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Recent Seventh Circuit Decisions
St. Paul, Minnesota
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FIRST AMENDMENT

Kingstad v. State Bar of Wisconsin, ___ F.3d ___ (7th Cir. Sept. 9, 2010) (No. 09-4080)
http://www.ca7.uscourts.gov/tmp/0Y0RVBN0.pdf

Wisconsin requires, as a condition to practice law in the state, membership in the Wisconsin State Bar and payment of bar dues. Certain activities may not be funded by compulsory dues, and State Bar publishes notice of activities that are instead subject to voluntary dues. State Bar conducted public image campaign, and allocated the cost as part of members' compulsory dues. The campaign included television spots showing lawyers improving lives of senior citizens, participating in elementary and high school mock trials, volunteering at legal clinics, and supporting food pantries. The slogan of the campaign was "Wisconsin Lawyers. Expert Advisors. Serving You."

Plaintiffs objected, and arbitrator ruled that campaign was properly subject to compulsory dues, finding that the campaign was neither political nor ideological. Arbitrator ruled that germaneness was not relevant to the inquiry. Plaintiffs sought judicial review, and defendant State Bar removed the action to the U.S. District Court, since the claim arose under the U.S. Constitution. District Court affirmed the arbitrator's finding, and plaintiffs appealed.

The Court of Appeals affirmed, but held that the activity must be germane--"reasonably related to the constitutionally relevant purpose of that association." In so doing, the court overruled one of the alternative holdings of Thiel v. State Bar of Wisconsin, 94 F.3d 399, 405 (7th Cir. 1996), which had stated, "First Amendment does not prohibit the Bar from funding non-ideological, non-germane activities with compelled dues."

The court, however, affirmed, since it found that the campaign was germane to a constitutionally acceptable purpose, improving quality of legal services to the people of Wisconsin. The court noted that the standard of review is deferential, and that the State Bar's theory was not unreasonable.

Judge Sykes dissented from the denial of rehearing en banc. While agreeing with the panel's analysis, he dissented from the application of those principles. He would have found that the campaign was not germane to the purpose of improving the quality of legal services, but merely to boost public opinion of Wisconsin lawyers.

Goldhamer v. Nagode, ___ F.3d ___ (7th Cir. Sept 2, 2010)(No. 09-2332)
http://www.ca7.uscourts.gov/tmp/0Y19NWH2.pdf

Plaintiffs were protesting near a military recruiting booth at the Taste of Chicago festival. Police officers formed a line between the protesters and the booth, and ordered the plaintiffs to disperse, pursuant to city ordinance, "under circumstances where three or more persons are committing acts of disorderly conduct in the immediate vicinity...." Plaintiffs refused, and were arrested.

Plaintiffs appeared in state court on these charges, and prosecution requested a continuance. This request was denied, and the state court instead dismissed the charges. The Court of Appeals noted that the grounds for the arrest were apparently specious, since there was no evidence that three or more persons were committing acts of disorderly conduct.

Plaintiffs then commenced this action in U.S. District Court, seeking injunction against enforcement of ordinance, since it amounted to an impermissible "heckler's veto" of free speech. The District Court agreed, and enjoined enforcement of the ordinance.

The Court of Appeals reversed, holding that the plaintiffs lacked standing. "Such a clear misuse of a law [arrest despite the fact that no persons in the vicinity were acting disorderly] does not provide a basis for a federal court to explore the law's facial constitutionality."

In a footnote, the Court noted that its opinion "should not be understood to extend to a situation in which police misuse of the failure-to-disperse law has become so common as to amount to a municipal policy or custom that would subject the city to direct liability under section 1983.

Badger Catholic, Inc., v. Walsh, ___ F.3d ___ (7th Cir. Sept. 1, 2010)(Nos. 09-1102 & 09-1112)
http://www.ca7.uscourts.gov/tmp/0Y1CEGTY.pdf

University of Wisconsin collects student fees, which it distributes to a number of student organizations to offset the cost of speech on such topics as sustainable agriculture, social justice, healthy sexuality, etc. Badger Catholic, a religious student organization, applied for funds, some of which were rejected on the grounds that funds were not allowed for prayer, proselytizing, or religious instruction.

The District court entered declaratory judgment providing that University must reimburse Badger Catholic on the same basis as other groups. University appealed.

The Court of Appeals affirmed. "Once it creates a public forum, a university must accept all comers within the forum's scope. This is why, in another decision arising from the University of Wisconsin's fee system, we held that the University is not entitled to exercise a general discretion over which groups can draw on the funds."

SECOND AMENDMENT

United States v. Yancey, ___ F.3d ___ (7th Cir. Sept. 3, 2010)(No. 09-1138)
http://www.ca7.uscourts.gov/tmp/0Y1CYQB8.pdf

Defendant, age 18, was arrested under warrant, and was carrying a loaded pistol and 0.7 grams of marijuana. He confessed that he had been smoking marijuana daily since age 16, and had been twice arrested for possession of marijuana.

Defendant was charged and convicted with violating 18 U.S.C. § 922(g)(3), which makes it a felony for a person "who is an unlawful user of or addicted to any controlled substance" to possess a gun. Defendant argued that the indictment should have been dismissed as violating the Second Amendment.

The court held that to withstand constitutional scrutiny, the law must be more than "merely 'rational'" and must "withstand 'some form of strong showing'". The court declined, and noted that the Supreme Court has heretofore declined, to "wade into the levels of scrutiny quagmire", but held that in this case, the correct standard was "whether the government had made a strong showing that the challenenged [statute] was susbstantially related to an important governmental objective." The court reserved for a later case "the question of whether a different kind of firearm regulation might require a different approach."

Under this standard, the court held that the regulation was valid. "Congress enacted [this provision] to keep guns out of the hands of presumptively risky people." Quoting Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 112 n.6 (1983), the court referred to groups of persons "including criminals, juveniles without the consent of their parents or guardians, narcotic addicts, mental defectives, armed groups who would supplant duly constituted public authorities, and others whose possession of firearms is similarly contrary to the public interest."

The court noted that "[k]eeping guns away from habitual drug abusers is analogous to disarming felons," and that "habitual drug users, like the mentally ill, are more likely to have difficulty exercising self-control, making it dangerous for them to possess deadly firearms," and that "academic research confirms the connection between drug use and violent crime."

Therefore, the statute is valid, since the government made this "strong showing" that the statute was substantially related to an important government objective.

Finally, the court noted that unlike a felon or one committed to a mental institution, an unlawful drug user "could regain his right to possess a firearm simply by ending his drug abuse."

Since the statute was constitutionally valid, the conviction was affirmed.

ANTITRUST

Flying J, Inc., v. VanHollen, ___ F.3d ___ (7th Cir. Sept. 3, 2010)(No. 09-1883)
http://www.ca7.uscourts.gov/tmp/0W1BYRJV.pdf

Wisconsin Unfair Sales Act mandates minimum markups of motor vehicle fuel. Plaintiff supplier of fuel asserted that it could sell fuel for less than the statutory minimum and still make a profit, and sought injunction, alleging that the statute was preempted by the Sherman Act. The District Court agreed, and issued a permanent injunction.

The Court of Appeals first noted that a state law is preempted only if it mandates or or authorizes conduct that necessarily constitutes a violation of the antitrust laws, or if it places irresistible pressure on private parties to violate the antitrust laws.

Plaintiff argued that in this case, the state law created a horizontal price fixing scheme. The Court of Appeals disagreed. Since the statute mandated a price using "relatively simple mathematical formulas", the scheme was one of unilateral government action, rather than concerted action by competitors. While the statute did contain a provision that allowed sellers to match a competitor's price, it neither requires nor authorizes competitors to act in a concerted manner. The Court of Appeals remanded the case with instructions to dissolve the injunction.

EMPLOYMENT

Chapin v. Fort-Rohr Motors, Inc., ___ F.3d ___ (7th Cir. Sept. 3, 2010) (Nos. 09-1347 & 09-2177)
http://www.ca7.uscourts.gov/tmp/0X19HP5X.pdf

Plaintiff filed EEOC complaint against employer, after which his supervisor notified him that he needed to "reverse the claim right away, and it needs to be done today," and that "you aren't going to work here until you get it reversed. Period."

Plaintiff went home, but did not withdraw the complaint. On a later day, supervisor stated, "I didn't fire you," and "I suggest that you go get dressed and report back to work." Plaintiff neither resigned nor returned to work. Jury returned verdict in favor of plaintiff on retaliation claim.

The Court of Appeals reversed. Under these facts, plaintiff was neither actually terminated nor constructively discharged. A reasonable employee would not believe that firing was an "imminent and inevitable event." The court conceded that "perhaps [defendant] would have fired him" or "constantly harassed him to the point where his safety was at risk." However, "these possibilities would require speculation on our part."

The court did mention in a footnote that such a threat of termination, if it had the impact of disuading an employee from supporting a discrimination complaint, might constitute an adverse action.

Hensley v. Peterson, ___ F.3d ___ (7th Cir. Sept. 10, 2010) (No. 09-2676)
http://www.ca7.uscourts.gov/tmp/0Z0TS2GC.pdf

Under 1978 consent decree, Indianapolis Police Department was to ensure that African-Americans constitute at least 25% of incoming training classes. It also contained a

"long-range goal" of "increas[ing] the black composition of the Police and Fire Departments." Consent decree also stated that "[p]romotions shall be based upon relevant standards and criteria which will be applied without regard to race or color." Plaintiff white police officers alleged that they were passed over for promotions due to race.

Defendant City moved for summary judgment, asserting that the 1978 consent decree conferred qualified immunity, citing Martinez v. City of St. Louis, 539 F.3d 857 (8th Cir. 2008). In particular, City relied upon the decree's long-range goal of increasing number of black officers. However, since the decree specifically prohibited the conduct alleged by plaintiffs, namely, promotion based upon race or color, qualified immunity was unavailable.

ENVIRONMENTAL LAW

McEvoy v. IEI Barge Services, ___ F.3d ___ (7th Cir. Sept. 7, 2010)(Nos. 09-3494 & 09-3495)
http://www.ca7.uscourts.gov/tmp/0W19F0GE.pdf

Adjoining property owner brought action against barge operator under Clean Air Act for pollution resulting from coal dust entering his property. Plaintiff asserted that Clean Air Act's citizen-suit provision could be used to enforce two Illinois environmental regulations.

The Seventh Circuit held that the citizen-suit provision would not support an action premised upon the violation of these state regulations. The act allows a suit based upon state regulations specifying an "emission standard or limitation". However, the regulations in question were general prohibitions against "pollution" and "fugitive particulate matter". In the absence of "metrics that are susceptible to objective evaluation in court", such a regulation cannot be the basis of a citizen suit under the Clean Air Act.

CIVIL PROCEDURE

In re Specht, ___ F.3d ___ (7th Cir. Sept. 8, 2010) (No. 10-2823)
http://www.ca7.uscourts.gov/tmp/0X17T0EG.pdf

After suit had been pending about a year, plaintiff brought motion to add party to case. Trial judge's wife was director of proposed corporate defendant, and grant of motion would have required recusal of judge. Motion was heard by judge and denied, and plaintiff brought petition for mandamus.

Court of Appeals stated that the district judge should have recused himself from the motion, but that recusal was not necessary from the case if the motion was denied.

Mandamus, however, would not issue. The court noted that the three judges of the panel had no interest in the litigation, and "can resolve the dispute immediately," holding that a grant of the motion would have been an abuse of discretion.

Bodum USA, Inc., v. La Cafetiere, Inc., ___ F.3d ___ (7th Cir. Sept. 2, 2010)(No. 09-1892)
http://www.ca7.uscourts.gov/tmp/0Y1AIJVQ.pdf

This was a commercial dispute governed largely by French law. In determining the foreign law issues, the trial court had relied almost entirely upon affidavits of French attorneys and law professors that had been submitted by the parties, as authorized by Fed. R. Evid. 44.1. While the Court of Appeals affirmed the judgment, the court, in an opinion by Chief Judge Easterbrook, criticized the practice of relying upon such affidavits, to the exclusion of independent inquiry by the court into foreign legal materials.

Judge Posner authored a concurring opinion in which he offered his "emphatic support for, and modestly to amplify", the court's criticism of the practice of relying upon expert affidavits.

Judge Wood concurred but stated that he was unpersuaded that "expert testimony is categorically inferior to published, English-language materials. Exercises in comparative law are notoriously difficult, because the U.S. reader is likely to miss nuances in the federal law...."

IMMIGRATION

Mozdzen v. Holder, ___ F.3d ___ (7th Cir. Sept 7, 2010)(No. 09-3017)
http://www.ca7.uscourts.gov/tmp/0W1B4RMP.pdf

In 1999, aliens obtained in their passport purported I-551 stamp, indicating legal permanent residency. In reality, the stamp was placed by an undercover agent, posing as a corrupt immigration official, as part of a "sting" operation. Aliens subsequently re-entered the United States on the basis of that stamp. DHS subsequently commenced removal proceedings, and Immigration Judge found aliens to be removable, because they were inadmissible at the time they entered the country. The Immigration Judge made no finding as to whether they had affirmatively engaged in fraud.

The Seventh Circuit denied aliens petition for review, holding that the entry under the fraudulent stamp was not a "lawful entry". Therefore, it was unnecessary to resolve any other issues, since those issues were premised upon a lawful entry.

Lin v. Holder, ___ F.3d ___ (7th Cir. Sept. 1, 2010)(No. 09-3090)
http://www.ca7.uscourts.gov/tmp/0Y1BVCIG.pdf

In removal proceeding, aliens sought assylum, asserting that they feared persecution for violation of China's one child policy, since they had two children born in the United States. Immigration Judge concluded that aliens' testimony as to their fears were credible, but that fears were not objectively reasonable. Immigration Judge relied, in part, upon State Department Country Profile, which concluded that overall enforcement of family planning laws in aliens' province was "uneven", and that children born in U.S. were not counted. Court of Appeals concluded that this was a reasonable conclusion, and denied petition for review.

Aliens also argued that Immigration Judge erred in taking administrative notice of State Department report. The court disagreed. It did caution that immigration authorities should treat such reports with "healthy skepticism, rather than as a holy writ." However, in this case, the Immigration Judge did maintain the "individualized nature of the inquiry." Especially in a case where the burden of proof had not shifted to the government, it was not error to consider the report.

CRIMINAL LAW

United States v. Diaz-Jimenez, ___ F.3d ___ (7th Cir. Sept 8, 2010) (No. 10-1988)
http://www.ca7.uscourts.gov/tmp/0X18AAYS.pdf

Government in plea agreement agreed to sentence at bottom of guidelines range. At sentencing hearing, prosecutor mistakenly, but in apparent good faith, initially recommended sentence at top of range. Defense counsel objected, and prosecutor agreed that his recommendation was wrong, but equivocated in recommendation and stated, "I suppose a larger sentence could be appropriate."

District Court sentenced in middle of range, and defendant appealed. The Court of Appeals held that this was a "serious breach of the plea agreement", and remanded for resentencing by a different judge. The court of appeals realized that the new judge will have read the appellate opinion, and noted that it expected "a different prosecutor . . . will appear before that judge, apologize for the clumsy mistake of the previous prosecutor, and recommend an 18-month sentence without any ifs, ands, or buts."

Socha v. Pollard, ___ F.3d ___ (7th Cir. Sept 3, 2010)(09-1733)
http://www.ca7.uscourts.gov/tmp/0X18WGV6.pdf

Prisoner, aware of approaching deadline for filing habeas corpus petition, filed motion with U.S. District Court requesting extension of time for filing petition, and this motion was granted. Prisoner filed petition after statutory time for filing had expired, but within extension granted by court.

Judge hearing the petition dismissed it as untimely, holding that prior order was of no effect, because it was filed prior to petition, rendering it a mere advisory opinion.

The Court of Appeals reversed and remanded, holding that the prior order was properly issued as part of a "case or controversy". The Court first noted that a court may act upon a case or controversy that has not been yet filed, and cited as an example Federal Rule of Civil Procedure 27, which permits depositions to perpetuate testimony.

Secondly, the Court noted that the motion for extension could be treated as the actual petition for habeas corpus, but filed in an incomplete form.

The Court also noted that equitable estoppel might apply, and should be considered by the

district court.

United States v. Szymuszkiewicz, ___ F.3d ___ (7th Cir. Sept. 9, 2010) (No. 10-1347)
http://www.ca7.uscourts.gov/tmp/0Y1D4QQH.pdf

Defendant, concerned that his supervisor would discover that his driver's license had been suspended, decided to monitor her incoming e-mail. To do so, he used her computer and added a "rule" to Microsoft Outlook that all e-mails addressed to her would also be forwarded to his computer. Defendant was convicted under the Wiretap Act, 18 U.S.C. §2511(1)(a), for intentionally intercepting an electronic communication. The Court of Appeals concluded that the evidence was sufficient to convict.

Defendant also argued that he should have been charged under the Stored Communications Act, 18 U.S.C. §§ 2701–12, rather than the Wiretap Act, since he contended that the message was forwarded only after it "arrived". The Court concluded that the Wiretap Act does not have a contemporaneous requirement, but even if it did, at least three separate "devices" (the defendant's computer, the victim's computer, and the server) were involved in contemporaneously intercepting the message. Therefore, the conduct was covered by the Wiretap Act, even though that Act might overlap the Stored Communications Act.