ANNUAL CASE LAW UPDATE

OVERVIEW OF CASES DECIDED UNDER 42 U.S.C. § 1983 IN 2011 AND 2012

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Presented by Stephen C. Piepgrass, Troutman Sanders, LLP*

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I. First Amendment

A. Speech by Government Employees

(1) *Bland v. Roberts*, 2012 U.S. Dist. LEXIS 57530 (E.D. Va. April 24, 2012) (Jackson, J.).

Summary

Several civilian employees in the City of Hampton Sheriff's Office brought a § 1983 suit against the Sheriff, alleging that they had been fired in violation of their First Amendment rights. The plaintiffs alleged that the Sheriff had learned that his employees supported his opponent. After winning reelection, the Sheriff terminated the employees' employment. The employees brought suit, asserting that they had been fired in retaliation for exercising their rights to freedom of speech and freedom of association. The Sheriff responded to the charges offering facially legitimate reasons for the plaintiffs' terminations and moved for summary judgment.

Probably the most far-reaching part of the decision is its discussion of Facebook posts. A number of the employees claimed they had exercised their free speech rights by "liking" the Sheriff's opponent's Facebook page. The court held the plaintiffs failed to establish a *prima facie* case for free-speech retaliation, reasoning that while some "posts" on Facebook can constitute speech, merely "liking" someone's Facebook page did not constitute speaking out on a matter of public concern. The plaintiffs also failed to establish that the sheriff had known about their support of his opponent for purposes of the freedom-of-association claim. Alternatively, the sheriff was entitled to qualified immunity, because the relevant law was not clearly established, or to sovereign immunity as an arm of the state.

Takeaway

This decision probably will not be the last word on the subject of Facebook and how much "speech" is necessary to qualify for First Amendment protection. Particularly in the wake of the Chick-fil-a controversy, this question probably will come up again, and it will be interesting to see how other courts resolve it.

(2) *Silverman v. Town of Blackstone*, 843 F. Supp. 2d 628 (E.D.Va. 2012) (Gibney, J.), aff'd 2012 U.S. App. LEXIS 18010 (4th Cir. Aug. 23, 2012).

Summary

Silverman, the Town of Blackstone's director of Water and Waste Utilities Department, brought a § 1983 suit against the Town alleging he had been fired for exercising his First Amendment right to free speech. Silverman asserted that the discharge was retaliation for the employee voicing his dissatisfaction with the leadership of the Town Manager in a series of letters and memoranda sent to the Town Manager. The Town moved to dismiss the complaint under 12(b)(6).

The court granted the Town's motion because all of the relevant communications were made by the Plaintiff as part of his job and as a public official rather than by the plaintiff as a

private citizen, it did not constitute protected speech under the First Amendment. Further, all of the allegedly "protected" speech consisted of communication solely between the plaintiff and other town staff, concerning internal town business. The court rejected Silverman's argument that he was really fired because the Town Manager was concerned he would make his concerns public. First, that argument failed because he never actually threatened or made his concerns public until after he was terminated; second, to allow such an argument would essentially mean that attempts to blackmail an employer by threatening to "go public" with his supposed flaws are protected speech.

Takeaway

A government employee's internal communications made in his or her official capacity and concerning matters solely related to his or her official duties is not protected speech under the First Amendment.

B. Sign Ordinance

(3) *Wag More Dogs v. Cozart*, No. 11-1226 (4th Cir. May 22, 2012).

Summary

A "doggy day care," Wag More Dogs, commissioned a nearly 960 square foot mural, which was painted on the exterior wall of the store facing a neighboring dog park. The mural showed dogs, bones and paw prints – some of which were drawn from the store's logo. The size of the mural exceeded the maximum allowable size under Arlington County's sign ordinance in the zoning district where Wag More Dogs was located. The County told the owner of Wag More Dogs that she had to either remove the mural or apply for a "comprehensive sign plan," which was unlikely to be granted. In the interim, Wag More Dogs had to either cover or paint over the mural.

Wag More Dogs challenged the sign ordinance under the First Amendment, claiming that it was (1) an impermissible content-based restriction on speech, (2) unconstitutionally vague, and (3) a prior restraint on speech. The District Court ruled in favor of the County, dismissing the Complaint and request for injunction, and Wag More Dogs appealed to the Fourth Circuit.

On appeal, the Fourth Circuit held that the sign ordinance, a regulation of commercial speech, survived intermediate scrutiny, because it was content-neutral on its face, furthered a substantial governmental interest (promoting traffic safety and aesthetics), was narrowly tailored, and it left open alternative communication channels. The Fourth Circuit also rejected Wag More Dogs' claim that the mural was non-commercial speech, since it was meant to attract customers from the neighboring dog park, included components of the logo and was economically motivated. The court also rejected the contention (1) that the ordinance's definition of "sign" was unconstitutionally vague, (2) that it constituted an unlawful prior restraint (it provided sufficient standards to be applied by officials and a review process).

Takeaway

Localities may regulate signage on buildings, as long as the regulations are reasonable and content-neutral, without running afoul of the First Amendment.

C. Use of Official Seal

(4) *Rothamel v. Fluvanna County,* 810 F. Supp. 2d 771 (W.D. Va. 2011) (Moon, J.).

Summary

The operator of a blog on local news and events brought a § 1983 suit against Fluvanna County, alleging that an ordinance restricting the display or use of the image of the official county seal violated the First Amendment. During a public meeting preceding the enactment which instituted this policy, a member of the County Board of Supervisors made it clear that the plaintiff's use of the seal was the precipitating cause of the ordinance's proposed enactment. Both parties moved for partial summary judgment.

The court held:

(1) The plaintiff had standing to challenge the constitutionality of the ordinance. Even though the ordinance had yet to be enforced against the plaintiff, there was a sufficiently credible threat of present or future prosecution of the plaintiff under the ordinance to confer standing to mount a pre-enforcement challenge to it.

(2) The plaintiff's use and display of the County seal on his blog fell within the prohibition of the ordinance.

(3) Although the County had a legitimate interest in preventing individuals or entities from conveying the false impression of having governmental sponsorship, the County failed to show that the ordinance had been narrowly tailored to achieve such an interest.

(4) The County could not control all privately owned images or representations of the seal simply by declaring an interest in managing its own property.

(5) The use by a private individual of a governmental emblem was private speech or expression.

Takeaway

Normally states and localities have a legitimate interest in preventing certain activities of its citizens, when the First Amendment is involved, however, the entity must show that the restriction is narrowly tailored. A blanket prohibition on use of a locality's seal is not narrowly tailored.

D. Time, Place and Manner Restriction

(5) *Yates v. Norwood*, 2012 WL 92547 (E.D. Va. Jan. 11, 2012).

Summary

The Richmond May Day Coalition and an individual member, Yates, brought a § 1983 suit against the Richmond City Police (RPD), challenging the constitutionality of a City's practice requiring parade permit applicants to bear the cost of police resources dedicated to the applicant's event. It is the City's practice to deny permits for "applicants seeking to march" "unless they agree to reimburse the City for the cost" for police staffing the event. The permit required a route that crossed more than twenty downtown intersections yet indicated that traffic control and police escort would be unnecessary. The RPD agreed to grant the permit if the Coalition hired off duty officers for the event. The Coalition refused and thus the permit was denied. A lawsuit ensued and both parties filed for summary judgment.

Judge Hudson held first that the "permitting regime . . . does not involve content-based discrimination" and instead is a "content-neutral time, place, and manner regulation of the use of a public forum." Second, the court held the ordinance, on its face, did not violate the First Amendment. The permitting scheme contained specific criteria for making a decision based on three factors: (1) whether the event conforms to public safety parameters, (2) whether traffic control can bring the event into compliance, and (3) the fee to be charged based on the number of officers assigned. The court found the discretion exercised in determining whether a permit would be granted to be "quite reasonable, perhaps even necessary." The court therefore granted the City's Motion for Summary Judgment.

Takeaway

Judge Hudson determined that the City's parade permit ordinance did not involve content-based discrimination, but rather, was a valid time, place, and manner restriction of a public forum. Further, on its face, the ordinance did not violate the First Amendment. Some level of discretion among officers in determining whether to grant a permit is permissible under the First Amendment.

II. Election Law

(6) *Lux v. Judd*, 842 F. Supp. 2d 895 (E.D. Va. 2012) (though not a § 1983 case, involved important questions of Virginia election law).

Lux, an independent candidate for Congress challenged the residency requirement in Va. Code § 24.2-506, under which an independent candidate's petition circulators were required to be from the congressional district in which they were circulating petitions. Lux himself had circulated many of the petitions in question, but was not from the district in which he was circulating. The SBE disqualified the signatures circulated by Lux and, as a result, disqualified him from the ballot. Lux and Virginia States Board of Elections both moved for summary judgment.

The court held that the most important constitutional aspect that Lux was seeking to protect was not the right to ballot access, but the right to circulate petitions, which, the court held, was a core speech interest protected by the Constitution. As a result, the court applied strict scrutiny to the residency requirement. The court found that the residency requirement imposed a significant burden on Lux's speech rights and that the requirement was not sufficiently narrowly tailored. The court suggested that a *state* residency requirement would pass constitutional muster, relying the Supreme Court's holding in *Buckley v. Am. Constitutional Law Found., Inc*., 525 U.S. 182 (1999), but a *district* residency requirement was insufficiently narrowly tailored.

Takeaway

The district residency requirement in Virginia Code § 24.2-506 is out.

(7) *Perry v. Judd*, 471 Fed. Appx. 219 (4th Cir. 2012) (though not a § 1983 case, involved important questions of Virginia election law).

Summary

Texas Governor Rick Perry, a presidential candidate, filed an emergency motion to have his name appear on the ballot for the Republican primary in Virginia, or in the alternative, to order the State Board of Election, not to order, print, or mail ballots prior to a final consideration of his appeal. Perry claimed that the requirements in Virginia that candidates submit at least 10,000 signatures of qualified voters, including at least 400 qualified voters from each congressional district in the Commonwealth, who intend to participate in the candidate's primary, as well as the requirement that petition circulators be Virginia residents created a burden too onerous for candidates to bear. The district court denied Perry's request for injunctive relief and the Fourth Circuit affirmed.

The Fourth Circuit noted that Perry had every opportunity to challenge Virginia ballot requirements at a time when the challenge would not have created disruption. His request contravened repeated U.S. Supreme Court admonitions that federal judicial bodies not upend electoral processes at the eleventh hour. Perry knew months earlier the requirements of Virginia's election laws. If the court were to have granted the requested relief, it would have encouraged presidential candidates who knew the requirements and failed to satisfy them to seek to change the rules of the game at a late hour. That would not have been fair to the states or to other candidates who timely complied with the processes and it would have thrown the presidential nominating process into added turmoil. The defense of laches barred the requested relief in any event.

Takeaway

Candidates who do not bring their challenges within a reasonable time may be cut off by laches.

(8) *Eppes v. Showalter*, No. 3:12-cv-00545 (E.D. Va. Aug. 16, 2012) (Hudson, J.) & *Ryan, et al. v. Showalter et al.*, No. CL12-3277-3 (City of Richmond Cir. Ct. 2012) (Marko, J.).

These companion cases challenged the decision by the Registrar for the City of Richmond to deny certain independent candidates a review after she determined they lacked a sufficient number of qualified signatures.

The *Eppes* case involved a candidate for School Board who had submitted a sufficient number of signatures, but who was disqualified after the Registrar determined that a number of those signatures were invalid. Eppes reviewed the signatures that had been rejected and found that a substantial number had been improperly rejected – enough to make the ballot. The State Board of Elections' official guidance in its GREBook, stated that once a local registrar had rejected a candidate's signatures, and the time for submitting signatures had passed, no review process was permitted to review the determination of the registrar. Based on this guidance, the Registrar said that her hands were tied and she could not allow a review or reconsideration of even facially improper disqualifications.

Eppes brought a Complaint and Motion for Preliminary Injunction in the Eastern District of Virginia, pointing out that her First Amendment right to circulate petitions, and the First Amendment rights of her petition signers were being violated. Eppes also pointed out that a review process used to exist in the Commonwealth, but was eliminated in 2004 or 2005, without pre-clearance under Section 5 of the Voting Rights Act. The parties resolved the case by consent order, placing Eppes on the ballot.

The *Ryan* case involved similar facts and was brought by an independent candidate for Mayor of the City of Richmond, who also alleged signatures had been improperly disqualified and that if those signatures were counted, he would have enough to place him on the ballot. Even though the Eppes case had just been resolved, the Registrar refused to provide a review. Ryan therefore sought an injunction, based on similar allegations to those raised by Eppes. The Circuit Court for the City of Richmond granted the injunction, requiring a review. Following the review, the Registrar again refused to place Ryan on the ballot. Ryan challenged the Registrar's determination based on the manner in which the Registrar decided to count voters who had moved from one area of the city to another. Ryan again sought an injunction – this time to place him on the ballot. The Court agreed and the day the ballots were scheduled to go to the printer, ordered him to be placed on the ballot.

<u>Takeaway</u>

The SBE's main argument was that it could not provide a review because there was no specific authorization for a review in the Code of Virginia. The Court made clear that election law is not limited to just the Code, but also to the Constitution, and even if the Code did not provide for a review, the Due Process Clause required one. Registrars should consider whether decisions they are making impact more than just the Code of Virginia. Registrars should also look for future changes in the GREBook taking into account these decisions.

III. Law Enforcement/Fourth Amendment

(9) *Merchant v. Bauer*, 2012 WL 1447926 (4th Cir. April 26, 2012) (King, J.), *aff'g*, 778 F. Supp. 636 (E.D. Va. April 11, 2011) (Ellis, J.).

Summary

An arrestee brought a § 1983 suit against a Fairfax County, Virginia, police officer, alleging, *inter alia*, arrest without probable cause. While inspecting the plaintiff's vehicle on an unrelated matter, the officer had observed what appeared to be a police shield in the plaintiff's pocket. The plaintiff did not present the badge to the officer, nor did the officer request that she do so, and it remained sufficiently concealed such that the officer could not discern its text or markings. The plaintiff, however, told the officer "several times that she 'work[ed] in public safety,' recited that she was Deputy Director of the Prince George's County Department of Corrections, that she is 'second in charge,' and once referred to 'my sheriffs.'" Upon reviewing the video and audio recordings of the above-described encounter, the officer determined that the plaintiff had unlawfully impersonated a police officer in violation of Virginia Code. Before seeking an arrest warrant, the officer studied what he believed to be on-point precedent and even consulted with a deputy Commonwealth's Attorney, who advised that the officer had a "good case."

The officer arrested the plaintiff, but the trial court ultimately dismissed the charge as unfounded. The instant lawsuit ensued, the district court denied the officer's assertion of qualified immunity, and the officer filed an interlocutory appeal. The Fourth Circuit held that the trial court had not erred in denying the officer qualified immunity. "Even at the outer reaches of the Impersonation Statute, there was a lack of probable cause to arrest [the plaintiff] for falsely assuming the privileges of or pretending to be a police officer. She accurately related to [the officer] that she was a Deputy Director of the Prince George's County Department of Corrections and that she worked in public safety."

Takeaway

Even if an officer speaks with the Commonwealth's Attorney prior to making an arrest, if the facts should have made clear to the officer that there was a lack of probable cause for the arrest.

(10) *McAfee v. Boczar*, 2012 U.S. Dist. LEXIS 115323 (E.D. Va. Aug. 15, 2012)

In this case, the plaintiff, McAfee, was arrested by the defendant, an Animal Control Officer for Powhatan County. McAfee had become aware of a dog being kept on a chain in rural Powhatan in the middle of winter. She brought the owner a dog house. In the process, McAfee was bitten on her hand. She was treated at a local hospital, which reported her bite to the Animal Control Officer. The officer and McAfee spoke by phone on only one occasion. During that conversation, McAfee told the officer she didn't know the address of the dog, but could probably find it. Following that conversation, McAfee had a series of conversations with various local health officials about the bite and her potential need for rabies treatment. A few days later, McAfee was arrested and booked for allegedly failing to disclose the location of a potentially

rabid dog, a Class 2 misdemeanor. The case went to trial and McAfee was acquitted. She then sued for "malicious prosecution" under § 1983.

The officer raised qualified immunity as a defense prior to trial, but summary judgment on that issue was denied. Following a two-and-a-half day jury trial, the jury came back with a verdict against the officer. The officer then renewed her motion for qualified immunity, pointing out, among other things, that she had relied on statements by various local health officials in swearing out the warrant, including a statement by a public health nurse that she felt McAfee might be withholding information.

Judge Payne rejected that motion in a scathing opinion. Although the jury had rejected a state law claim for malicious prosecution (which required a showing of malice), Judge Payne took note of a transcript of a conversation between the officer and a Sheriff's Office dispatcher, prior to McAfee's arrest, in which the officer called McAfee a "kook" and suggested that she did not want her in her county any more. (Apparently, the officer had confused McAfee with someone else, with whom she had had a previous run-in.) Judge Payne also took the officer to task for statements in her sworn Criminal Complaint to the magistrate that seemed to shade the truth.

Takeaway

Law enforcement officers should be careful in swearing out criminal complaints to be completely clear in their allegations. Officers who rely on witness statements must be careful to ensure that the persons on whom they are relying asked the right questions of the suspect – they cannot rely simply on a feeling or hunch of the witness.

(11) *Johnson v. Rankin*, 844 F. Supp. 2d 716 (E.D. Va. Feb. 16, 2012) (Smith, J.)

Summary

The estate of the deceased suspect brought an action under § 1983, alleging excessive force against a three-year veteran of the City of Portsmouth Police Department. On the night in question, the officer received a call from dispatch reporting a "burglary in progress," and stating that a white male was banging on the glass door of the residence trying to gain entry.

Upon arriving at the address, the officer spotted the suspect banging on the glass doors and trying to gain entry. Within seconds, the officer had fired nine shots, fatally wounding the unarmed suspect. According to the officer, in response to his order to show hands and get down on the ground, the suspect turned, thrust one hand deep inside his pants, made a menacing facial expression, and then charged directly at the officer.

The decedent's estate disputed the officer's account, asserting that the suspect was too drunk to charge the officer at a full run with one hand inside his pants (the "too drunk defense"). The officer filed a motion for summary judgment.

The district court denied the police officer's motion for summary judgment because the use of deadly force was not objectively reasonable as a matter of law under the circumstances, and there were genuine issues of material fact on that issue so as to preclude a finding of qualified immunity.

Takeaway

The court specifically held that the officer was not entitled to summary judgment on his claim of qualified immunity because there was a triable question as to whether the officer had violated the decedent's right to be free of a seizure accomplished by deadly force.

(12) *Pleasants v. Town of Louisa*, 847 F. Supp. 2d 864 (W.D. Va. March 12, 2012) (Moon, J.)

Summary

An arrestee brought a § 1983 action against the Town of Louisa and a town police officer, arising out of the officer's warrantless entry into the plaintiff's apartment and the officer's subsequent decision to place her under arrest. The plaintiff and her estranged husband had a contentious relationship that produced a daughter, over whom the plaintiff obtained legal custody. The officer was dispatched to meet with the husband to conduct a welfare check on the daughter, who, the husband said, had been crying and screaming in the background during a telephone conversation.

Accompanied by the husband, the officer went to the plaintiff's home and interviewed the daughter, who told him that the plaintiff slapped her and grabbed her by the wrist. The officer then arrested the plaintiff and took her to the police department, where she was placed in a jail cell. The officer then obtained an arrest warrant charging the plaintiff with a Class 1 misdemeanor of assault and battery against a family member. The charge was ultimately dismissed, and the lawsuit ensued. The complaint asserted three claims against the officer under § 1983, alleging violations of the Fourth Amendment on theories of false arrest, unlawful entry, and malicious prosecution. The plaintiff also asserted a claim against the Town of Louisa for failure to train under § 1983. Defendants moved to dismiss the complaint pursuant to 12(b)(6).

The court held that a police officer was entitled to qualified immunity on the arrestee's § 1983 Fourth Amendment unlawful entry claim. The plaintiff also failed to state a cause of action under § 1983 against the officer for false arrest, malicious prosecution, and against the town for failure to train the police officer.

Takeaway

Qualified immunity existed here because, even assuming that the police officer had actually violated the plaintiff's Fourth Amendment right against warrantless entry, at the time of the officer's actions, it was not clearly established that a police officer, called to a residence for the second time in six weeks, could not enter without a warrant in order to ensure the safety of a hysterical minor whose mother was potentially intoxicated and allegedly violent.

(13) *Durham v. Horner*, 690 F.3d 183 (4th Cir. Aug. 8, 2012) (King, J.), *aff'g*, 759 F. Supp. 2d 810 (E.D. Va. Dec. 7, 2010) (Jones, J.)

Summary

The plaintiff arrestee, who, because of misidentification, had been wrongly indicted, brought a § 1983 action against a Big Stone Gap police officer, asserting that his Fourth Amendment rights had been violated by the initiation of a criminal prosecution against him without probable cause, and he also asserted a state law claim for malicious prosecution.

A grand jury returned three indictments against the plaintiff, charging him with felony drug distribution offenses. As a result, the circuit court issued three separate bench warrants for his arrest. Upon learning of the warrant, the plaintiff surrendered to Memphis authorities, waived extradition, and was transported to the Southwest Virginia Regional Jail. The plaintiff appeared before a Virginia magistrate and informed the court that it had the wrong person, but to no avail. Eventually, the plaintiff's attorney convinced the Commonwealth's Attorney that the wrong person had been indicted and arrested, and the charges were promptly dropped. The instant lawsuit ensued, and the officer moved for summary judgment on the basis of qualified immunity. The district court granted the officer summary judgment, and the plaintiff appealed.

The Fourth Circuit held first that the plaintiff was unable to establish a violation of the Fourth Amendment because, although the underlying criminal proceedings had been terminated in his favor, the prosecution had been supported by probable cause, as established by the three indictments. The plaintiff's primary problem was that he had been indicted by a grand jury before which the officer did not even testify, and the plaintiff did not put forward any evidence that the officer had acted maliciously or conspired with the law enforcement agents who did testify in order to mislead the grand jury. The Fourth Circuit affirmed summary judgment in favor of the officer.

Takeaway

This case indicates that even though actual malice is not a necessary component of a federal "malicious prosecution" claim, where there is no evidence of malice whatsoever, qualified immunity likely will apply.

(14) *Sawyer v. Asberry*, 2012 WL 1813053 (S.D. W. Va. May 18, 2012).

Summary

A pretrial detainee brought a § 1983 action alleging that a Wood County deputy sheriff violated his Fourteenth Amendment right to be free from excessive force when a deputy at the detention center grabbed the plaintiff by his throat and then punched him in the face, where the plaintiff ended up on the floor and was left for a period of time. Plaintiff admits that he was verbally belligerent to the deputy prior to the incident. Plaintiff was later taken to the hospital, where he was treated for a broken nose. The plaintiff then filed this civil action.

After close of evidence, the plaintiff moved for judgment as a matter of law on the issue of liability. The district court took the motion under advisement and submitted the action to the jury. The jury found for the deputy on the excessive-force claim. After the trial, the plaintiff

filed a renewed motion for judgment as a matter of law. The district court granted the plaintiff's motion for judgment as a matter of law.

The district court held that a law enforcement officer is not justified in using physical force against a pretrial detainee based solely on the detainee's words. Moreover, video evidence of the incident could not be reconciled with the jury's verdict in favor of the defendant officer.

Takeaway

A court may be willing to disturb a jury's verdict when video evidence is present that makes the jury's verdict irreconcilable with the facts. Additionally, even "fighting words" do not justify the use of force against a detainee.

IV. Equal Protection

(15) *Myers v. Simpson*, 831 F. Supp. 2d 945 (E.D. Va. Dec. 9, 2011) (Brinkema, J.).

Summary

A man who was repeatedly denied access to "self-defense for women" workshops sponsored by the Loudoun County Sheriff's Office held at the Northern Virginia Criminal Justice Training Academy brought a pro se § 1983 suit against the Sheriff's Office and three individuals affiliated with it, alleging violations of the Equal Protection Clause and various federal statutes. After several failed attempts to participate in the workshop, the Sheriff had issued the plaintiff a written trespass notice prohibiting him from entering the Academy. The lawsuit ensued, and the defendants moved to dismiss.

Citing *United States v. Virginia*, 518 U.S. 515 (1996), the "VMI case," The court applied intermediate scrutiny, under which the "governmental objectives" must be important, and the "discriminatory means employed must be substantially related to the achievement of those objectives." The court held that the government's decision to offer self-defense classes exclusively to women did not violate the Equal Protection Clause or other statutes. A gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened. In this case, women were assaulted more than men, and therefore the class aimed at helping women avoid assault was justified. The court also offered as an alternative ground for its ruling that qualified immunity would apply to the Sheriff's Office officials who were sued.

Takeaway

The government may benefit one gender when it is advancing an important governmental objective and the discriminatory means employed are substantially related to the achievement of that objective.

V. Due Process

(16) *Newbrough v. Piedmont Reg'l Jail Auth.*, 822 F. Supp. 2d 558 (E.D. Va. 2011).

Summary

The administrator of a deceased immigration detainee's estate brought a § 1983 suit against Piedmont Regional Jail Authority and the Jail's medical staff alleging, *inter alia*, violations of the detainee's rights under the 14th Amendment. While awaiting deportation, the detainee developed a severe staph infection and alleged that his requests for medical attention were "either ignored, denied, or not taken seriously." The detainee suffered heart failure caused by the infection and brought suit.

Defendants filed a motion to dismiss under 12(b)(6) on the grounds that (1) the Jail Authority was not a "person" subject to a § 1983 suit, (2) the claims against the superintendent in his official capacity should be dismissed because it is merely another way of stating a claim against the agency, and (3) the § 1983 count failed to state a claim of municipal liability. In addition, the medical staff filed for a 12(b)(6) dismissal for failing to state a claim for medical indifference.

The court found (1) the Regional Jail Authority can be considered a "person" in the context of a § 1983 claim because it is not an arm of the State, but rather a local entity and therefore a "person" under the statute; (2) the official capacity claims were duplicative of the claims against the Regional Jail Authority were dismissed; (3) because the detained person was not a convicted prisoner, his claims were governed by the 14th Amendment, and not the 8th Amendment.

In assessing the Due Process claim for failing to provide medical care, the court applied the "deliberate indifference" standard requiring an allegation that the defendant *deliberately* denied, delayed, or interfered with the detainee's medical care *with knowledge* of his grave condition. In this case, the court found it plausible that a Due Process violation occurred and did not dismiss the Due Process claim for failure to provide medical care.

Next, the court found the claims against the Regional Jail Authority and its superintendent plausible, alleging systematic inadequacy of training, constituting a custom or policy of deliberate indifference to the jail's detainees' medical care.

Takeaway

The court made several § 1983 relevant determinations in this case. First, a regional jail authority can be considered a "person" in the context of a § 1983 claim. Second, denial of medical care claims for *detainees* who are not convicted prisoners are governed by the Due Process Clause of the 14th Amendment and its deliberate indifference standard. Third, inadequate training can constitute a "custom or policy" of deliberate indifference, allowing a detainee to state a claim for violation of a detainee's due process rights.

(17) *Slaughter v. Mayor of Baltimore*, 682 F. 3d 317 (4th Cir. June 7, 2012) (Niemeyer, J.).

Summary

The estate of a Baltimore City Fire Department recruit who died during a live-burn training exercise brought a § 1983 suit against the City and others, alleging, *inter alia*, that the Fire Department had violated the recruit's substantive due process rights. The complaint alleged that the recruit's death could have been avoided with adequate preparations and that the Fire Department had created unduly dangerous conditions in staging the exercise without following nationally recognized safety standards. The district court granted the defendant's 12(b)(6) motion, holding that the "deliberate indifference" standard relied upon by the plaintiffs did not apply, where the decedent had not been in the defendants' custody and she had the option of declining to participate in the training exercise or even of declining to be a firefighter. The plaintiffs appealed.

The Fourth Circuit held that a firefighter recruit's death during a live-burn training exercise did not constitute a violation of her substantive due process rights absent an allegation that the exercise was intended to cause harm.

Takeaway

Apart from situations involving custody, the Supreme Court has never applied a "deliberate indifference" standard merely because the State created a danger that resulted in harm. Rather, in the *voluntary employment* context, an intent to harm is necessary to establish a substantive due process violation.

(18) *Lanier Const. Co. v. City of Clinton, N.C.* 812 F. Supp. 2d (E.D.N.C. Sept. 6, 2012).

Summary

A minority-owner construction company brought a § 1983 suit against the City of Clinton, North Carolina and the City Manager asserting claims for violation of procedural due process, defamation, intentional interference with contractual relations, and breach of contract. Despite being the lowest bidder, the City Manager rejected the Plaintiff's bid on the ground that he was not the lowest "responsible" bidder. The City Council adopted the recommendation of the City Manager and selected the next lowest bid, a non-minority-owned company. Plaintiff asserted rejection based on African-American company ownership. The Defendants moved to dismiss under FRCP 12(b)(6).

The court held the plaintiff had failed to state a cognizable due process claim because it had not been deprived of a cognizable property or liberty interest. The defamation claim was dismissed because the statements made with regard to the "responsible" bidder status were made in the context of a "quasi-judicial proceeding, and thus the statements were absolutely privileged." The Plaintiff's claim for intentional interference lacked the required specificity as required by law and was dismissed. Finally, the breach of contract claim was dismissed because no valid contract had arisen between the City and the Plaintiff. The invitation to bid was merely a solicitation for an offer and the bid was merely an offer to the City. The court granted the 12(b)(6) motion and dismissed all of Plaintiff's claims.

Takeaway

The decision (1) recognizes that merely making a bid does not create a property interest; (2) the bid-making process is a quasi-judicial one, in which statements are absolutely privileged.

VI. Freedom of Information Act

(19) *McBurney v. Young*, 2012 WL 286915 (4th Cir. Feb. 1, 2012) (Agee, C.J.), *aff'g* 780 F. Supp. 2d 439 (E.D. Va. Jan. 21, 2011) (Spencer, J.).

Summary

Two nonresidents of Virginia brought a § 1983 suit alleging that the "citizens-only" provision of the Virginia Freedom of Information Act violated the dormant Commerce Clause and the Privileges and Immunities Clause of the U.S. Constitution. Both Plaintiffs made FOIA requests to Virginia state agencies (seeking child support documents and real property tax records) but both were denied because they were not citizens of the Commonwealth.

The Fourth Circuit affirmed Judge Spencer's decision in the Eastern District of Virginia holding that the "citizens only" provision did not burden a fundamental right within the meaning of the Privileges and Immunities Clause. Because the "citizen's only" provision did not bar the Plaintiff's "from engaging in the political process, advocating [their] own interests, or advancing [their] political or legal arguments within the Commonwealth," the Privileges and Immunities Clause was not violated. Further, the dormant Commerce Clause was not violated because "[a]lthough VFOIA discriminates against noncitizens of Virginia, it does not discriminate 'against interstate commerce' or 'out-of-state economic interests." VFOIA is wholly silent to commerce.

Takeaway

VFOIA's "citizen's only" provision is constitutional and can withstand a challenge on both Privileges and Immunities and dormant Commerce Clause grounds.

VII. Civil Procedure

(20) *Lavender v. City of Roanoke Sheriff's Office*, 2011 WL 5970862 (W.D. Va. Nov. 30, 2011) (Wilson, J.).

Summary

A pretrial detainee brought a § 1983 suit against the City of Roanoke Sheriff's Office, the City Sheriff, and several "John Doe" deputy sheriffs, alleging a § 1983 claim for excessive force while he was being held at the Roanoke City Jail, as well as common-law claims for assault and battery. The plaintiff alleged that one of the unnamed deputies "threw him into a table resulting in the loss of a tooth and a laceration to his head and that he was stripped of his clothes for an unspecified period of time until his arraignment."

Defendants moved to dismiss under Fed. R. Civ. P. 12(b)(6), and the court granted that motion for the § 1983 claim because the plaintiff's pleadings were "boilerplate" and "devoid of specific facts" to show that the Sheriff "was deliberately indifferent to or tacitly authorized a particular practice that led to the single alleged use of excessive force against" the plaintiff by an unidentified deputy.

Takeaway

Judge Wilson's decision falls squarely under the established Supreme Court precedent of *Iqbal* and *Twombly*, namely, that a complaint must state with specificity the precise incidents which led to the § 1983 claim.

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