

WINTER 2013 NEWSLETTER

CIVIL RIGHTS LAW UPDATE

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United States Court of Appeals for the Fifth Circuit

1. Newman v. Guedry, 703 F.3d 757 (5th Cir. Dec. 21, 2012)

In this excessive force case, an officer who tased an individual three times was not entitled to qualified immunity at the summary judgment stage of the case. The Fifth Circuit rejected the officer's argument that he should be entitled to qualified immunity because there was no clearly established law with respect to the appropriate use of a taser.

An officer does not lack the necessary warning that applying certain force may be unreasonable, and therefore, violates an individual's constitutional rights simply because the instrument used to apply the force is a novel one that has not been subject to court interpretation. Qualified immunity was, therefore, denied where an officer tased an individual three times and the factors surrounding the circumstances did not warrant such force.

Newman, a passenger in a car stopped for a routine traffic stop, was subsequently arrested after he failed to comply with the officer's direction to remain in the vehicle as Mario, another passenger from the vehicle, was arrested for having outstanding warrants. As the officers were trying to arrest Mario, he was actively resisting arrest and cursing. Newman and the driver exited the vehicle and were trying to get Mario to calm down and comply with the officers. Officer Guedry arrived at the scene and proceeded to escort Newman to the back of the car and pat him down. During the pat-down, a contested series of events occurred that resulted in Officer Burke, another officer arriving at the scene, striking Newman with his baton across the hip and upper arm a total of thirteen times. Guedry then proceeded to tase Newman a total of three times.

Newman sued in state court alleging various state law claims and excessive force in violation of the Fourth Amendment under 42 U.S.C. § 1983, and defendants removed to federal court. The officers moved for summary judgment on the grounds of official immunity as to all of the state law claims and qualified immunity for the Section 1983 claim. Summary judgment was denied as to Officers Guedry and Burke with the court concluding that there were issues of material fact as to whether the force used by the officers was clearly excessive and objectively unreasonable.

The Fifth Circuit affirmed. In doing so the court denied the officers' claim that Newman was unable to establish that "the officer's actions were objectively unreasonable in light of clearly established law at the time of the conduct in question." The officers claimed that there was no "clearly established law" with regards to the appropriate use of a taser, and therefore, lacked the necessary warning that their actions may have been unconstitutional. The court rejected this claim, finding that qualified immunity will not protect an officer who applies excessive and unreasonable force "merely because their means of applying it are novel." Additionally, the court rejected the officer's claims for official immunity under state law, finding that the officers did not act in good

faith when applying force to Newman.

2. *Gonzalez v. Seal*, 702 F.3d 785 (5th Cir. 2012)

Exhaustion of the prison grievance processes under the Prison Litigation Reform Act (“PLRA”) is mandatory and a defendant may move to dismiss for failure to exhaust such remedies. The need for exhaustion of such prison grievance processes is no longer left to the discretion of the district court.

Gonzalez, a Louisiana prisoner, filed a Section 1983 complaint claiming he had suffered as a result of unconstitutional prison practices, including an excessive use of force and denial of medical care. Gonzalez filed his Section 1983 complaint before exhausting the prison grievance process available to him. The district court declined to dismiss the complaint, instead exercising its discretion to excuse Gonzalez’s failure to exhaust based on the Fifth Circuit’s decision in *Underwood v. Wilson*, which held that “a non-jurisdictional exhaustion requirement may, in certain instances be excused.”

The Fifth Circuit reversed the ruling of the district court, finding that their previous ruling in *Underwood* was no longer good law in light of two United States Supreme Court cases. The court reasoned that since *Underwood*, the Supreme Court has held that exhaustion of the prison grievance process is mandatory due to the need to “eliminate unwarranted federal court interference with the administration of prisons.” The Fifth Circuit, therefore, held that *Underwood* had been tacitly overruled and exhaustion is now mandatory.

3. *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).

Supreme Court of Texas

***1. Tex. Dep't of Crim. Justice-Community Justice Assistance Div. v. Campos*, 384 S.W.3d 810 (Tex. 2012)**

An exception to governmental immunity for a negligence claim where the underlying conduct is intentional in nature, such as an assault, will only exist when the plaintiff can show that the offending party made "use" of tangible personal or real property.

Plaintiffs sued, among others, the Texas Department of Criminal Justice Community Justice Assistance Division ("TDCJ"), for negligent hiring, training, supervision, and implementation of policy. The suit arose out of allegations that two Nueces County Substance Abuse Treatment Facility ("SATF") officers sexually harassed and assaulted them. Plaintiff's claimed that the officers used property such as a laundry room, a laundry cart, and a storage room in perpetrating the assaults,

and therefore, the TDCJ's immunity was waived by the TTCA, even though the underlying assault was an intentional tort. The Plaintiffs relied on Section 101.021(2) of the Texas Civil Practice and Remedies Code which waives immunity when injuries are caused by a condition or use of tangible property.

The Court held that immunity was not waived since the officers did not use the property for any purpose other than to perpetrate their intentional assaults on the Plaintiffs, and the alleged negligent conduct did not involve the use of tangible property. The Court went on to say that the TTCA does not waive immunity for intentional torts, and only waives immunity for claims of negligence that are attached to an intentional tort when the plaintiff can show that the negligence is distinct from the intentional tort. Providing an employee with property that is not inherently unsafe is not a "use" under the Texas Tort Claims Act ("TTCA") and will not waive governmental immunity. Neither are decisions on placement of surveillance cameras. The decision on where to put a camera does not equate to "using" the camera, such that the requirement that property be put or brought into service or employed or applied to a given purpose is met.

Texas Court of Appeals

I. Foster v. City of El Paso, No. 08-10-00157-CV, 2013 Tex. App. LEXIS 1657 (Tex. App.—El Paso Feb. 20, 2013, no pet. h.)

A city is entitled to rely upon the experiences of other cities in enacting content-neutral time, place, and manner regulations to address the undesirable secondary effects of sexually-orientated businesses so long as the evidence relied upon is reasonably believed to be relevant to the problem that the city is trying to address. Additionally, the city is not required to produce or rely upon expert testimony in proving that the regulation is sufficiently related to preventing the negative secondary effects.

The City of El Paso ("the City") passed an ordinance requiring sexually-oriented businesses to have open, instead of closed booths for customers viewing videos, unobstructed employee view and overhead lighting that illuminates the entire premises where patrons are allowed, and employee licensing. Foster, the owner of a sexually-oriented business, sought declaratory and injunctive relief, claiming that the ordinance was unconstitutional because it denied his right to free speech and expression, due process, equal protection, and adequate procedural safeguards as guaranteed by the Texas Constitution. The trial court denied the temporary restraining order, based on the fact that courts of precedential authority have repeatedly rejected constitutional challenges to ordinances like the one in question regulating sexually-orientated businesses. After discovery, the City moved for, and was granted, summary judgment on the grounds that the ordinance was "a constitutional regulation of the time, place, and manner in which sexually-oriented businesses operate" within the city.

The court of appeals affirmed the trial courts grant of summary judgment, holding that the ordinance was constitutional under the four-prong *O'Brien* test. Most importantly under the second prong, the regulation furthers a substantial governmental interest. The court applied the U.S. Supreme Court's *Renton-Alameda* standard that holds "a city may rely on *any* evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a

substantial, independent government interest.” The evidence may include the experience of other cities and detailed findings summarized in judicial opinions. The city is not required to conduct its own studies prior to enacting an ordinance. In applying the *Renton-Alameda* standard to the City’s evidence that it presented in support of the constitutionality of the ordinance, the court found that the City relied on relevant studies, its on-going experience, and public comment when adopting the ordinance. Additionally, it held that the City was not required to produce or rely upon expert testimony. The court ultimately held that based on the evidence presented by the City showing the negative secondary effects of sexually-orientated businesses, the ordinance survived constitutional scrutiny.

2. *Writt v. Shell Oil Co.*, No. 01-11-00201-CV, 2013 Tex. App. LEXIS 1449 (Tex. App.—Houston [1st Dist.] Feb. 14, 2013, no pet. h.)

Statements made to a prosecutorial agency, prior to the initiation of criminal proceedings, are not subject to an absolute privilege amounting to immunity. Instead they are granted the adequate protection of conditional privilege, which does not amount to immunity.

Shell was subject to an informal inquiry by the United States Department of Justice (“DOJ”). In response to the inquiry, Shell provided statements that allegedly falsely accused Writt, an employee of Shell, of engaging in unethical conduct in connection with the payment of bribes and providing inconsistent statements during Shell’s internal investigations. Writt filed a claim of defamation against Shell for the allegedly false statements. Shell filed a Motion for Summary Judgment, claiming that the statements made in the report to the DOJ were “absolutely privileged” and as such could not give rise to a defamation claim. In response, Writt argued that statements made to prosecutorial agencies receive at most a qualified privilege, and therefore, Shell was not entitled to summary judgment. The trial court granted Shell’s Motion for Summary Judgment, and Writt appealed.

The court of appeals concluded that the trial court erred in granting Shell’s Motion for Summary Judgment since the defamatory statements made by Shell to the DOJ were not absolutely privileged. In so holding, the court reasoned that Texas only recognizes an absolute privilege in a select number of situations including statements made in the due course of a judicial proceeding. Statements made in the due course of judicial proceedings include statements made by the judge, jurors, counsel, parties or witnesses. Additionally, absolute privilege extends to proceedings before executive officers, and boards and commissions that exercise quasi-judicial powers. Finally, the court distinguished that statements that are made to government agencies are also entitled to absolute immunity so long as they are not unsolicited, are part of an ongoing proceeding, and they are made to an agency whose findings do not need to be approved by another agency. The court concluded that the statements made by Shell to the DOJ were not entitled to absolute privilege because there was no ongoing proceeding at the time the statements were made, and therefore, the statements were only subject to a conditional privilege. In contrast to absolute privilege, conditional privilege may be overcome where it is found that the person who made the statements was motivated by malice.