burritt claimed that Deputy Ditlefsen ignored the exculpatory evidence that the girl's story does not support the route allegedly taken and that Deputy Ditlefsen should have delayed arrest until after obtaining the exculpatory cellular phone evidence that prompted the recantation. After reviewing Deputy Ditlefsen's methodical investigation, the Seventh Circuit reiterated that law enforcement is not required to discover additional information undermining probable cause once that probable cause is established. Given the circumstances of the investigation, including the fact that Deputy Ditlefsen consulted with the district attorney on the probable cause issue, the appellate court held that Deputy Ditlefsen was reasonable in her belief that she had probable cause to arrest Burritt.

Deputy Ditlefsen was entitled to qualified immunity and the district court's grant of summary judgment was affirmed.

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Eighth Circuit Cases of Note

by Jeffrey Robert Connolly

Spectra Communications Group, LLC v. City of Cameron, 806 F.3d 1113 (8th Cir. 2015)—In this case, the Eighth Circuit considered whether section 253 of the Telecommunications Act authorized a private right of action under section 1983. The court of appeals found it did not. The City of Cameron, Missouri passed a Right of Way and Communications Ordinance (ROW Code)

which forced communications providers to pay fees and to obtain use permits to place facilities in the city's right of way. It also forced communications providers into agreements to use city-owned utility poles. Spectra allegedly failed to pay certain license taxes and much litigation followed. In this action Spectra sought, among other things, a declaration that the ROW Code violated section 253 of the Act and damages under section 1983. Section 253, generally, prevents state and local regulation from prohibiting the ability of telecommunication providers to provide service. The Court begins it analysis by observing the Supreme Court's direction that a 1983 plaintiff must "assert a violation of a federal *right*, not merely a violation of federal *law*." The Court also acknowledged that Congress can only create new rights under section 1983 through clear an unambiguous terms. The Court, agreeing in result with the Second, Fifth, Ninth, and Tenth Circuits—and disagreeing in result with the Sixth and Eleventh Circuits—concluded that although the Act was designed to pre-empt state regulatory authority, it did not clearly authorize a private right of action for damages under section 1983.

Reid v. Griffin, 808 F.3d 1191 (8th Cir. 2015)—Reid, an inmate in an Arkansas Department of Correction (ADC) facility, filed a 1983 action alleging that the ADC was indifferent to her serious medical needs. Reid is biologically male, but identifies as female. A divided panel affirmed the district court's grant of summary judgment in favor of the ADC. The majority, in a per curiam decision, addressed Reid's explicit claim for medical indifference, the denial of hormone-replacement therapy for her Gender Identity Disorder (GID). Reid's allegation followed a GID committee's determination that she did not meet the criteria for a GID diagnosis. The GID committee's consideration followed an incident in which Reid attempted, unsuccessfully, to castrate herself. Four months later, Reid successfully completed her self-castration and underwent emergency surgery. The per curiam majority found that the individual defendants were entitled to qualified immunity because numerous medical professionals had evaluated Reid and none had diagnosed her with GID. The majority applied the Eighth Circuit's long standing holding that prison doctors are free to exercise independent judgment and that inmates do not have a constitutional right to choose the course of their treatment. The dissent, however, concluded that qualified immunity was not appropriate, because the pro se complaint sufficiently alleged medical indifference, not just from the denial of the GID diagnosis, but also from the failure of the individual defendants to protect Reid from self-harm after she partially castrated herself.

Oglala Sioux Tribe &Rosebud Sioux Tribe v. Van Hunnik, 2016 U.S. Dist. LEXIS 20274 (D. S.D. 2016)—This is a case pending in the District of South Dakota.

The Rosebud Sioux Tribe, the Oglala Sioux Tribe, and others sued (in their official capacities only) the South Dakota Secretary of the Department of Social Services (DSS), a DSS employee, an elected county state's attorney, and the presiding judge of the 7th Judicial Circuit of South Dakota. The complaint alleged, among other things, that the defendants violated the Indian Child Welfare Act (ICWA) and the due process rights of tribal members in violation of Section 1983. In March of 2015, the district court granted plaintiffs' motions for partial summary judgment in relation to the ICWA claims and the due process claims. In finding liability against the county state's attorney and the DSS defendants, the district court concluded that when "these defendants did not challenge [the judge's policies], his policies became the official policy governing their own agencies." All defendants moved for reconsideration of the partial summary judgment order. After 8 months, the district court denied the defendants' motions for reconsideration, concluding that the states attorney created a policy of violating ICWA rights through his deputies "active involve[ment]" in court hearings, and that the DSS defendants adopted a judge's policy as their own by ignoring state guidelines.

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Ninth Circuit Cases of Note

by Elizabeth Dooley & Noah Blechman

Klein v. City of Laguna Beach, 810 F.3d 693 (9th Cir. 2016)—In the underlying action brought under 42 U.S.C. § 1983, plaintiff sought to invalidate aspects of a Laguna Beach ordinance prohibiting the use of sound-amplification devices on public sidewalks. After long arguments, and several appeals, plaintiff had won nominal damages on three of his four as-applied challenges. Plaintiff then filed a motion for attorneys' fees. Although plaintiff's award of nominal damages made him a "prevailing party" under 42 U.S.C. § 1988(b), the district court relied on *Farrar v. Hobby*, to conclude that Plaintiff was not entitled to fees for his merely "technical" victory. 506 U.S. 103 (1992). On appeal, plaintiff argued that the standard set out in *Farrar*, which held that a prevailing party who seeks a large compensatory award, but receives only nominal damages, may not be entitled to fees, did not apply to the case at hand, arguing that the most critical factor in determining the reasonableness of a fee award 'is the degree of success obtained,'" *Farrar*, 506 U.S. at 114. In *Farrar*, the Court held that when a plaintiff "seeks compensatory damages, but receives no more than nominal damages," "the court may lawfully award low fees or no fees." *Id.* Here, plaintiff never requested compensatory damages, and therefore, had no chance of receiving a significant monetary payout. Plaintiff's primary goal had always been the legalization of amplified speech in Laguna Beach. The Ninth Circuit held that because plaintiff's lawsuit achieved its future-oriented goals and plaintiff never attempted to secure compensatory damages under § 1983, the *Farrar* exception did not apply and the district court erred by not considering plaintiff's entitlement to fees under the standard framework.

Yousefian v. City of Glendale, 779 F.3d 1010 (9th 2015)—Plaintiff called the police to report that he had been attacked by his father-in-law and had injured his father-in-law when defending himself. After the police arrived, they were told conflicting stories as to what had really happened. Based on the stories and evidence presented to them, the police determined found that plaintiff might have attacked his father-in-law and he was arrested. After plaintiff's arrest, his wife met with one of the police officers and gave him some drugs, which she had purportedly found in plaintiff's car. Soon thereafter, the officer and plaintiff's wife began a sexual relationship. After plaintiff was arrested, the case was turned over to a separate detective. Plaintiff was charged with assault, elder abuse and two counts of drug possession. The drug charges were eventually dismissed for lack of probable cause, and a jury acquitted plaintiff of the assault and elder abuse charges. Plaintiff then filed a lawsuit alleging false arrest and malicious prosecution. The absence of probable cause is a necessary element of § 1983 false arrest and malicious prosecution claims. *Barry v. Fowler*, 902 F.2d 770, 772-73 (9th Cir. 1990). The panel held that there was probable cause to arrest and prosecute plaintiff for assault and elder abuse because probable cause requires only that those "facts and circumstances within the officer's knowledge are sufficient to warrant a prudent person to believe that the suspect has committed…an offense.'" *Barry*, 902 F.2d at 773. The panel further determined that because the police officer's romantic relationship with plaintiff's wife began after all of the evidence relating to the altercation had been collected and documented in official reports; the police officer's later misconduct did not undermine the existence of probable cause. For the drug charges, plaintiff had only alleged malicious prosecution. Under a malicious prosecution claim, in addition to showing that the defendants prosecuted him with malice and without probable cause, a plaintiff must demonstrate a Fourth Amendment seizure. *See Albright v. Oliver*, 510 U.S. 266, 271-75 (1994). The only seizure that plaintiff could arguably have suffered was being released to his own-recognizance. However, the other charges brought against plaintiff had these same restrictions, and therefore, plaintiff did not suffer a civil rights injury or seizure. The panel affirmed the summary judgment on the malicious prosecution claim because Plaintiff failed to demonstrate a Fourth Amendment seizure.

Reyes v. Smith, 810 F.3d 654 (9th Cir. 2016)—While in prison, plaintiff was put on a regimen of pain medication for his degenerative spine condition. A few

months later, defendants ordered that his pain medications be gradually reduced, and shortly thereafter, discontinued entirely. Plaintiff filed a prison grievance complaining of the "drastic changes" to his medication regimen. Plaintiff was denied relief at all three levels of the prison grievance process. Plaintiff then brought a 42 U.S.C. § 1983 action against prison officials, alleging they had violated his Eighth Amendment rights through deliberate indifference. The district court dismissed the claims after finding that plaintiff had failed to exhaust his administrative remedy under the Prison Litigation Reform Act because he had to named the defendant physicians in his grievance, contrary to a procedural rule requiring inmates to "list all staff involved" in a grievance and "describe their involvement in the issue." Code Regs. Tit. 15 § 3084.2(a). The panel held that despite the prisoner's failure to comply with the procedural rule, the exhaustion requirement was nevertheless satisfied because prison officials decided the potentially flawed grievance on the merits. The panel held that when prison official opt not to enforce a procedural rule, but instead decide a grievance on the merits, the purpose of the PLRA exhaustion requirement has been fully served: prison official have had fair opportunity to correct any claimed deprivation and an administrative record supporting the prison's decision has been developed. Additionally, defendants argued that plaintiff's suit should be barred under the PLRA because his grievance failed to "alert[] the prison to the nature of the wrong for which redress is sought." Plaintiff's grievance plainly put prison official on notice of the nature of the wrong alleged in his federal suit having clearly delineated the pain management regimen in his grievance. Additionally, prison officials knew that the Pain Management Committee, of which the defendant physicians were members, had decided plaintiff should not receive the medication; that decision was cited repeatedly by the prison administration in denying plaintiff's grievance. The panel held that in this case, the grievance sufficed to put prison officials on notice of the alleged deprivation and gave them ample opportunity to resolve it.

Patel v. City of Montclair, 798 F.3d 895 (9th Cir. 2015)—Police officers came onto the public areas of the Galleria Motel and cited plaintiff for code violations observable in plain view. Pursuant to 42 U.S.C. § 1983, plaintiff filed a lawsuit against the City of Montclair and its' police officers. Plaintiff's only allegation was a violation of his Fourth Amendment and defendants filed a motion to dismiss for failure to state a claim. The district court granted the motion holding that plaintiff did not have a reasonable expectation of privacy in the areas of the Galleria Hotel that were open to the public. On appeal, plaintiff did not argue a Fourth Amendment violation under a reasonable expectation of privacy, but rather that the police officers violated his Fourth Amendment rights by entering his property for the purposes of conducting an investigation. The Fourth Amendment clearly enumerates what falls under its protection. The areas of the Galleria Motel open to the public are not within the enumerated items in the Fourth Amendment; therefore, no search occurs when police officers enter those areas. Plaintiff argued that he has an expectation of privacy in a private business; however, the panel found that under *United States v. Jones*, 132 S.Ct. 945, 953 (2012), the "open fields" doctrine squarely holds that some areas of private property are not protected by the Fourth Amendment's prohibition on unreasonable searches. Case law also indicates that only those areas of private property that are not open to the public are protected by the Fourth Amendment. *See Camara v. Municipal Court of City and Cty. of S.F.*, 387 U.S. 523 (1967) and *See v. City of Seattle*, 387 U.S. 541 (1967). Because plaintiff's Complaint alleged only that police officers entered the public areas of the Galleria Motel, plaintiff failed to demonstrate a reasonable expectation of privacy. The Court found that police officers entering the public areas of the Galleria Motel were entitled to observe (without a warrant) anything observable by the public. The panel held that police officers did not conduct a search within the meaning of the Fourth Amendment merely by entering an area of a private, commercial property that is open to the public.

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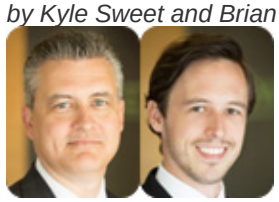
Tenth Circuit Case of Note

by Kyle Sweet and Brian Blackstock



Cressman v. Thompson, 798 F.3d 938 (10th Cir. 2015)—An Oklahoma resident brought a claim under 42 U.S.C. § 1983 alleging he was forced to display a Native American pantheistic image on his vehicle in violation of his free-speech, free-exercise, and due-process rights under the First and Fourteenth Amendments of the U.S. Constitution.

The re-designed license plate was released in 2008. It states, "Native America," and contains an image of a kneeling Native American man shooting an arrow towards the sky. The image is based on a sculpture by an Oklahoma artist called Sacred Rain Arrow. The inspiration for the sculpture was a story of an Apache warrior who fired an arrow, which was blessed by a medicine man, into the heavens to carry prayers for rain to the "spirit world."

Mr. Cressman alleged the image teaches there are multiple gods and that the arrow is an intermediary for prayer. Mr. Cressman argued that message is incompatible with his Christian beliefs that, in his words, "Jesus Christ is the mediator between all people and God." However, Mr. Cressman's options for avoiding displaying the image on his vehicle are limited. An Oklahoma statute makes it a misdemeanor to conceal a state-issued license plate. Specialty plates are available to vehicle owners, but at an increased cost.

Mr. Cressman brought suit against various individuals in their official capacities as representatives of various State agencies ("Appellees"). He sought an injunction prohibiting state officials from prosecuting him for covering the image on the standard plate or, alternatively, an order requiring the Oklahoma Tax Commission to provide him with a specialty plate at a cost equal to that of the standard plate. After a bench trial, the district court found for Appellees and Mr. Cressman appealed to the Tenth Circuit.

Appellees argued that Mr. Cressman lacked standing because the plate constituted government speech. Rejecting this argument, the Tenth Circuit quoted U.S. Supreme Court precedent in *Wooley v. Maynard*, 430 U.S. 705, 715 (1977), stating, "state-issued standard license plates are 'readily associated' with vehicle owners, and may force them to 'use their private property as a mobile billboard for the State's ideological message[.]"

Appellees also argued that Mr. Cressman lacked Article III standing. Rejecting this argument, the Tenth Circuit stated Mr. Cressman met the injury-in-fact element because: 1) the clear language of the statute makes it illegal to conceal a state-issued license plate; and 2) Mr. Cressman was warned by multiple public offices of the threat of prosecution if he covered the plate. The court also found the alternative of purchasing a specialty plate at an additional cost is a requirement of an "additional fee or tax for a government service," which is "indirect discouragement" recognized as injury in the First Amendment context under *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1290 (10th Cir. 2004).

The primary focus on appeal, however, was whether Mr. Cressman was unconstitutionally compelled to speak by Oklahoma's requirement that he either display a Native American Image on his license plate or pay extra for a specialty plate. In *Wooley v. Maynard*, the U.S. Supreme Court stated objectionable speech on standard license plates implicates compelled-speech concerns if it forces vehicle owners "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Wooley*, 430 U.S. at 715. Also relying on *Spence v. Washington*, 418 U.S. 405 (1974), the Tenth Circuit further clarified that the test is whether the Native American image conveys a particularized message that a *reasonable observer* is likely to understand and to which Mr. Cressman objects. *See Id.* at 410-11.

The Tenth Circuit found that the reasonable observer viewing Oklahoma's standard license plate would not conclude that the Native American image communicates pantheism, ritualistic prayer, or even the legend that inspired the Sacred Rain Arrow statue. Instead, the court found the only identifiable message to a reasonable observer is that Oklahoma's history and culture has been strongly influenced by Native Americans. In this regard, the court states, the image qualifies as symbolic speech. However, Mr. Cressman failed the second part of the test, because he conceded that this is not a message he finds objectionable. Therefore, the Tenth Circuit affirmed the district court's ruling in favor of Appellees. Mr. Cressman has petitioned the U.S. Supreme Court for certiorari.

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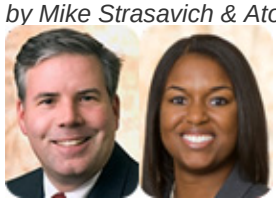
Eleventh Circuit Cases of Note

by Mike Strasavich & Atoyia Scott Harris



***Singletary v. Vargas*, 804 F.3d 1174 (11th Cir. 2015)—** During an undercover "drug deal gone bad," an officer allegedly used excessive force in violation of the Fourth Amendment against a passenger riding in a car with a suspect drug dealer. After receiving a pre-determined signal, the defendant officer approached the car in his official tactical uniform and shouted at the suspect driver to show his hands. As the defendant officer approached plaintiff's side of the car, the car accelerated at him, abruptly stopped, and accelerated again. The defendant officer shot at the vehicle and hit plaintiff, causing a serious leg injury. Plaintiff asserted § 1983 claims against the defendant officer in his individual capacity, who sought summary judgment based on qualified immunity.

According to plaintiff, the defendant officer could not have reasonably believed he was in danger because he was not in the car's path when it accelerated and stopped, or when he started shooting, citing the location of the bullet holes. The court record contained a video showing the exact location of the defendant officer in front of the car. Still, the district court denied the officer's summary judgment motion, holding that a material fact existed as to whether the defendant reasonably believed he was in danger if the car was not in the defendant's path and had stopped before he fired the shots.

The Eleventh Circuit disagreed, and reversed the district court's denial, questioning the district court's decision to "spruce up" plaintiff's testimony concerning the position of the defendant officer when the car accelerated. The Eleventh Circuit emphasized the well-established rule that courts must view the facts in the light most favorable to the non-moving party when reviewing summary judgment motions; however, the court also concluded that it should not automatically adopt testimony of a non-movant when a blatant contradiction existed between the non-movant's version of events and video evidence clearly establishing that the car accelerated towards the defendant officer, supporting the officer's fear for his safety.

As to the district court's reasoning that the car stopped before the defendant officer fired the shots, the Eleventh Circuit held that this did not dissipate the danger that existed in the split-second immediately preceding the decision to use deadly force. Moreover, the law does not require officers to wait until a suspect uses a deadly weapon to respond in self-defense. The Eleventh Circuit also reviewed the evidence of the bullet holes on the vehicle and found that, in addition to the clear evidence in the video, an expert report confirmed that the bullet holes were the result of defendant officer's fall to the ground as he fired the shots. In concluding that the defendant officer was qualifiedly immune, the Court held that it is clearly established that an officer may use deadly force when his life is threatened by a deadly weapon, such as a car.

***Mech v. Sch. Bd. of Palm Beach Cty.*, 806 F.3d 1070 (11th Cir. 2015)—** The Eleventh Circuit held that public school banners are not protected by the First Amendment because they are governmental speech. A Palm Beach County school board had adopted a pilot program for its schools to recognize their sponsors by hanging banners on the schools' fences. This pilot program imposed several requirements for the banners, including approval from the school principal, consistency with the mission of the school board, district, and community, and appropriateness for the subject student ages at the school. The

policy also required that banners be visible from the road and include a message thanking the sponsor.

Plaintiff owned Happy/Fun Math Tutor, a tutoring company, and sponsored banners for three schools in the school district. Plaintiff owned not only the tutoring business, but also a production company that formerly had produced pornography. The two businesses shared a mailing address. Several parents complained about the banners after discovering this common ownership. The schools informed plaintiff that the utilization of a shared mailing address created a conflict with the educational values of the community, even though neither the shared mailing address nor the production company were displayed on the banners.

Plaintiff sued the school board for First and Fourteenth Amendment violations and for breach of contract. The district court granted summary judgment in favor of the board, holding that the board did not violate the First Amendment because it removed the banners due to the common ownership of the companies, not the banner's content.

Plaintiff's appeal only challenged the First Amendment claim. In affirming the summary judgment but on alternative grounds, the Eleventh Circuit concluded that the banners were governmental speech. The Free Speech Clause of the First Amendment restricts governmental regulation of private speech, not government speech. The Eleventh Circuit recognized that the Supreme Court has not established a clear test to differentiate between private and governmental speech; however, it relied on the Supreme Court's previous three-factor test: 1) whether the history of the object in question suggests "they long have communicated messages from the States;" 2) whether reasonable observers would conclude that the State "agrees with the message;" and 3) whether the State exercises direct control over the displayed message on the object in question.

The Eleventh Circuit stated that the banner pilot program lacked sufficient history to determine whether there was a long history of a communicated message from the school board. Nevertheless, in evaluating the whether the school board appeared to endorse the message in question, the Eleventh Circuit held that the message did appear to be endorsed. The school board argued there was a clear association between the school board and the sponsor because the banner was displayed on governmental property, contained the school's initials and colors, as well as a message that the sponsor was a "Partner in Excellence" with the school.

Plaintiff contended that the banners were mere advertisements and invites the public to do business with the sponsor, not the school, and therefore was protected by the First Amendment. Plaintiff also argued that the "Partners in Excellence" message displayed on the banners was a message from the business, as schools have no information on whether the businesses provide "excellent services." In rejecting plaintiff's argument, the Eleventh Circuit held that the "Partner in Excellence" message on the banners represented the business relationship between the school and those sponsors who provide adequate funding to the school. Additionally, the Eleventh Circuit reasoned that board's design prerequisites outlined in the policy required the school's colors and initials, and identified the sponsor as a partner of the school. Banners with those specific requirements displayed on school property would therefore imply to the public that the school is advertising tutoring services because they are related to the schools' mission.

Finally, the Eleventh Circuit held that the board exercised direct control over the banners, requiring every principal to approve every banner prior to display for compliance with the mission of the school, board, and community. The sponsor's contributions to the design did not extinguish the government's control of the banner.

Buehrle v. City of Key West, No. 14-15354, 2015 WL 9487716 (11th Cir. Dec. 29, 2015)—As a matter of first impression, the Eleventh Circuit held the act of tattooing is an activity protected by the First Amendment. The City of Key West banned plaintiff from opening a tattoo establishment in the City's designated historic district due to a City ordinance. The United States Navy had requested the tattoo ordinance out of fear its sailors would obtain "ill-advised tattoos." The City permitted two tattoo establishments resulting from a settlement of a prior lawsuit challenging the ban, but refused to permit plaintiff to build an additional tattoo parlor.

Plaintiff sued the City alleging the ordinance was an unconstitutional restriction on his First Amendment freedom of expression. The district court granted the City's summary judgment motion, concluding that the City's ordinance was content-neutral and a reasonable time, place, and manner restriction.

Reversing and remanding, the Eleventh Circuit evaluated the distinction made by various circuits between the tattoo itself and the process of creating the tattoo. Within those circuits, the creation of the tattoo has been held not to be an expression protected by the First Amendment. Rejecting this line of reasoning, however, the Eleventh Circuit held that the First Amendment protects both the end result of the artistic expression, and the sequence of acts by different parties related to that expression. This ranges from the owner who displays the art to the purchaser of the art. This interpretation of the First Amendment covers both the tattoo artist and the tattoo wearer.

The Eleventh Circuit further held that the City unconstitutionally regulated the art of tattooing in that the ordinance was not narrowly tailored to serve a significant governmental interest based on pre-enactment evidence, though the ordinance provided alternative channels for communication of the information. As concerns whether there is a narrowly tailored governmental interest, the City argued that permitting more tattoo establishments is inconsistent with the district's historic character, and that a fear that tourists would obtain regrettable tattoos may lead to a negative impression of Key West. The Eleventh Circuit agreed that the City had a substantial governmental interest, but failed to establish that it had a reasonable basis for believing that the regulation would further its interest based on "pre-enactment evidence." The City presented deposition testimony and an affidavit of the Director of Planning confirming that tattoo establishments would affect tourism, but the Eleventh Circuit rejected the Director of Planning's statements because this testimony and affidavit were post-enactment statements, and because the statements were not supported by actual evidence that tattoo establishments would affect tourism. The mere fact that the City prohibited tattoo establishments for many years was not sufficient to conclude that such establishments negatively impact tourism. The City permitted two tattoo establishments, and could not prove why allowing one additional tattoo establishment would "sour the district's historical flavor."

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