

## **50<sup>th</sup> ANNIVERSARY EDITION: NEWSLETTER**

### **LOCAL GOVERNMENT LAW UPDATE**

**By Laura O'Leary**

#### **Fifth Circuit Court of Appeals**

##### ***Bethany v. Reescano*, 2011 U.S. App. LEXIS 6005 (5<sup>th</sup> Cir. 2011)**

Bethany, a prisoner, brought a claim against the prison warden, Reescano, under 42 U.S.C. § 1983 when Bethany was unable to attend morning Ramadan meals during his time scheduled for use of the law library.

The Fifth Circuit upheld the district court's dismissal of Bethany's claim as frivolous because the §1983 claim purported to be one for individual liability of the warden but was based solely on the contention that Reescano had policymaking authority. The Court held that questions involving an official's policymaking authority pertain to municipal, not individual, liability.

##### ***Carnaby v. City of Houston*, 2011 U.S. App. LEXIS 5846 (5<sup>th</sup> Cir. 2011)**

Carnaby, a widow, sued the city and two police officers under 42 U.S.C. § 1983 claiming excessive force in the shooting death of her husband and failure to train the officers adequately. The decedent claimed to be a CIA agent when the two police officers pulled him over in a traffic stop. While trying to confirm his status, the police officers asked the decedent to step out of his car, but he fled. After a car chase, the police officers approached decedent's vehicle and perceived that he was pulling a weapon on them. One officer shot and killed the decedent.

The Court affirmed the district court's grant of summary judgment for the officers and the city, determining that the officer's use of deadly force in these circumstances was reasonable and therefore their behavior was subject to qualified immunity. The Court noted that the use of deadly force may be reasonable regardless of the officer's negligence if, at the time of the use of force, the officer was trying to prevent serious injury or death to himself or another.

The Fifth Circuit also upheld the district court's dismissal of the failure to train complaint, declining, on the facts of this case, to address whether a municipality can ever be held liable for failure to train officers when the officers did not commit any

constitutional violation.

### **Supreme Court of Texas**

#### ***City of Houston v. Williams*, 2011 Tex. LEXIS 229, 54 Tex. Sup. J. 713 (2011)**

A group of more than five hundred retired firefighters sued the city complaining of wrongful underpayment of lump sums due upon termination of their employment. The city asserted governmental immunity in a plea to the jurisdiction.

The Supreme Court affirmed the lower courts' refusal to grant the plea to the jurisdiction, holding that the applicable city ordinances created a unilateral contract with the firefighters which waived governmental immunity with respect to claims of breach of the employment contract.

### **Texas Courts of Appeals**

#### ***Continental Foods, Inc. v. State of Texas*, 2011 Tex. App. LEXIS 607 (Tex. App.—Dallas 2011)**

A sub-lessee of real property taken in an inverse condemnation action by a city, sought to defeat the city's plea to the jurisdiction. The sub-lessee's lease provided for termination and a reservation of rights as to damages in the event that the land was subjected to condemnation proceedings. The court affirmed the grant of the city's plea to the jurisdiction, noting that although sovereign immunity is waived for an inverse condemnation proceeding under Tex. Const. art. I § 17, the sub-lessee in this instance had no compensable claim due to the applicable clauses in the sub-lessee's lease.

#### ***City of Oak Ridge North v. Mendes*, 2011 Tex. App. LEXIS 2092 (Tex. App.—Beaumont 2011)**

A city filed a plea to the jurisdiction in response to a former city manager's suit alleging breach of his employment contract and violation of the Texas Wiretap Statute.

The court dismissed some of the manager's contractual claims but remanded one claim for further proceedings giving the manager an opportunity to correct his pleadings to assert that the city had waived sovereign immunity with respect to the breach of contract claim. The court held that a plaintiff must be given an opportunity to amend his pleadings to assert waiver of sovereign immunity when the pleading defect is identified for the first time on appeal.

The court also held that the Texas Wiretap Statute does not clearly and unambiguously waive sovereign immunity.

***Ici Construction, Inc. v. Orangefield Independent School Dist.*, 2011 Tex. App. LEXIS 2094 (Tex. App.—Beaumont 2011)**

A construction company sought to recover for sums spent repairing school district property after Hurricane Katrina.

The Court granted the school district's plea to the jurisdiction, holding that Tex. Loc. Gov't Code Ann. § 271.152 requires a written contract which contains the essential terms of the parties' agreement in order to waive sovereign immunity. Here, because the putative contract documents failed to define the basis on which the school district was to pay for repairs and the properties on which the construction company was to perform repairs, essential terms of the contract were missing. Accordingly, the school district had not waived sovereign immunity, and their plea to the jurisdiction was appropriate.

***Texas Department of Transportation v. Bowen*, 2011 Tex. App. LEXIS 2103 (Tex. App.—Houston (14<sup>th</sup> District) 2011)**

A motorcyclist sued the Texas Department of Transportation when she sustained injuries after hitting a bump in the road and losing control of her motorcycle.

The Court held that the Texas Department of Transportation had no duty to warn because the motorcyclist, who drove daily on that road, knew about the dangerous condition.

***Romo, Bexar County Tax Assessor v. Cavender Toyota*, 330 S.W.3d 648 (Tex. App.—San Antonio 2010, no pet.)**

An automobile dealership sued the tax assessor for providing a certificate of title falsely indicating that a particular vehicle was subject to no liens. The district court denied the tax assessor's plea to the jurisdiction asserting sovereign immunity.

The Appeals Court reversed, holding that Texas Transportation Code Ann. § 501.137 did not contain the type of language that the legislature generally used to waive immunity from suit, and that allowing a dealership to sue the tax assessor to recover damages caused by a consumer did not further the spirit of the Texas Transportation Code.

***City of Benavides v. Pena*, 2011 Tex. App. LEXIS 2051 (Tex. App.—San Antonio 2011)**

Employees sued the city after they were fired by the mayor, alleging that the mayor had acted beyond her statutory authority. The trial court denied the city's plea to the jurisdiction asserting sovereign immunity. The Court reversed, granting the city's plea to the jurisdiction.

The court held that a suit seeking to require a city's compliance with state law is brought *ultra vires* even when it fails to use the specific term. Suits complaining of *ultra vires* activity must be brought against the government actor in his official capacity rather than against the governmental unit subject to sovereign immunity.