SUMMER 2014 NEWSLETTER

CIVIL RIGHTS LAW UPDATE

By Josh Skinner

UNITED STATES SUPREME COURT

***Burwel v. Hobby Lobby Stores, Inc.*, No. 13-354 (June 30, 2014)**

For-profit corporations, like non-profit corporations, are entitled to assert religious exercise rights under the federal Religious Freedom Restoration Act (RFRA). If the religious exercise of the corporation (i.e., of the controlling members of its governing body) is "substantially burdened" by the federal government, the federal government carries the burden of proving that the government regulation or activity serves a compelling governmental purpose and that it is the least restrictive option. While the federal statute at issue in this only applies to federal laws and agencies, many states, including Texas, have similar religious freedom laws and it is likely that lower courts will look to this decision in applying, for instance, the Texas Religious Freedom Restoration Act.

Hobby Lobby and various other for-profit corporations owned and operated by Christian individuals or families challenged the application of a regulation issued by the Department of Health and Human Services ("the HHS mandate") as part of the Affordable Care Act ("the Act"). The HHS mandate sets out types of medication and drugs that employers are required to provide in health care plans under the Act. Specifically, the HHS mandate includes under the category of required women's health services various medications and drugs classified as contraceptives. However, some of the medications and drugs work not merely to prevent conception, but also can prevent implantation of a conceived embryo. The owners of Hobby Lobby and the other plaintiffs believe that the prevention of implantation is a form of abortion, to which they are opposed on religious grounds.

The plaintiffs brought suit, requesting an injunction against the portion of the HHS mandate that they assert violates their religious beliefs. They argued, as relevant here, that the requirement that they provide insurance coverage for medications and drugs to which they have a religious objection violated their rights under RFRA. The federal circuits were split on the issue and the Supreme Court granted review. In a narrow 5-4 decision, the Supreme Court held that the plaintiffs' religious exercise rights under RFRA were violated by the application of the HHS mandate to them. The federal government had argued that RFRA did not apply to the plaintiffs because they were for-profit corporations. The majority rejected the government's exclusion of for-profit corporations from RFRA coverage because the statute does not explicitly exclude them and prior precedents already permitted non-profit corporations from asserting RFRA rights.

***McCullen v. Coakley*, No. 12-1168 (June 26, 2014)**

A state law requiring a 35-foot buffer zone around abortion clinics was unconstitutional

under the First Amendment because it effectively prevented "sidewalk counselors" from communicating with patients and was overly broad.

Massachusetts adopted a law that imposed a 35-foot buffer zone around medical facilities (other than hospitals) in which abortions were performed. The law largely prohibited anyone other than patients and employees acting in their official capacities from coming within the buffer zone. In support of the law, the Massachusetts legislature heard testimony indicating that the law would help to serve public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways. The plaintiffs are "sidewalk counselors," individuals who attempt to engage in conversation with women considering abortion in order to explain alternatives to abortion. The plaintiffs are not protestors and believe that protesting, including yelling and holding up signs, is more likely to be counter-productive in regard to their effort to communicate their message to women entering abortion clinics. The plaintiffs stated that the buffer zone essentially prevented them from engaging in "sidewalk counseling" because it required them to be too far away from women entering the clinics.

The petitioners argued that, because the law only applies to abortion-providing facilities, the law is "content-based" and subject to strict scrutiny under the First Amendment. The Court rejected the application of strict scrutiny, noting that Massachusetts set forth a variety of non-speech related objectives in adopting the buffer zone. Instead, the Court concluded that the law must be "narrowly tailored to serve a significant governmental interest." Even under this lower standard, a unanimous Court struck down the law, holding that the buffer zone largely eliminated the plaintiffs' speech ("sidewalk counseling") and that it burdened substantially more speech than necessary to achieve the state's asserted interests.

***Riley v. California*, No. 13-132 (June 25, 2014)**

The police generally may not, without a warrant, search digital information on a cell phone seized from and individual who has been arrested.

Riley was stopped by the police for driving with expired registration tags. During the stop, the officer learned that his license was suspended. The car was impounded and Riley was arrested because an inventory of the car revealed that he was in possession of concealed and loaded firearms, in violation of California law. An officer searched Riley, found associated with the "Bloods" street gang and also found a cell phone (a smart phone) in Riley's pocket. The officer searched the smart phone and found information that be believed tied Riley to the "Bloods." At the police station, a detective examined the phone at length and found evidence tying Riley to an earlier shooting and attempted murder. Riley was ultimately charged with these later offenses. Riley moved to suppress the evidence from the phone, arguing that the search of the cell phone without a warrant violated the Fourth Amendment. The motion to suppress was denied, Riley was convicted and that the California court of appeals affirmed. After the state supreme court denied reviewed, the United States Supreme Court granted Riley's petition for certiorari.

The Supreme Court held that, generally speaking, police must secure a warrant before

searching the contents of an arrestee's cell phone. The cell phone does not pose any physical danger to police (unlike a concealed gun near the arrestee that justifies a search of the area around him) and there was virtually no evidence that securing a warrant would result in the arrestee or a confederate remotely destroying the data on the cell phone. In addition, unlike the items that a person could traditionally carry on his or her person, modern cell phones contain a substantial quantity of personal data that justifies a heightened expectation of privacy protection for them.

***Lane v. Franks*, No. 13-483 (June 19, 2014)**

A public official was entitled to qualified immunity for terminating the employment of a public employee because the employee provided truthful sworn testimony, compelled by subpoena, outside the course of his ordinary job responsibilities. While the Court also concluded that the conduct violated the First Amendment, it also concluded that the law was not clearly established and granted qualified immunity.

Lane was hired as the Director of Community Intensive Training for Youth (the youth program) at the Central Alabama Community College. When Lane was hired, the youth program already faced significant financial difficulties. Consequently, Lane conducted a comprehensive audit of the program's expenses and discovered that a state representative. Schmitz, was on the payroll, but did not report to work. Lane ultimately fired Schmitz. The FBI became interested in the case and Schmitz was ultimately indicted. Lane testified before the grand jury and, later, pursuant to a subpoena, testified at the criminal trial. Schmitz was convicted. Franks, the president of the College, terminated Lane's employment as Director of the youth program. Lane brought suit alleging that his termination violated his First Amendment rights. Franks filed a motion for summary judgment, which the district court granted based on qualified immunity. On appeal, the Eleventh Circuit affirmed, holding that Lane's testimony was not entitled to First Amendment protection because it related to his official duties in investigating and terminating Schmitz' employment.

The Supreme Court held that Lane's testimony was protected by the First Amendment and that terminating his employment because of his testimony would violate the First Amendment. The Court hold that the First Amendment protects a public employee who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities. Since Lane's job responsibilities did not ordinarily include testifying in court proceedings (in contrast, perhaps, to a police officer), Lane's speech was entitled to First Amendment protection and not subject to the exception set out in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). While the Court concluded that Franks' alleged conduct violated the First Amendment, the Court also held that Franks was entitled to qualified immunity. The Court noted that Eleventh Circuit precedent did not preclude Franks from reasonably believing that his alleged actions were permissible and no decision of the Supreme Court was sufficiently clear to cast doubt on the precedents that supported Franks' rationale.

***Plumhoff v. Rickard*, No. 12-1117 (May 27, 2014)**

Police officers who used deadly force to stop a fleeing vehicle did not violate the Fourth Amendment and, alternatively, were entitled to qualified immunity. In addition, courts of appeals have jurisdiction of interlocutory appeals from the denial of qualified immunity and should use the normal standards of review as to factual disputes that are relevant to the qualified immunity analysis.

A police officer pulled over Rickard for a minor traffic violation and asked him to get out of his vehicle. Instead of complying, Rickard sped off and a high-speed pursuit ensued, including swerving around other vehicles on the highway. Rickard ultimately got off the highway in Memphis. He collided with a police car and the police attempted to box him in. He backed up and attempted to flee in the vehicle from the one remaining unguarded side. The police started shooting. Fifteen shots were fired, killing Rickard. The bullets and the resulting crash killed the passenger. Rickard's family filed suit against the police officers. The officers filed a motion for summary judgment, which was denied by the district court and the denial was affirmed by the court of appeals.

The Supreme Court held that the officers' conduct did not violate the Fourth Amendment because Rickard's reckless driving was a danger to the officers and the public and the officers were entitled to use deadly force to prevent Rickard from returning to the highway and resuming his high-speed flight. The Court also held that the officers were entitled to qualified immunity because the law was not clearly established at the time of the incident. In reaching the Fourth Amendment and qualified immunity issues, the Court also addressed a jurisdictional question. Courts of appeals only have limited jurisdiction over interlocutory appeals from the denial of qualified immunity. In particular, prior precedents appeared to exclude factual issues from that review. The Court, however, held that appellate courts have jurisdiction over all evaluations of the factual evidence that are relevant to the qualified immunity issue.

A podcast with a more extended discussion about the decision is available at http://www.fed-soc.org/multimedia/detail/plumhoff-v-rickard-post-decision-scotuscast

***Town of Greece v. Galloway*, No. 12-696 (May 5, 2014)**

A municipality does not necessarily violate the First Amendment prohibition on establishments of religion by opening its monthly board meetings with a prayer.

The Town of Greece has a short prayer at the beginning of its monthly board meetings. The Town permits any minister or layperson (including an atheist) to give the invocation. However, since the practice was started in 1999 through 2007, all the participants were Christian. Similarly, nearly all of the congregations in town are Christian. The Town neither reviews in advance nor provides guidance as to their tone or content. Many prayers include explicitly Christian references. Two citizens brought suit alleging that the practice violates the First Amendment Establishment Clause. The Town moved for summary judgment, which the district court granted. On appeal, the Second Circuit reversed.

The Supreme Court upheld the invocations, holding that they do not violate the Establishment Clause. The Court further rejected claims that any prayers must be nonsectarian.

However, if the course and practice over time shows that the invocations "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion," the Court might come to a different conclusion.

***Tolan v. Cotton*, No. 13-551 (May 5, 2014)**

In determining whether a public official is entitled to qualified immunity at the summary judgment stage, the courts must view the evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his favor.

Edwards, a police officer, ran the license plate of a vehicle in a residential area that appeared suspicious. However, he typed in the number incorrectly and the computer system informed him and nearby officers that he had located a stolen vehicle. Edwards exited his vehicle and ordered the men from the vehicle (Tolan and Cooper) to the ground and accused them of having stolen the car. Tolan denied the charge, but complied. Tolan's parents exited the home and similarly denied the theft charge. Shortly thereafter, Officer Cotton arrived. Cotton ordered Tolan's mother against the garage door and allegedly pushed her into it. Tolan began to get up, at least onto his knees, and yelled a profanity at Cotton. Cotton drew his pistol and shot Tolan, permanently injuring him and destroying his career. Tolan and his family filed suit. Cotton moved for summary judgment, which was granted by the district court and affirmed by the Fifth Circuit. The Fifth Circuit relied on the following facts: that the front porch was "dimly-lit"; the Tolan's mother had refused orders to remain quiet and calm; that Tolan's words had amounted to a verbal threat; and that Tolan was moving to interfere in Cotton's handling of his mother.

The Supreme Court did not issue a ruling on whether Cotton was entitled to qualified immunity. Rather, the Court held that the Fifth Circuit had improperly described the facts in light of the deference given to a nonmovant at the summary judgment stage. In particular, the Court pointed to evidence submitted by Tolan that the front porch area was well-lit with flood lights, that his mother remained calm, albeit persistent in her statements, that Tolan claimed he used profanity in a manner indicating that he intended to inflict harm, and that Tolan was not intending to interfere. The Court vacated the judgment of the Fifth Circuit and remanded for further proceedings consistent with its opinion.

Update: On remand, the Fifth Circuit, in a cursory opinion, concluded that Cotton was not entitled to summary judgment and remanded the case to the district court.