

## **FALL 2011 NEWSLETTER**

### **CIVIL RIGHTS LAW UPDATE**

by Joshua Skinner

#### **United States Court of Appeals for the Fifth Circuit**

- ***Greater Houston Small Taxicab Co. Owners v. City of Houston, Texas*, No. 10-20381, 2011 U.S. App. LEXIS 20590 (5th Cir. Oct. 10, 2011)**

A municipality does not violate the Equal Protection clause by distinguishing between taxicab companies based on their size in determining how to award additional taxicab permits.

The City decided to expand the number of taxicab permits/operators within the City. After analyzing the issue, the City decided to award the permits to companies based on the number of permits that the company already had. Larger companies would get more permits than small companies. Many small taxicab companies, through an association, brought suit challenging the distinction between large and small taxicab companies under the Equal Protection clause of the Fourteenth Amendment. The City provided a greater percentage of the new permits to the larger taxicab companies. The City claimed that the distinction was rationally related to increasing the availability of 24-hour taxi service, increased access to taxi service throughout the City, increased disability accessibility in the taxi service, and increased “environmentally friendly” taxi service. The City contended that larger taxicab companies were better able to meet its goals and, consequently, were to be given more of the new permits. In addition, the City permitted smaller taxicab companies to seek additional permits (beyond the initial allocation) by demonstrating that they could meet the concerns of the City.

The Court held that the City had a legitimate purpose behind the statute and that the means adopted were rationally related to that purpose. Even if other means could have been adopted that would have served the legitimate purpose more fully, the means adopted by the City were acceptable and did not create a Constitutional violation.

- ***Porter v. Epps*, No. 09-60324, 2011 U.S. App. LEXIS 19756 (5th Cir. Sept. 28, 2011)**

In a suit alleging retaliation in violation of the First Amendment, members of the governing body of a governmental entity can be held liable for failing to renew a contract of an employee even if they never made a formal vote to reject renewal of the employee’s contract.

Juarez was employed by the Brownsville Independent School District on a one year contract that could be renewed annually. Juarez reported alleged financial irregularities to the FBI. At the conclusion of the year, the Board of Trustees did not renew Juarez’s contract. Juarez alleges that the school board members did not renew his contract in retaliation for his having reported possibly illegal conduct to law enforcement authorities. Juarez sued the board members in their individual capacities. The board members moved for summary judgment, arguing that they could not be held personally liable because they could only perform “adverse employment actions” under the First

Amendment by formal vote of the Board. Since there was no vote on Juarez's contract, they contended that they could not be held liable under the First Amendment.

The Court rejected the school board members' argument, holding that their informal agreement not to vote or renew Juarez's contract was just as much an adverse employment action as if they had actually voted. Merely permitting the contract to expire did not change the nature of the act of nonrenewal.

- ***Frame v. City of Arlington*, No. 08-19035, 2011 U.S. App. LEXIS 19035 (5th Cir. Sept. 15, 2011) (en banc)**

Individuals with disabilities have a private right of action to enforce Title II and Section 504 with respect to newly built and altered public sidewalks, regardless of whether use of those sidewalks is necessary for gaining access to other services, programs or activities of the municipality. The sidewalks themselves are the "service" covered by statute. The private right of action accrues at the time the plaintiff first knew or should have known that he or she was being denied the benefits of the sidewalks in question.

The plaintiffs, disabled individuals who depend on motorized wheelchairs for mobility, brought suit against the City under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act based on sidewalks that were built or altered by the City after Title II became effective on January 26, 1992. The case was dismissed by the district court based on the statute of limitations. On appeal, a panel of the Fifth Circuit reversed, holding that there was a private right of action, but that the statute of limitations was an affirmative defense that should not have been decided based on the pleadings. After the parties sought rehearing, the panel withdrew its opinion, and replaced it with an opinion holding that there was no private right of action based on the allegedly defective sidewalks because they were not programs, services or activities under Title II. However, if the non-compliant sidewalk denied one of the plaintiffs access to a program, service, or activity that does fall within the meaning of Title II, then there was a private right of action. The Court granted en banc review.

The Court held that, when a city decides to build or alter a sidewalk and makes that sidewalk inaccessible to individuals with disabilities without adequate justification, the city unnecessarily denies disabled individuals the benefits of its services in violation of Title II. This is true whether it is the building or altering of sidewalks that is a service, program, or activity of the city or whether it is the sidewalk itself that is the service, program or activity. The Court rejected the City's contention that the right of action accrued when the sidewalks were built or modified. Instead, the Court concluded that the right of action accrued when the plaintiffs knew or should have known that they were denied access to a service, program or activity of the City.

- ***Jennings v. Houston Patton*, 644 F.3d 297 (5th Cir. June 17, 2011)**

A public official cannot be sued for initiating a prosecution without probable cause if the arrest warrant affiant and person who actually prepared, or was fully responsible for the preparation of, the warrant application was an independent investigator.

Jennings brought suit against Judge Patton, alleging that Patton caused Jennings to be prosecuted without probable cause. Jennings had a prior claim against Judge Patton relating to actions Judge Patton took in overseeing a series of disputes between Jennings' and Jennings' ex-wife. Jennings' attorney contacted Judge Patton about settling Jennings' claim against the Judge. Unbeknownst to Jennings, Judge Patton contacted the district attorney's office and reported the settlement offer as a possible attempt to bribe the judge. An investigator from the county sheriff's department, Larry Iles, was hired to investigate the matter. Iles listened to and recorded various conversations between Judge Patton and Jennings' attorney in which they ultimately agreed on settlement terms. Based on the affidavit and testimony of Iles, an arrest warrant was issued and a grand jury returned an indictment against Jennings (and his attorney). Neither Jennings nor the attorney was ever tried and the case was later dismissed. Jennings brought suit against Judge Patton and the District Attorney. Judge Patton moved for dismissal based on qualified immunity. The district denied the motion to dismiss and Judge Patton appealed.

Since the magistrate who issued the arrest warrant and the grand jury relied on the independent testimony of Iles and Jennings did not otherwise show how Judge Patton's actions tainted the deliberations of the magistrate or grand jury, the "independent intermediary doctrine" cut off the possibility of bringing suit against Judge Patton. The Court was unwilling to extend liability beyond the affiant and person who actually prepared, or was fully responsible for the preparation of, the warrant application.

- ***McKinley v. Abbott*, 643 F.3d 403 (5th Cir. June 8, 2011)**

The Texas statute prohibiting chiropractors from soliciting new patients within thirty days of an accident is facially constitutional under the First Amendment.

McKinley, a chiropractor, brought a facial challenge under the First Amendment to a state statute regulating barratry and solicitation of professional employment by chiropractors. The statute makes it a criminal offense for a chiropractor to solicit, in person, by phone or in writing, or permit someone to solicit on his behalf, potential patients who were involved in an automobile accident or arrested if the solicitation occurs within thirty days of the accident or arrest.

Challenges to statutes regulating commercial speech are not subject to being ruled unconstitutional under the First Amendment based on overbreadth because the overbreadth doctrine does not apply to commercial speech. To succeed on a facial attack, a party challenging a commercial speech regulation must establish that no set of circumstances exists under which the regulation would be valid or that the regulation lacks any plainly legitimate sweep.

Personal solicitation is a form of commercial expression protected by the First Amendment. If the speech is not unlawful or misleading, then the court must determine whether the asserted governmental interest is substantial, whether the harms the government recites are real and the restriction will in fact alleviate them to a material degree, and whether the regulation is not more extensive than is necessary to serve the stated interest.

The Court held that protecting the privacy of accident victims, as well as controlling the licensing and regulation of professions, are substantial governmental interests. The Court also held that the evidence indicated that solicitation within thirty days of an accident caused real harm and that the restriction, while perhaps not the “least restrictive means,” is reasonable and in proportion to the interest served.

### **Supreme Court of Texas**

- ***Combs v. Tex. Entm’t Ass’n, Inc.*, No. 09-0481, 2011 Tex. App. LEXIS 602 (Tex. Aug. 26, 2011)**

A state-imposed \$5 per customer fee on sexually-oriented businesses that permit the consumption of alcohol does not violate the free speech clause of the First Amendment.

In 2007, the Texas Legislature enacted the Sexually Oriented Business Fee Act, which imposes on sexually oriented businesses a \$5 entry fee for each customer admitted to the business if the business authorizes on-premises consumption of alcoholic beverages. The statute applies whether or not the business sells the alcohol.

The Court held that the fee was a content-neutral restriction because it was aimed at discouraging the combination of nude dancing and alcohol in order to avoid the negative secondary effects that derive from that combination. In addition, the fee, at least nominally, serves to further the stated purpose of discouraging the aggravated negative secondary effects of combining nude dancing and alcohol. Finally, the restriction is not overly restrictive because businesses can simply decline to permit the consumption of alcohol and the amount of the fee is a minimal restriction.

### **Texas Courts of Appeals**

- ***Main v. Royall*, No. 05-09-01503-CV, 2011 Tex. App. LEXIS 5668 (Tex. App. – Dallas July 25, 2011, no pet. h.)**

Authors and book publishers are “members of the electronic or print media” and have the right to an interlocutory appeal from the denial of a motion for summary judgment based on a claim or defense arising under the free speech or free press clause of the First Amendment or Article I, Section 8 of the Texas Constitution.

- ***Harris County v. Nagel*, No. 14-09-00780-CV, 2011 Tex. App. LEXIS 6830 (Tex. App. – Houston [14th Dist.] Aug. 25, 2011, no pet. h.)**

County Constable’s statements affirming that deputy constables under his authority acted properly in the handling of an arrest qualified as ratification of their conduct sufficient to establish liability for the County on an excessive force claim.

- ***Rosenstein v. Rosenstein*, No. 02-09-00272-CV, 2011 Tex. App. LEXIS 6402 (Tex. App. – Fort Worth Aug. 11, 2011, no pet. h.)**

An order delineating a divorced couples’ possession rights over their children during religious holidays violated the Establishment Clause because it gave substantially greater rights to the father for providing religious instruction than it gave to the mother. In the absence of evidence that the mother’s religious preferences or lack of religion are illegal or immoral or otherwise present a danger to the children, the Court concluded that the order violated the Establishment Clause by failing to be neutral between the religious tenants of the two parents.