

50th ANNIVERSARY EDITION: NEWSLETTER

CONSTITUTIONAL/CIVIL RIGHTS LAW UPDATE

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United States Supreme Court

National Aeronautics & Space Administration v. Nelson, 562 U.S. ____ (2011)

The federal government may inquire about a prospective employee's recent illegal drug use and treatment in employment background checks and these inquiries are not a violation of an individual's informational privacy.

Federal contract employees were subject to a government background check. On one of the forms, an employee was asked whether he/she has used, possessed, supplied, or manufactured illegal drugs in the last year and if so, the employee must provide details, including information about any treatment or counseling received. One of the forms was sent to an employee's references and asked open-ended questions about whether they have any reason to question the employee's honesty or trustworthiness or have any adverse information concerning a variety of other matters. All the responses on the forms were subject to protection under the Privacy Act. The employees filed suit claiming the background check process violates a constitutional right to informational privacy.

The district court declined to issue a preliminary injunction but the Ninth Circuit reversed finding that although the inquiries into recent drug involvement furthered the government's interest in combating illegal drug use, the drug treatment or counseling question furthered no legitimate interest and was likely to be held unconstitutional. The Ninth Circuit also held that the forms sent to employees' references were not narrowly tailored to meet the government's interest in verifying contractor's identities and ensuring security.

The U.S. Supreme Court found that the federal government has an interest in conducting basic background checks in order to ensure the security of its facilities and to employ a competent reliable workforce to carry out the people's business and thus, is not prevented from asking reasonable questions in light of the government's interests at stake. The Court found that the government has good reason to ask employees about their recent illegal-drug use and follow-up questions regarding treatment or counseling for recent illegal drug use is also a reasonable employee/employment related inquiry. The Court found that the open-ended inquiry questions provided to the references seeking information bearing on the suitability for government employment or security clearance were reasonable and furthered the government's interest in managing its operations. The

information sought was reasonable and thus, did not violate a constitutional right to informational privacy.

***Ortiz v. Jordan*, 562 U.S. ____ (2011)**

A party may not appeal an order denying summary judgment after a full trial on the merits.

Ortiz, a former inmate, brought a Section 1983 action against superintending prison officials. Ortiz claimed that she was sexually assaulted by a corrections officer on two consecutive nights. Ortiz reported the first assault to Officer Jordan but he did nothing to prevent the second assault, despite his awareness of the substantial risk of that occurrence. Ortiz also charged that a prison investigator, Officer Bright, retaliated against her for her accusations by placing her, shackled and handcuffed, in solitary confinement in a cell without adequate heat, clothing, bedding, or blankets. Ortiz stated that the response of both officers violated her right, safeguarded by the Eighth and Fourteenth Amendments, to reasonable protection from violence while in custody.

Both officers moved for summary judgment on pleas of “qualified immunity” and the district court, noting factual disputes material to Ortiz’s claims and the officers’ qualified immunity defenses, denied the summary judgment motion. The officers did not appeal the ruling and the case proceeded to trial where a jury returned a verdict against the officers. On appeal, the officers urged that the district court should have granted their motions for summary judgment based on qualified immunity defense. The Sixth Circuit agreed and reversed the judgment.

The U.S. Supreme Court held that a party may not appeal a denial of summary judgment after a district court has conducted a full trial on the merits. A qualified immunity defense does not vanish when a district court declines to rule on the plea summarily. The immunity plea remains available to the defendant at trial but at that stage, the defense must be evaluated in light of the character and quality of the evidence received in court. Once trial has been had, the availability of qualified immunity should be determined by the trial record, not the pleadings nor the summary judgment record. After trial, if defendants continue to urge qualified immunity, the decisive question, ordinarily, is whether the evidence favoring the party seeking immunity is legally sufficient to overcome the defense.

The Court found that the officers sought no immediate appeal from denial of their summary judgment action nor did they avail themselves of Rule 50(b) which permits the entry of judgment, post verdict, for the verdict loser if the court finds the evidence legally insufficient to sustain the verdict. Absent such a motion, an appellate court is powerless to review the sufficiency of the evidence after trial. The Court found that dispositive facts were disputed and the officers’ qualified immunity defense did not present “neat abstract issues of law”. To the extent that the officers urge that Ortiz has not proved her case, they were, by their own account, obligated to raise that sufficiency of the evidence

issue by post-verdict motion for judgment as a matter of law under Rule 50(b). The Court found that since the officers did not do so, the Sixth Circuit had no basis to upset the jury's decision on the officers' liability and the case was reversed and remanded.

***Michigan v. Bryant*, 562 U.S. ____ (2011)**

If the primary purpose of the police interrogation is to enable police assistance to meet an ongoing emergency, then the statements elicited during the interrogation do not violate the Sixth Amendment's Confrontation Clause.

Michigan police officers were dispatched to a gas station parking lot where they found Anthony Covington mortally wounded. Covington told the police he had been shot by Bryant. Bryant was arrested and tried. At Bryant's trial, the officers testified about what Covington told them and Bryant was found guilty of second degree murder. The Michigan Supreme Court reversed his conviction holding that the Sixth Amendment Confrontation Clause rendered Covington's statements inadmissible testimonial hearsay.

The U.S. Supreme Court held that the circumstances of the interaction between Covington and the police objectively indicate that the "primary purpose of the interrogation" was to enable police assistance to meet an ongoing emergency and thus, Covington's identification and description of the shooter and location of the shooting were not testimonial statements and their admission did not violate the Confrontation Clause. To make the "primary purpose" determination, the Court must objectively evaluate the circumstances in which the encounter between the individual and the police occurs and the parties' statements and actions. The existence of an "ongoing emergency" at the time of the encounter is among the most important circumstances in forming the interrogation's primary purpose. An emergency focuses the participants not on proving past events potentially irrelevant to later criminal prosecution but on ending a threatening situation.

The Court found the Michigan Supreme Court failed to appreciate that whether an emergency exists and is ongoing is a highly context-dependent inquiry. An assessment of whether an emergency threatening the police and the public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to the first responders and public may continue. The circumstances of the interrogation involved an armed shooter, whose motive for and location at the shooting were unknown and a mortally wounded Covington within a few blocks and a few minutes of the location where the police found Covington. The Court found that at the time of the interrogation, there was an ongoing emergency which threatened both the police and the public. The statements did not violate the Confrontation Clause and the Court reversed the Michigan Supreme Court.

***Snyder v. Phelps*, 562 U.S. ____ (2011)**

The First Amendment's Free Speech Clause can serve as a defense in state tort

suits on matters of public concern.

The Westboro Baptist Church has picketed military funerals to communicate its belief that God hates the United States for its tolerance of homosexuality, particularly in America's military. Greg Phelps, who founded the church, and six parishioners traveled to Maryland to picket the funeral of Marine Lance Corporal Matthew Snyder who was killed in Iraq in the line of duty. The picketing took place on public land approximately a thousand feet from the church where the funeral was held, in accordance with the guidance from local law enforcement officers and the picketers were carrying signs. Matthew Snyder's father filed a diversity action against Phelps and the church alleging state tort claims of intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy. The jury held Westboro liable and Westboro challenged the verdict as grossly excessive and sought judgment as a matter of law on the ground that the First Amendment fully protected its speech. The district court reduced the punitive damage award but left the verdict otherwise intact. The Fourth Circuit reversed, concluding that Westboro's statements were entitled to First Amendment protection as those statements were on matters of public concern, were not provably false and were expressed solely through hyperbolic rhetoric.

The U.S. Supreme Court held that the First Amendment shields Westboro from tort liability for his picketing in this case. Whether the First Amendment prohibits holding Westboro liable for a speech in this case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case. Speech on matters of public concern occupies the highest realm of the hierarchy of the First Amendment values and is entitled to special protection. The Court has found that speech deals with matters of public concern when it can "be fairly considered as relating to any matter of political, social or other concern to the community" or when it "is a subject of general interest and a value concern to the public." A statement's arguably "inappropriate or controversial character is irrelevant to the question whether it deals with a matter of public concern." To determine whether speech is a public or private concern, the Court must independently examine the content, form, and context of the speech as revealed by the whole record.

The Court found that the content of Westboro's signs plainly relates to public rather than private matters. The placards highlighted issues of public import – the political and moral conduct of the United States and its citizens, the fate of the nation, homosexuality in the military and scandals involving the Catholic clergy – and Westboro conveyed its views in a manner designed to reach as broad a public audience as possible.

The Court found that the context of the speech – its connection with Matthew Snyder's funeral – cannot by itself transform the nature of Westboro's speech from a matter of public concern to private concern. Westboro's signs, displayed on public land next to a public street, reflect the fact that the church finds much to condemn in modern society. Westboro's speech was on a matter of public concern and the funeral setting does not alter that conclusion.

The Court found that Westboro had been actively engaged in speaking on the subjects addressed in his picketing long before he became aware of Matthew Snyder and there can be no serious claim that the picketing did not represent Westboro's honestly held beliefs on public issues. While Westbrook may have chosen the picket location to increase publicity for his views, and his speech may have been particularly harmful to Snyder, this does not mean that his speech should be afforded less than full First Amendment protection under the circumstances of this case.

The Court found that even protected speech is not equally permissible in all places and at all times. Westboro's choice of where and when to conduct his picketing is not beyond the government's regulatory reach – it is subject to reasonable time, place, or manner restrictions. However, Maryland did not have a law in effect at the time restricting funeral picketing so the Court was not asked to review the reasonableness of a statute.

The Court held that what Westboro said, in the whole context of how and where it chose to say it, is entitled to special protection under the First Amendment, and that protection cannot be overcome by a jury finding that the picketing was outrageous. Otherwise, that would pose too great a danger that the jury would punish Westboro for its views on matters of public concern. For all these reasons, the jury verdict imposing tort liability on Westboro for intentional infliction of emotional stress must be set aside.

The Court held that Snyder may not recover for the tort of intrusion upon seclusion. Although Snyder argued he was a member of a captive audience at his son's funeral, the Court held that the captive audience doctrine should not be expanded to the circumstances in this case. The Court found that Westboro stayed away from the memorial service, Snyder could see no more than the top of the picketers' signs and there is no indication that the picketing interfered with the funeral service itself.

The Court held that because the First Amendment bars Snyder from recovery for intentional infliction of emotional distress or intrusion upon seclusion, Snyder cannot recover for civil conspiracy based on those torts. Westboro addressed matters of public import on public property in a peaceful manner, in full compliance with the guidance of local officials. Westboro did not disrupt Matthew Snyder's funeral and its choice to picket at that time and place did not alter the nature of its speech. The Court found that because this nation has chosen to protect even hurtful speech on public issues to insure that public debate is not stifled, Westboro must be shielded from tort liability for its picketing in this case.

Fifth Circuit Court of Appeals

***Rundus v. City of Dallas*, 634 F.3d 309 (5th Cir. 2011)**

This case involves the First Amendment. Rundus was prohibited from distributing free Bible pamphlets at the State Fair of Texas. Although the fair is held on property owned by the City of Dallas, the State Fair of Texas, a private corporation, runs the fair and primarily has control over the grounds during the fair. The State Fair of Texas has rules and regulations which prohibit the distribution of literature without a booth rental. Rundus declined to rent a booth. Rundus sued the City and the State Fair of Texas under 42 USC §1983 alleging that the restriction violates his First Amendment rights. The district court found that the State Fair of Texas is not a state actor and thus, no liability because state action is a prerequisite for bringing an action under § 983.

On appeal, in order to establish state action, Rundus argued that the State Fair of Texas was financially entwined with the City in a joint venture. The Fifth Circuit was not persuaded by Rundus' argument that the parties had a mutual commitment to improve Fair Park because the State Fair of Texas improved only the portions of Fair Park that would attract more fair goers. The Court found that while the City's Police were present at the fair, they were not enforcing the State Fair of Texas' rules and regulations. The City Police were enforcing only criminal statutes and ordinances that provide neutral assistance. The Court found that the State Fair of Texas is not a state actor merely because it takes advantage of law enforcement services provided to the public. The Court found that the City had no say in the State Fair of Texas' internal decision making and had no role in enacting the restrictions on distribution of literature. The Court held that since the State Fair of Texas is not a state actor, the Court did not need to address whether the restrictions meet constitutional muster.

***Harris v. Pontotoc County School District*, 2011 U.S. App. Lexis 4639 (5th Cir. March 10, 2011)**

Derek Harris, a student at South Pontotoc Middle School was accused of hacking into the school's computer system and was sent to alternative school. Derek's mother was the secretary for the principal of South Pontotoc Middle School. As a result of this incident, the Superintendent decided to reassign Ms. Harris to an assistant teaching position to limit her access to computers containing confidential information. Ms. Harris had a conversation with the Superintendent about her son's treatment and her reassignment and during the conversation Ms. Harris called the Superintendent a liar and allegedly used profanity. The Superintendent terminated Ms. Harris' employment over the phone. Derek and his mother sued the District and Superintendent alleging that Derek was denied his due process rights and was defamed, and Ms. Harris was wrongfully terminated in retaliation for protected First Amendment speech. The district court granted summary judgments to the District on all claims.

The Fifth Circuit held that while the right to an education creates a property interest protected by the Due Process Clause of the Fourteenth Amendment, a student's transfer to an alternative education program does not deny access to public education and does not violate a Fourteenth Amendment interest. While the Fifth Circuit disagreed with some of the reasoning of the district court and did not agree that Derek admitted to the

offense, the Court found that Derek was adequately informed of the specific charges on which the suspension derived and he was given the opportunity to present his side of the story and thus, the process was sufficient.

The Court held that Derek had no defamation claim because all of his allegations were based either on hearsay, or on statements made directly to him. Hearsay evidence inadmissible at trial cannot be used to create a genuine issue of material fact to avoid summary judgment, and defamatory statements must be made to a third party, not to the claimant.

As for Ms. Harris's First Amendment claim, the First Amendment protects a public employee's speech in cases of alleged retaliation only if the speech addresses matter of "public concern". If the speech is not of public concern, we do not question an employer's motivation for taking action against the employee. The Court held that Ms. Harris' First Amendment rights were not violated because her speech did not address a matter of public concern. The Court found that evidence in the record shows only a mother who complained about the treatment her child received in a discrete incident and an employee who was upset at being reassigned. These matters are personal and Ms. Harris did not speak predominantly as a citizen and thus, the District was entitled to summary judgment on this claim.

Demoss v. Crain, 2011 U.S. App Lexis 4219 (5th Cir. March 2, 2011)

An inmate challenges several Texas Department of Criminal Justice policies under 42 USC § 1983. The inmate alleges the policies violated his constitutional rights under the First and Fourteenth Amendment. After a bench trial, the district court concluded that none of the policies violated the inmate's constitutional rights and entered judgment in favor of Defendants on all remaining claims.

The Fifth Circuit found that although the inmate asserted many constitutional claims under § 1983 before the district court, on appeal he has explicitly disclaimed all save his challenge to the recording policy. Prison regulations that limit an inmate's fundamental right to free speech are valid if they are reasonably related to legitimate penological interests. In order to satisfy this standard the court determines: (1) whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it; (2) whether "there are alternative means of exercising the right that remains open to prison inmates"; (3) what "impact accommodation of the asserted constitutional right might have on guards and other inmates"; and (4) whether there is an "absence of ready alternatives."

The Court found that the recording policy had a rational connection to a legitimate government interest in prison safety in that it ensures that Texas Department of Criminal Justice is able to investigate possible disciplinary violations that may have occurred during inmate-led religious services and, relatedly, ensures that services stay on religious topics.

The Court found that the recording policy did not foreclose alternative avenues of religious expression. The inmate presented scant evidence that the recording policy stifled his ability to express his religious beliefs at religious services and the evidence showed that religious service recordings were not used to punish the inmates for religious discussion.

The Court found that the only alternative to recording religious services would be to have staff or approved outside volunteers present, or, as with other groups, cancel service when no staff or volunteers are available. Either alternative would saddle the Texas Department of Criminal Justice with additional administrative costs, take staff away from other postings in the prison, or reduce the number of services available for Muslim inmates. The inmate failed to point to “an alternative that fully accommodates the prisoner’s right at *de minimis* cost to valid penological interests” and thus, he failed to establish a violation of his constitutional rights.

***Fisher v. University of Texas at Austin*, 631 F.3d 213 (5th Cir. Jan. 18, 2011)**

A person’s race can be considered as a factor in admissions.

Two white students who were denied undergrad admission to the University of Texas at Austin filed suit alleging the school’s admission policies unfavorably favored minority applicants. The students argued that use of race in admissions was improper. The students argued the University should not have started considering an applicant’s race when it had in place a more effective race-neutral approach to achieve diversity. The suit refers to a law in place since 1997 that automatically grants admission to any state, public college or university to Texas students in the top ten percent of their high school class. The district court found that the University’s admission policies were narrowly tailored, especially in terms of race, and in line with the United States Supreme Court’s decision in *Grutter v. Bollinger*, which upheld the University of Michigan’s law school’s use of race as one factor to evaluate applicants.

The Fifth Circuit held that the University of Texas could rely on race as one of the “special circumstances” used to evaluate student applicants because race is not the only factor considered. The Court found that the University of Texas’ use of race in admissions was to ensure a more diverse student body. The Court found the University’s use of race in admissions was tailored to the Supreme Court’s decision in *Grutter v. Bollinger*, which held that colleges may consider race in admissions but must first give “serious, good-faith consideration” to “workable, race-neutral” alternatives to achieve diversity.

***Duvall v. Dallas County, Texas*, 631 F.3d 203 (5th Cir. Jan. 13, 2011)**

Mark Duvall brings suit against Dallas County for personal injuries stemming from a staph infection he contracted while incarcerated in the County’s jail. Duvall was a

pretrial detainee and as a result of contracting a staph infection, he eventually lost the use of one of his eyes. Duvall brings a § 1983 complaint against the County alleging that the County had deprived him of his right to due process by subjecting him to an unconstitutional condition of confinement. A jury found for Duvall and the County filed an appeal.

The Fifth Circuit found that because a State may not punish a pretrial detainee, conditions of confinement for such an inmate that amount to “punishment” violate the Constitution. The County stipulated to the fact that “no legitimate governmental purpose” was served by the allowance of the MRSA infection to be present in the jail. The Court found that the record contains a surfeit of evidence that the County knew of the condition complained of, yet continued to house inmates in those conditions. The Court found that the jury heard evidence that the jail experienced around two hundred infections per month, that the County’s awareness of the situation preceded Duvall’s confinement and there had been a serious outbreak of MRSA in the jail for at least three years before Duvall’s arrival. The jury found that Duvall’s injury was caused by a policy or custom of the County and that there was evidence the Sheriff and other jail officials had long known of the extensive MRSA problem yet had continued to house inmates in a face of the inadequately controlled staph contamination.

The Court found that the evidence was amply sufficient to prove that the violations were serious, extensive, and extended and that they were much more than *de minimis* and thus, the condition created a constitutional violation.

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