2013 YEAR IN REVIEW

SIGNIFICANT DECISIONS IN 2013:
CIVIL RIGHTS LAW UPDATE

By Josh Skinner and Nichole Plagens

United States Supreme Court

***Stanton v. Sims*, No. 12-1217, 2013 U.S. LEXIS 7773 (November 4, 2013)**

Police officer was entitled to qualified immunity on Fourth Amendment claim by third-party injured by officer where the officer made "split-second decision" to enter a residence in hot pursuit of a suspect he believed had committed a jailable misdemeanor under state law and accidentally injured resident.

Officer Stanton received a call about a disturbance involving a person with a baseball bat. He responded and observed three individuals. Two of the individuals turned into a nearby apartment complex and one, Nicholas Patrick, ran or quickly walked toward a residence. The residence belonged to Drendolyn Sims. Stanton considered Patrick's behavior suspicious, called out "police," and ordered Patrick to stop. Patrick looked at Stanton, but ignored the order and quickly went through the front gate of Sims' yard. The fence prevented Stanton from seeing into the yard. Stanton decided to pursue Patrick, believing that Patrick's actions constituted a violation of state law because Patrick disobeyed his order to stop. However, when Stanton kicked open the front gate, it hit Sims, injuring her. Sims brought suit, alleging that Stanton unreasonable searched her home without a warrant in violation of the Fourth Amendment. Stanton moved for summary judgment, which was granted by the district court. However, on appeal, the Ninth Circuit reversed, holding that Stanton had violated clearly established law. Stanton sought review from the Supreme Court and it granted the writ of certiorari.

The Supreme Court held that Officer Stanton is entitled to qualified immunity because the law is not clearly established. It remains an open legal question as to whether an officer may enter a residential property while in hot pursuit of a criminal suspect. The Court did not decide that underlying Fourth Amendment issue, but did conclude that, in light of the open nature of the question, Officer Stanton could not be held personally liable.

United States Court of Appeals for the Fifth Circuit

***Moussazadeh v. Tex. Dep't of Crim. Justice*, 703 F.3d 781 (5th Cir. 2012)**

The Prison Litigation Reform Act ("PLRA") does not require an inmate to re-exhaust the prison grievance process because of changed circumstances when the nature of the complaint has

not changed and the Texas Department of Criminal Justice ("TDCJ") continues to be on notice of the complaint. Under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), a showing of sincerity does not require perfect adherence to the beliefs held by the inmate. Finally, food is an "essential" benefit that is provided to all inmates, and denying kosher food to a Jewish inmate at no charge constitutes a substantial burden on the exercise of religion.

Moussazadeh, a Jewish inmate, exhausted the grievance process with the TDCJ when he appealed the TDCJ's denial of his grievances requesting kosher meals. He then filed suit, claiming violations of RLUIPA and the Texas Religious Freedom and Restoration Act. After more than seven years of litigation, the district court granted summary judgment to the TDCJ, holding that Moussazadeh's claim was barred by the PLRA for failure to exhaust the prison's administrative remedies before seeking judicial relief, and under RLUIPA finding that Moussazadeh was not sincere in his religious beliefs.

The Fifth Circuit reversed the ruling of the district court on both grounds. With regards to the PLRA, the court found that Moussazadeh exhausted the prison's administrative grievance procedures when he filed a Step 1 grievance complaining of the denial of kosher meals, and appealed that denial by filing a Step 2 grievance, which was also denied. The court found that the change in circumstances over the seven years of litigation, which included a period where he was provided with kosher meals, but was subsequently denied them, did not warrant the necessity of re-exhausting the prison's administrative procedures. The court reasoned that throughout the entirety of the litigation proceedings, Moussazadeh's complaint had not changed, and therefore, the TDCJ had received the necessary notice of his complaint and was afforded an opportunity to address it without being subjected to the interference of the court. The court reasoned that at this stage in the litigation, dismissal of the complaint for failure to exhaust administrative procedures would not fulfill the purpose of the PLRA.

The court then turned to the second grounds for dismissal; the district court's finding that Moussazadeh did not have a claim under RLUIPA because he did not sincerely hold his beliefs that his religion required him to eat kosher meals. The court found that the district court, in determining the sincerity of a held belief, should have limited its inquiry to a credibility assessment instead of performing a deeper examination of Moussazadeh's religious convictions.

Finally, the court laid out the standard that should be applied on remand, directing the district court to find that the denial of kosher meals to Moussazadeh free of charge constituted a substantial burden on his exercise of religion. The court reasoned that food is an essential, generally available benefit that is freely given to all of the other inmates, and to deny food that complies with an inmate's sincerely held religious beliefs would constitute a substantial burden. The court additionally held, that based on the evidence presented to the court the TDCJ had not proven that there was a compelling interest in denying the kosher meals, nor that the TDCJ had adopted the least restrictive means of achieving its compelling interest.

It is likely that the issues raised by this case will continue to be a source of controversy and disagreement. The panel decision elicited a strong dissent from Judge Barksdale. When the TDCJ sought rehearing *en banc*, the panel denied the request, but elicited an even stronger dissent from the denial of rehearing from Judge Jolly, who was not a member of the panel. Judge Jolly not only explained the reasons for his disagreement with the panel decision, he

specifically stated that the district court, on remand, should disregard the panel decision in favor of an earlier Fifth Circuit ruling: *Baranowski v. Hart*, 486 F.3d 112 (5th Cir. 2007).

***RBIII v. City of San Antonio*, No. 11-50626, 2013 U.S. App. LEXIS 8267 (5th Cir. Apr. 23, 2013)**

When a State takes property and acts in order to "abate an emergent threat to public safety," predeprivation notice is not required under the Fourteenth Amendment procedural due process requirements.

RBIII owned a building in San Antonio that was subsequently demolished by the City. The events leading up to the demolition were as follows: On December 27, 2007, a code enforcement officer for the City of San Antonio responded to a neighbor's complaint that a structure was unsecured and dilapidated, by driving by and looking at a building. On December 28, 2007, the same officer and a certified building inspector conducted a thorough inspection and determined that the building was an "imminent threat to life, safety, and/or property, requiring immediate demolition." The building inspector also concluded that under the circumstances, no other abatement procedure was reasonably available. The building inspector presented his findings to the City's Planning and Development Services Department, who concurred in the building inspector's findings, and then presented the recommendation to the City's Neighborhood Services Department, who also concurred in the recommendation. During this time, the code enforcement officer obtained an environmental survey, notified the City's Historic Preservation office of the planned demolition, arranged to have the gas and electric services cut-off, searched the City's permit records and determined that no permits had been obtained in order to repair the building, and revisited the property on January 9, 2008, determining that no repairs had been done to the building. The building was demolished the next day on January 10, 2008. On January 11, 2008, the City sent a letter notifying RBIII that the building had been demolished as an "Emergency Case." At no time during the thirteen day period preceding the emergency demolition did the City notify RBIII of the pending demolition.

RBIII filed suit against the City and the code enforcement officer's supervisor alleging claims under local, state, and federal law. The City removed to federal court. The district court granted summary judgment in favor of defendants on all claims except for two: 1) that the City violated RBIII's Fourteenth Amendment to procedural due process by demolishing the building without providing notice, and 2) that the City unreasonably seized the building in violation of the Fourth Amendment. The district court held a trial on the Fourth and Fourteenth Amendment claims and the jury found in favor of RBIII. The City appealed, arguing that the district court's jury instructions did not accurately reflect the applicable law and that under the correct legal standard they were entitled to judgment as a matter of law.

In deciding the appeal, the Fifth Circuit stated that, under the Fourteenth Amendment, predeprivation notice is not always required before the State takes property. Instead, there are exceptions where postdeprivation process will satisfy the procedural due process requirements of the Constitution. One such exception is when a State acts to "abate an emergent threat to public safety." In order to determine if adequate procedural due process has been granted where no prior notice is given for the deprivation of property, the court must evaluate: 1) the State's

determination that there existed an emergency situation necessitating quick action, and 2) the adequacy of the postdeprivation process. At issue was the first prong, whether the building constituted a public emergency requiring summary abatement. The City claimed that the jury instruction given was improper. The instruction as given read: "The emergency situations in which it is considered reasonable to proceed without giving prior notice are generally limited to situations in which there is an immediate danger to the public." The Fifth Circuit agreed with the City and held that the instruction as given improperly shifted the jury's focus from the reasonableness of the City's determination that the building posed a public emergency to the accuracy of that determination. The City's decision to demolish the building should have been given deference, and proof of the City's compliance with the local ordinance should have been the standard for reasonableness given to the jury. The Fifth Circuit vacated and remanded the case for reconsideration based on the findings.

***Garner v. Kennedy*, No. 11-40653, 2013 U.S. App. LEXIS 6604 (5th Cir. Apr. 2, 2013)**

Under the facts presented to the court, the Texas Department of Criminal Justice's ("TDCJ") policy of prohibiting prisoners from growing a beard for religious reasons violates the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). The question was characterized as a mixed question of fact and law, subject to the Fifth Circuit's de novo review.

Garner, a Texas state prisoner in the custody of the TDCJ, claimed that as a Muslim he is required to wear a beard. TDCJ's rules prohibit most inmates from having a beard, except for a limited number who are allowed to grow beards up to a quarter of an inch if they have specific skin conditions. Garner filed a *pro se* complaint against TDCJ pursuant to RLUIPA and Section 1983, claiming that the TDCJ violated RLUIPA and his constitutional rights by prohibiting him from growing a beard. The district court initially denied Garner's request to appoint counsel and granted summary judgment in favor of TDCJ. Garner appealed, and the Fifth Circuit reversed the district court's judgment on Garner's request for declaratory relief and injunctive relief with regards to his RLUIPA claim. On remand the district court appointed counsel and held a bench trial on Garner's RLUIPA claim. The district court found that the TDCJ failed to meet its burden in showing that its grooming policy regarding beards was the least restrictive means of furthering a compelling governmental interest. TDCJ appealed.

The Fifth Circuit affirmed the district court's findings. The Fifth Circuit articulated that the determination of whether the imposition of a burden on an individual's religious exercise is the least restrictive means of furthering a compelling governmental interest is a mixed question of fact and law, due to it being highly dependent on the underlying factors. In so finding, the Fifth Circuit applied a de novo review of the district court's findings, rejecting other circuits' holdings that the question is one of law and subject only to a review for clear error. The Fifth Circuit affirmed the district court's findings that the evidence presented by TDCJ in support of its contention that to alter its current grooming policy to allow for the growth of beards for religious preferences would create a significant economic impact on the TDCJ. The evidence presented by TDCJ was vague, conflicting, and speculative. The Fifth Circuit also found that the TDCJ did not present enough evidence to support a finding that the no-beard policy furthers the compelling governmental interest in promoting security at the prison. The Fifth Circuit was careful to say that based on the record before the court, the TDCJ had not met its burden to show that its no-beard policy is the least restrictive means of furthering a compelling government

interest. In making that distinction, the Fifth Circuit left open the possibility that the TDCJ, based on a different record, might be able to meet its burden under RLUIPA.

***Curtis v. Anthony,* No. 11-20906, 2013 U.S. App. LEXIS 4654 (5th Cir. Mar. 6, 2013)**

Under the facts of the case, law enforcement's reliance on a "dog-scent" lineup was not objectively unreasonable, and therefore, a grant of summary judgment based on qualified immunity was appropriate.

Pikett, a former deputy, made use of scent discriminating bloodhounds in conducting lineups. Pikett would obtain a scent sample from the suspect under investigation by wiping the individual with a sterile gauze pad. The gauze pad containing the suspect's scent would then be stored in a Ziploc bag until the time of the lineup. At the time of the lineup, a second officer would arrange six cans, one containing the suspect's scent pad and the other five containing other persons' scent pads. The other scent pads were taken from persons of the same race and gender. Pikett would then expose a bloodhound to a scent sample taken from the crime scene. The bloodhound was trained to "alert" if the scent matched any of the scents from the six cans. The process would then be repeated with a second bloodhound in order to confirm the findings of the first bloodhound. From 2007 – 2009, Texas courts uniformly accepted Pikett as an expert in "dog-scent lineups." Appellants, Curtis, Johnson, and Bickham, sued Appellee's, assorted law enforcement officers including Pikett, under Section 1983. Appellants challenged Appellee's reliance on "dog-scent lineups" which Pikett conducted, and which the municipalities used to arrest, charge, and hold Appellants. Appellees asserted qualified immunity defenses. The district court granted summary judgment in favor of Appellees, citing qualified immunity and insufficient evidence of constitutional violations.

The Fifth Circuit affirmed summary judgment, pointing out that in order for a plaintiff to overcome the shield offered by qualified immunity, a plaintiff must plead facts showing: "1) that the official violated a statutory or constitutional right, and 2) that the right was clearly established at the time of the challenged conduct." Qualified immunity protects "all but the plainly incompetent or those willing to violate the law." The Fifth Circuit held that Appellant's failed to show that the officers' actions were objectively unreasonable in relying on Pikett's dog-scent lineups. First, at the time the evidence obtained from the dog-scent lineups was used against Appellants, Pikett enjoyed a solid reputation in the community. At least one Texas court had held that "dog-scent lineups" were a legitimate field of expertise and that Pikett's methodology properly relied upon accepted principles in the field. Second, Appellant's offered no evidence of misconduct on the part of the officers who relied upon the results of the dog-scent lineups. Finally, Appellant's presented no evidence that Pikett had acted to secure a false identification. As such, the Fifth Circuit distinguished the facts presented in this case from earlier Fifth Circuit precedent that had not granted summary judgment based on qualified immunity to Pikett and other officers who had relied on a dog-scent lineup.

***Hogan v. Cunningham*, 722 F.3d 725 (5th Cir. July 12, 2013)**

Police officers were entitled to qualified immunity from excessive force claims based on their forced entry into the plaintiff's home and tackling him. However, the officers were not entitled to qualified immunity for the warrantless entry because, even though the suspect/plaintiff

was interfering with his ex-wife's custody of their son by having him in the home, there were no exigent circumstances that justified the warrantless entry.

Officers Cunningham and Potter went to Hogan's residence in order to enforce a child-custody order granting custody of Hogan's son to his ex-wife. The officers told Hogan that they were there to retrieve his son. When Hogan heard that they were there about his son, he attempted to close the door. Officer Cunningham testified that the door hit him and Hogan testified that he did not know whether the door hit the officer. When Hogan attempted to close the door, the officers forced it open and apprehended Hogan. Hogan subsequently brought suit, alleging excessive force, unlawful arrest, and malicious prosecution, as well as Texas state-law claims. The officers moved for summary judgment. The district granted the motion as to the malicious prosecution claim, but otherwise denied it. The officers appealed.

The officers argued that they were entitled to dismissal of the unlawful arrest (warrantless entry) claim because Hogan had assaulted a public servant by hitting Officer Cunningham with the door. However, the district court concluded that there was a genuine issue of material fact as to whether Hogan did in fact hit Officer Cunningham with the door. Since the interlocutory appeal applicable to denials of qualified immunity does not include points on which the lower court concludes there is a genuine issue of material fact, the Fifth Circuit could not consider the issue in this appeal and the warrantless entry could not otherwise be justified. However, the amount of force used by the officers was not clearly unreasonable and they were, therefore, entitled to qualified immunity on the excessive force claim.

***Wyatt v. Fletcher*, 718 F.3d 496 (5th Cir. May 31, 2013)**

The Fourth Amendment does not clearly prohibit school coaches from confronting students about issues in closed and locked rooms. The Fourteenth Amendment does not clearly prohibit school officials from disclosing private information about students to the student's parents, even if that information relates to sexual activity or orientation.

Wyatt brought suit on behalf of her daughter, S.W., against high school coaches Rhonda Fletcher and Cassandra Newell. Wyatt alleged that Fletcher and Newell (1) interrogated S.W in a locked locker room and (2) disclosed S.W.'s sexual orientation to Wyatt during a disciplinary meeting. Wyatt alleged that the interrogation violated S.W.'s Fourth Amendment rights and that the disclosure violated her Fourteenth Amendment right to privacy. Fletcher and Newell filed a motion for summary judgment, which was denied by the district court. They appealed.

The Fifth Circuit held that Fletcher and Newell were entitled to qualified immunity because (1) there is no clearly established Fourth Amendment right that bars a student-coach confrontation in a closed and locked room, and (2) there is no clearly established Fourteenth Amendment privacy right that precludes school officials from discussing with a parent the student's private matters including matters relating to sexual activity of the student.