

WINTER 2011 NEWSLETTER

CIVIL RIGHTS LAW UPDATE

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United States Supreme Court

Los Angeles County, California v Humphries, 562 U.S. __ (Nov. 30, 2010)

The *Monell's* “policy or custom” requirement applies to §1983 claims against municipalities for prospective relief as well as to claims for damages.

Humphries were initially accused of child abuse but were later exonerated. Under California law, all reported child abuse found to be “not unfounded” is reported to the California Department of Justice and placed in a Central Abuse Index, where they remain available to state agencies for at least ten years. The statute provides that if a report is unfounded, the Department of Justice must be notified in writing and the Department shall not retain the report. The statute does not set forth procedures for reviewing whether a previously filed report is unfounded, or for allowing individuals to challenge their inclusion in the Index.

Humphries sought to have their names removed from the Index but the Los Angeles Sheriff’s Department refused to do so. Humphries filed suit under §1983 alleging that the Defendants had deprived them of their constitutional rights by failing to create a procedural mechanism through which one could contest inclusion on the Index. Humphries sought damages, injunction and declaration that their constitutional rights were violated. Los Angeles County filed a motion for summary judgment which was granted by the district court on the grounds there was no constitutional deprivation. The Ninth Circuit reversed the district court holding that the Fourteenth Amendment required the State to provide those on the list with notice and some kind of hearing and the *Monell's* “policy or custom” requirement for municipality liability applies only to claims for damages but not to claims for prospective relief and thus, Humphries were entitled to declaratory relief.

The Supreme Court, in *Monell*, held that a municipality is liable when its policy or custom causes a constitutional deprivation. Governmental entities can be sued under §1983 for monetary, declaratory or injunctive relief. A municipality is liable for its own violations and whether an action or omission is a municipality’s “own” has to do with the nature of the action or omission, not with the nature of the relief that is later sought in court. The Court found that the *Monell's* “policy or custom” requirement applies in §1983 cases irrespective of whether the relief sought is monetary or prospective and thus, reversed the Ninth Circuit’s decision.

Fifth Circuit Court of Appeals

***Brown v. Callahan*, __ F.3d ____ (5th Cir. Oct. 7, 2010)**

A supervisor's negligent supervision of the jail doctor and his relationship with the nursing staff-i.e. mistreatment of the nursing staff, does not establish supervisory liability under 42 USC §1983.

Jason Brown, a prisoner, complained of serious medical problems while at the jail. Brown was not transferred to the hospital ER or seen by the jail's supervising physician but was seen by a nurse. Brown died and his parents sued Sheriff Callahan in his individual capacity under 42 USC §1983 for failing to train and supervise properly the jail staff and jail physician, Dr. Bolin, who intimidated the nurses, discouraging them from contacting the doctor or referring patients to the ER for further medical treatment.. Brown's parents further allege that the Sheriff ratified as custom or policy Dr. Bolin's intimidation of the nursing staff which caused their son's death. The Sheriff moved for summary judgment asserting qualified immunity which was denied by the district court on the grounds the Sheriff's acts may have been objectively unreasonable.

The Fifth Circuit found that as a pretrial detainee, Jason Brown had a clearly established Fourteenth Amendment right not to be denied, by deliberate indifference, attention to his serious medical needs. However, the Court held that it could not conclude that there is a genuine material fact issue as to the Sheriff's deliberate indifference to constitutional rights. The Plaintiffs failed to establish a factual connection between Dr. Bolin's demeanor and any actual adverse consequences to the nursing staff or any prior instance in which the quality of the inmates' medical care was diminished because of Dr. Bolin's communication problems with them. The risk arising from Dr. Bolin's behavior was not clearly related to constitutionally inadequate medical care.

The Court found that in the absence of any prior incidents that connoted inadequate medical care at the jail, it is impossible to infer that the Sheriff was essentially callous about inmate medical care or had any reason to suspect the level of care had become or could become constitutionally inadequate. The Sheriff was neither plainly incompetent nor knowingly violating the law nor were his actions, in the circumstances he faced, objectionably unreasonable. The Court reversed the district court's denial of summary judgment for the Sheriff.

***United States v. Gomez*, __ F.3d ____ (5th Cir. Oct. 7, 2010)**

Gomez was detained and arrested for illegally possessing a weapon as a result of a 911 call/informant's tip. Gomez moved to suppress the evidence from the traffic stop and search of his vehicle on the grounds that the police lacked reasonable suspicion to

justify their decision to stop and search his vehicle. The district court found that the officers had a reasonable suspicion justifying their actions and thus, complied with the requirements of the Fourth Amendment and denied the motion to suppress. Gomez appeals.

The Fifth Circuit, relying on the U. S. Supreme Court's decision in *Terry v. Ohio* which held that police officers may stop and briefly detain an individual for investigative purposes if they have reasonable suspicion that criminal activity is afoot, found that the 911 call/tip satisfied the factors set forth in *U.S. v. Martinez*, 486 U.S. 855 (5th Cir. 2007) for traffic stops based on tips and thus, the officers had reasonable suspicion justifying the traffic stop. The Court found that 1) the informant was credible and reliable; 2) the tip contained specific information; 3) the information was verified by the officers in the field; and 4) the tip or report concerned active or recent activity.

***Gentilello v. Rege*, ___ F.3d ____ (5th Cir. Dec. 1, 2010)**

The due process clause does not protect a person's specific job duties or responsibilities absent a statute, rule, or express agreement reflecting an understanding that he had a unique property interest in those duties or responsibilities.

Gentilello, a tenured professor, brought suit under 42 USC §1983 against his supervisor for wrongful demotion without due process of law in violation of the Fourteenth Amendment. Gentilello alleges that he was demoted and removed from his Chair positions in retaliation for speaking out about the "improper and illegal" practices at Parkland Hospital. Gentilello asserted a First Amendment retaliation claim and a Fourteenth Amendment due process claim. Defendant filed a motion to dismiss and the district court dismissed the First Amendment retaliation claim but allowed the due process claim to proceed. Defendant filed an answer and moved for judgment on the pleadings. Gentilello moved for leave to supplement his pleading which was denied and the court granted the motion for judgment on the pleadings.

The Fifth Circuit held that to state a Fourteenth Amendment due process claims under §1983, a plaintiff must first identify a protected life, liberty or property interest and then prove that governmental action resulted in a deprivation of that interest. While Gentilello had a protected property interest in his continued employment, the due process clause does not protect Gentilello's specific job duties or responsibilities absent a statute, rule, or express agreement reflecting an understanding that he had a unique property interest in those duties or responsibilities.

The Court found that Gentilello did not plead any factual basis for his entitlement to the Chair positions or his alleged property interest in the Chair positions. Gentilello did not point to any ordinance, official policy, state or local law, contract or other enforceable agreement to support his claim of entitlement to the Chair positions and thus, his pleadings failed to state a due process claim. Furthermore, the Court, relying on the U.S. Supreme Court's decision in *Ashcroft v Iqbal*, found that Gentilello's "threadbare

recitals of the elements of the cause of action,” supported by mere conclusory statements, do not suffice to state a due process clause.

***Kovacic v. Villarreal*, __ F.3d ____ (5th Cir. Dec. 16, 2010)**

There is no “state-created” danger theory of liability in the Fifth Circuit.

Zachary Kovacic was arrested for being intoxicated. When the officers were told that the county jail was not accepting persons charged with a Class C misdemeanor, like intoxication, due to overcrowding, the officers decided to take Kovacic to his hotel. While on the way to the hotel, Kovacic requested that the officers drop him off at a convenient store so he can call his wife to pick him up. The officers did so and left the Kovacic. Once the police left, Kovacic began walking in the roadway and was hit and later died. Kovacic’s estate sued the officers and the City under 42 USC §1983 for false arrest, excessive force and failure to protect. Defendants filed a motion to dismiss and a motion for summary judgment. Kovacic argued that a special relationship existed between the officers and Kovacic since he had been in their custody at one time. The district court dismissed all claims against the officers except a §1983 due process claim under the special relationship theory and denied the officers motion for summary judgment.

The Fifth Circuit found that there is no constitutional duty which requires state officials to protect persons from private harms except when there is a special relationship between the individual and the state. The Court found no special relationship between them under the circumstances. The Court has not adopted a “state-created danger” theory of liability and thus, the officers were not on notice of a constitutional violation if they allowed Kovacic to get out of the car upon his request. The Court found that there is no duty when the victim is no longer in the officer’s custody and thus, there is no clearly established constitutional violation and the officers were entitled to qualified immunity.

***D.A. v. Houston Independent School District*, __ F.3d ____ (5th Cir. Dec. 28, 2010)**

42 USC §1983 offers no additional cause of action for a plaintiff seeking to recover under the Americans with Disabilities Act, §504 of the Rehabilitation Act or the Individuals with Disabilities Education Act.

Parents brought suit against the Houston Independent School District and several officials for failure to test their child for special education. Parents asserted claims for violations of the Individuals with Disabilities Education Act, §504 of the Rehabilitation Act, the Americans with Disabilities Act, the Age Discrimination Act, Texas and U.S. Constitution and §1983. Parents argued that the Houston Independent School District violated their constitutional rights by requiring them to show greater evidence of special needs than required of non-black children. Defendants filed motions for summary judgment which were granted.

The Fifth Circuit held that where a statutory regime already provides a comprehensive set of remedies for its enforcement, there is a presumption against the availability of the more general measures of §1983. The Court held that §1983 offers no additional cause of action for plaintiff-i.e. it cannot be used as an additional vehicle to redress violations of the Americans with Disabilities Act, §504 of the Rehabilitation Act or the Individuals with Disabilities Education Act. The Court found that there was no evidence the School District treated blacks differently and thus, no constitutional violation. The Court held that one cannot pursue an Individual with Disabilities Education Act, Americans with Disabilities Act, or §504 of the Rehabilitation Act claim through §1983.

***McAfee v. Thaler*, ___ F.3d ___ (5th Cir. Jan. 6, 2011)**

The Sixth Amendment right to counsel includes having counsel at the motion for new trial stage of the proceedings.

McAfee was convicted of aggravated robbery. McAfee filed a motion for new trial and motion to dismiss his court-appointed counsel on the grounds of ineffective-assistant counsel. The district court granted the motion to dismiss counsel but denied the motion for new trial.

The Fifth Circuit found that it is well settled that a Defendant's right to counsel attaches at or after the time adversary judicial proceedings have been initiated against him and once the right attaches, it continues to apply at every critical stage of the proceedings. There is a Sixth Amendment right to the assistance of counsel at the motion for new trial, during the post-trial, pre-appeal, in Texas, because it is a critical stage of the proceedings.

As for McAfee's ineffective-assistance of counsel claim, although the Court found that McAfee's attorney's conduct was deficient, the Court found that McAfee failed to show prejudice – i.e., a responsible probability that, but for the attorney's unprofessional errors, the result of the proceedings would have been different and thus, McAfee does not have a viable claim for ineffective assistance of counsel.

Texas Supreme Court

***Institutional Division of the Texas Department of Criminal Justice v. Powell*, ___S.W.2d ___(Tex. 2010)**

A claim of retaliation requires a retaliatory adverse action which is more than *de minimus*.

Powell, an inmate, was charged with creating a disturbance – an institutional disciplinary infraction. Powell alleged that this was in retaliation for complaints his

family had made about mistreatment at the facility. The Department held a disciplinary proceeding and determined the disturbance charges were supported by evidence. Powell was unable to call certain witnesses and subsequently, filed suit against the Department alleging that he was denied due process because he was denied the opportunity to call certain witnesses. Powell sued the officers for retaliation for his family's complaints about his alleged mistreatment at the facility. The officers filed special exceptions and the Department filed a plea to the jurisdiction. The trial court granted the officers' special exceptions and the Department's plea to the jurisdiction dismissing the suit.

On appeal, Powell abandoned his claim of denial of due process against the Department and asserted a constitutional claim against the Department based on retaliation. However, the only constitutional claim made against the Department at the trial court level related to Powell's inability to present evidence on his behalf.

The Texas Supreme Court held that prisoners have a First Amendment right to be free from retaliation for complaining about a prison official's misconduct, and a violation of this right is actionable under 42 USC §1983. To prevail on a claim of retaliation, one must establish a retaliatory adverse action which is more than "*de minimus*" – i.e., acts which would chill or silence a person of ordinary firmness from future First Amendment activities. While Powell was charged with a disciplinary infraction, the record contains no allegation or evidence of any punishment threatened or imposed for the alleged infraction. Powell asserts only that disciplinary proceedings were instituted. The Court found that it was unable to conclude that Powell has alleged an adverse action that was more than *de minimus* and thus, his §1983 claim fails.

Texas Court of Appeals

***Davis v. Barnett*, 2010 Tex. App. Lexis 64232 (Tex. App. – Fort Worth, Aug. 5, 2010)**

Unsuccessful or inadequate medical treatment does not constitute an Eight Amendment cruel and unusual punishment violation.

Davis, an inmate, complains about the medical care he received in jail. Specifically, Davis complained about tooth pain and was told that his tooth could be extracted but if wanted a root canal, he would have to pay for a private dentist. Davis wanted the jail to perform a root canal and when they failed to do so, Davis filed suit under 42 USC §1983. The district court dismissed the suit as being frivolous.

The Court found that the Eighth Amendment to the Constitution protects inmates from conditions so serious as to deprive them of the minimal measure of life's necessities. However, not every claim of inadequate or improper medical treatment is a violation of the Constitution. The Court held that an unsuccessful medical treatment, a disagreement between a physician and patient regarding treatment, or an inadvertent failure to provide adequate medical care cannot be said to constitute an unnecessary and wanton infliction of pain or to be repugnant to the conscience of mankind. The Court

found that the disagreement between Davis and the jail's dental director about the treatment of his tooth does not state a valid claim of medical mistreatment actionable under §1983 and thus, there is no constitutional violation.

***Hill v. Stephens*, 2010 Tex. App. Lexis 9987 (Tex. App. – Houston [14th Dist.], December 16, 2010)**

An inmate's administrative segregation, standing alone, does not violate the U.S. Constitution.

Hill, an inmate, filed suit under 42 USC §1983, claiming his right to be free of cruel and unusual punishment was violated because he was confined in administrative segregation (solitary confinement) for a total of twenty-two days. Defendants filed a motion to dismiss and the district court dismissed the case as being frivolous.

The Court of Appeals found that Hill has not alleged a violation of a federally protected right that would support a §1983 claim. Hill's confinement of administrative segregation, without more, does not violate the constitution. Since Hill alleged no constitutional violation, the district court did not abuse its discretion in dismissing the suit.

***Perry v. Kroll*, 2010 Tex. App. Lexis 10024 (Tex. App. – Austin, December 15, 2010)**

A claim for damages based on failure to receive written statement of evidence relied on in prison disciplinary proceeding is cognizable under 42 USC §1983.

Perry, an inmate, was accused of using abusive language against a prison employee and a disciplinary hearing was conducted. The hearing officer, Lance Knod, found Perry guilty of the violation and imposed penalties including forfeiture of fifteen days of good time credit. Perry appealed the decision through the Department's grievance procedure. The step one grievance form was submitted to Gene Kroll, who found that the evidence supported the finding of guilt and that no procedural errors had been committed. Perry filed suit alleging that the proceedings that resulted in the forfeiture of good time credit violated his Fourteenth Amendment due process rights in that: 1) Knod exhibited actual bias against him and used the disciplinary process to harass him for exercising his right of access to the courts; 2) Knod failed to specify in writing the facts and evidence supporting the finding of guilt; and 3) Kroll failed to correct the latter error when it was brought to his attention in his grievance. Defendants filed a motion to dismiss and the district court granted the motion and dismissed the suit as being frivolous.

The Court of Appeals held that an inmate cannot use a §1983 action to recover good time credit loss in a prison disciplinary proceeding. Claims for damages challenging the procedures used in prison disciplinary proceeding are not cognizable under §1983 until that proceeding has been reversed, expunged, or otherwise declared

invalid, if a favorable judgment in the §1983 action would necessarily imply the invalidity of the inmate's "conviction" in the proceeding of the length of his confinement. Perry's claim that Knod exhibited actual bias against him and used the disciplinary hearing to punish him for exercising his constitutional rights necessarily implies the invalidity of the hearing and its results and thus, Perry didn't have a claim cognizant under §1983 and the district court did not abuse its discretion in dismissing this claim.

As for Perry's claim for damage based on Knod's alleged failure to make constitutionally adequate written findings and Kroll's alleged failure to correct the error the Court found that due process requires that, in prison disciplinary proceedings, there be a written statement by the fact finder as to the evidence relied upon and the reasons for the disciplinary action. The Court found that since Perry's claim for damages on this basis does not necessarily imply the invalidity of the disciplinary hearing or the forfeiture of his good time credit, it is not indisputably meritless, and the district court abused its discretion by dismissing this claim as frivolous.

Fernandez v. Texas Department of Criminal Justice - Correction Institutions Division, 2010 Tex. App. Lexis 10307 (Tex.App. – Waco, December 22, 2010)

There is no due process claim if adequate post-deprivation remedies are available

Fernandez, a state prison inmate, alleges that employees of the Texas Department of Criminal Justice unlawfully confiscated numerous packages of food from his personal storage locker. Fernandez was disciplined for possession of contraband. Fernandez filed suit alleging state law claims and 42 USC §1983 claims against the individual defendants. Defendants moved to dismiss and the Court dismissed the suit on the grounds it was frivolous.

The Court of Appeals found that Fernandez §1983 claims against the individuals defendants all hinged on their alleged failure to comply with various Texas Department of Criminal Justice policies regarding the seizure of contraband and the conduct of disciplinary hearings. The Court held that a prison official's failure to follow the prison's own policies, procedures or regulations do not constitute a violation of due process, if constitutional minima are nevertheless met. The Court found that Fernandez had at least two constitutionally adequate post-deprivation remedies available and thus, his §1983 claims have no arguable basis in law and the district court did not abuse its discretion in dismissing these claims.