CIVIL RIGHTS INSIDER

Federal Bar Association Civil Rights Law Section's Newsletter

Summer 2018

From the Desk of the Chairperson

Dear Civil Rights Members

As we approach the summer, and look forward to the annual convention of the Federal Bar Association in New York City, I can see in the not far off distance, the closing of this chapter in my professional life. As I finish my second full year as Chair of the FBA Civil Rights Law Section and prepare to pass the reigns to the next group of civil rights leaders, I could not be prouder of how much we have accomplished as a section during my tenure.

This past year, the FBA Civil Rights Section followed up on the success of the April 2017 Civil Rights Etoufee by organizing, planning and hosting four more CLE programs in this past year across the Country. Please check them out at www.ETOUFEELAW.com. There is now an amicus committee functioning and seeking to submit memorandum of law on important issues related to civil rights law. Our social media presence has been recognized at various FBA meetings and conference calls as leading the way in how sections and divisions should be utilizing social media. This vibrant newsletter is a quarterly reminder of all of the great goals we have achieved as a national section. Our leadership ladder continues to fill with diverse members from various practice areas and jurisdictions across this great country. If you are reading this, get involved, email us and ask how you can be more active!

Quite obviously, our work as a group of lawyers dedicated to civil rights is not nearly finished, in many ways, we are living in perhaps, the most difficult time of our careers and lives. From immigration issues related to ICE arrests in and around courtrooms to separating families at the border in the United States; to investigations that include seizing attorney records; to a possible Supreme Court bench that will lean one direction for decades to come, I do not remember a more demanding time in my lifetime. I hope all of the members in the FBA Civil Rights Section will accept the epic challenge that we are facing at this moment in our history. Together we can rise up, fight back and protect our freedom, our constitution and our republic.

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In this Issue:

Supreme Court Update – Summer 2018

by Samuel T. Brandao, Clinical Instructor, Civil Rights and Federal Practice Clinic, Tulane University Law School

Whitford v. Gill, 218 F. Supp. 3d 837 (W.D. Wis. 2016), appeal docketed, Gill v. Whitford, 137 S. Ct. 2268 (2017).
No. 16-1161; opinion filed June 18, 2018. Vote: 9-0

The Court speaks with one voice in deciding not to decide whether Wisconsin's partisan gerrymander violates the Constitution, instead remanding with instructions that the Democratic challengers have a chance to prove concrete and particularized injuries to their individual voting rights as opposed to a theory of statewide injury.

Justice Kagan, joined by Justices Breyer, Ginsburg, and Sotomayor, explains in a lengthy concurrence the challengers' paths forward in establishing standing and in articulating both partisan gerrymanders' harms to freedom of association and also their tendency to dilute individual votes. Meanwhile Justice Thomas, joined by Justice Gorsuch, concurs to indicate a preference for outright dismissal. On the same day, the Court filed a per curiam opinion in Benisek v. Lamone, No. 17-333, affirming the district court's refusal to issue a preliminary injunction sought by Republican voters who claim that Maryland's sixth congressional district was politically gerrymandered in 2011. Result: vacated and remanded.

Husted v. A. Philip Randolph Institute, 838 F.3d 699 (6th Cir. 2016), cert. granted, 137 S. Ct. 2188 (2017).
No. 16-980; opinion filed June 11, 2018. Vote: 5-4

Ohio's registration-cancelling "supplemental process" is lawful under the National Voter Registration Act of 1993 (NVRA) and the Help America Vote Act of 2002 (HAVA) because the majority of the Court agreed to read the relevant causation requirement narrowly: states must not purge anyone "by reason of the person's failure to vote," but according to Justice Alito's opinion for the majority that language now only forbids purges relying on failure to vote as "the sole criterion."

Justice Breyer, joined by Justices Ginsburg, Kagan, and Sotomayor, argues in dissent that Ohio not only purges voters for failure to vote but also violates its statutory obligation to make "reasonable effort[s]" to keep its rolls current. Justice Sotomayor also writes separately to insist that the majority "entirely ignores the history of voter suppression against which the NVRA was enacted and upholds a program that appears to further the very disenfranchisement of minority and low-income voters that Congress set out to eradicate." Critics and supporters generally agree that Ohio's process is the most aggressive in the country. Result: reversed.

Ayestas v. Davis, 817 F.3d 888 (5th Cir. 2016), cert. granted, 137 S. Ct. 1433 (2017).
No. 16-6795; opinion filed March 21, 2018. Vote: 9-0

The Supreme Court unanimously reversed the Fifth Circuit, holding that it had applied the wrong standard to a funding request when it required the petitioner to show a "substantial need" for investigative services rather than that those services were "reasonably necessary" to his ineffective assistance of counsel claim. Writing for the Court, Justice Alito explains that the two phrases have similar meanings—"necessary" and "need" operating as practical equivalents here—but that a "substantial" need is arguably harder to prove than a "reasonable" one, and the Fifth Circuit erred by enforcing that higher standard. It compounded its error by requiring additionally that a petitioner must point to a viable constitutional claim that is not procedurally barred because "[i]n those cases in which funding stands a credible chance of enabling a habeas petitioner to overcome the obstacle of procedural default, it may be error for a district court to refuse funding." Instead, expert investigative services are reasonably necessary and must be funded if a reasonable attorney would see them as sufficiently important. Justice Sotomayor, in a lengthy concurrence joined by Justice Ginsburg, argues that the petitioner has satisfied the standard.

The opinion leaves open on remand the question of whether another statute, 28 U.S.C. § 2254(e)(2)—which the government cited for the first time before the Supreme Court—might preclude funding in this case. Result: reversed and remanded.

Wilson v. Sellers, 834 F.3d 1227 (11th Cir. 2016), cert. granted, 137 S. Ct. 1203 (2017).
No. 16-6855; opinion filed April 17, 2018. Vote: 6-3

Resolving a circuit split, the Supreme Court has upheld the "look through" doctrine of Ylst v. Nunnemaker, which requires federal courts to assume that summary decisions by state appellate courts adopt the reasoning spelled out by lower state courts. Writing for the majority, Justice Breyer explains that the Eleventh Circuit erred by holding that a federal court must use its imagination to identify all arguments that "could have supported" a summary opinion—instead, federal courts must presume that the state's decision is based on whatever reasons the lower state court identified, until that presumption is overcome by evidence that an unexplained affirmance most likely relied on other grounds in the record or briefing.

Justice Gorsuch, joined by Justices Alito and Thomas, insists in dissent that state supreme courts deserve the same respect that the Court demands for itself, namely that its summary affirmances indicate agreement with a lower court's judgment but not its reasoning. Justice Breyer's majority opinion points out that the AEDPA requires courts to identify state reasoning, and that in this narrow context the "look-through" presumption is more respectful than either an absolute rule or an exercise of judicial imagination would be. Result: reversed and remanded.

District of Columbia v. Wesby, 765 F.3d 13 (D.C. Cir. 2016), cert. granted, 137 S. Ct. 826 (2017).
No. 15-1485; opinion filed January 22, 2018. Vote: 9-0

D.C. police officers sued for false arrest by partygoers had probable cause to arrest and enjoyed qualified immunity. Writing for the unanimous Court, Justice Thomas complains that the D.C. Circuit reviewed the evidence piecemeal when it should have focused on "the whole picture" to assess whether the police had probable cause to believe that the party was unauthorized and the revelers knew it: the house lacked most furniture, the partying was wild, and Peaches, the putative host, eventually confessed that she had lied to the police about the circumstances. The Court did not need to address the qualified immunity issue, but did so to correct further analytical errors by the appellate court, including the lack of precedent supporting the notion that probable cause cannot exist where trespassers have a good-faith belief that they have permission. Result: reversed and remanded.

Class v. United States, 765 F.3d 13 (D.C. Cir. 2016), cert. granted, 137 S. Ct. 1065 (2017).

No. 16-424; opinion filed February 21, 2018. Vote: 6-3

Does an unconditional guilty plea implicitly waive a constitutional challenge to the statute of conviction? In a majority opinion notable for its brevity and its limitation to its facts, Justice Breyer allows constitutional challenges on direct appeal after guilty pleas, rather than barring them as implicitly waived. The opinion concedes that guilty pleas indeed waive some constitutional claims, such as those implicating rights important at trial. A guilty plea also bars appeals arguing that the government violated the Fourth Amendment, for example. But the statute of conviction is fair game: here, a Second Amendment challenge to a statute prohibiting weapons on Capitol grounds.

Justice Alito, joined by Justices Kennedy and Thomas, argues in dissent that the majority does not offer lower courts a workable standard for determining which claims survive a guilty plea and which do not. This case appears to be the first in which Justice Gorsuch and Justice Thomas disagreed on the merits. Result: reversed and remanded.

Minnesota Voters Alliance v. Mansky, 849 F.3d 749 (8th Cir. 2017), cert. granted, 138 S. Ct. 446 (2017).

No. 16-1435; opinion filed June 14, 2018. Vote: 7-2

Minnesota's ban on political apparel, buttons, and insignia fails First Amendment muster because it present no workable standard. Writing for the majority, Chief Justice Roberts notes—without endorsing—other states' bans that target apparel related to issues on the ballot, whereas Minnestoa's ban encompasses all "political" apparel. Justice Sotomayor, joined by Justice Breyer, argues in dissent that a remand seeking clarification from the Minnesota Supreme Court would have been appropriate. Result: reversed and remanded.

Masterpiece Cakeshop v. Colorado Civil Rights Commission, 370 P.3d 272 (Colo. App.), cert. granted, 137 S. Ct. 2290 (2017).

No. 16-111; opinion filed June 4, 2018. Vote: 7-2

In one of the most anticipated decisions of the term, at least measured by observers' ink spilled, the Court favored a Colorado baker who refused to make a custom cake for a same-sex couple, citing his religion. The Colorado Civil Rights Commission violated the baker's free exercise right, Justice Kennedy's majority opinion explains, both because it showed hostility to his beliefs in public hearings and because Colorado had not yet legally recognized gay marriages at the time of the baker's refusal, in 2012. The opinion is narrow by its own terms, specifically reserving the freedom of speech claim and inviting "further elaboration in the courts" of the balance to be struck between sincere religious beliefs and the dignity of gay persons in similar cases in the future. Result: reversed.

Epic Systems Corp. v. Lewis, 823 F.3d 1147 (7th Cir. 2016), cert. granted, 137 S. Ct. 809 (2017) (consolidated with Ernst & Young v. Morris, 834 F.3d 975 (9th Cir. 2016) and National Labor Relations Board v. Murphy Oil USA, 803 F.3d 1013 (5th Cir. 2015)).

No. 16-285; opinion filed May 21, 2018. Vote: 5-4

Employers may force employees to arbitrate disputes individually and waive their rights to access courts, including class actions. Writing for the majority, Justice Gorsuch refused to defer to the National Labor Relations Board's interpretation of its statute because that interpretation also implicated a limit on the Federal Arbitration Act. In response to a majority opinion she finds "egregiously wrong," Justice Ginsburg read portions of her dissent from the bench—a dissent, joined by Justices Breyer, Kagan, and Sotomayor, somewhat longer than the majority opinion.

Results: Epic Systems Corp. v. Lewis, No. 16-285: reversed and remanded; Ernst & Young v. Morris, No. 16-300: reversed and remanded; Murphy Oil v. NLRB, No. 16-307: affirmed. ■

Sam Brandao is a Clinical Instructor with experience enforcing housing equity, civil rights, and disability rights. He joined the Tulane Civil Rights and Federal Practice Clinic in 2016 after completing a two-year Skadden Fellowship, during which he served as a staff attorney at Southeast Louisiana Legal Services in New Orleans. At SLLS, he litigated housing discrimination cases and advocated for policy changes on behalf of persons with disabilities. Brandao clerked for United States District Judge Eldon E. Fallon of the Eastern District of Louisiana and for Circuit Judge Jacques L. Wiener, Jr. of the United States Court of Appeals for the Fifth Circuit. In the Civil Rights and Federal Practice Clinic, he assists Director Lucia Blacksher Rainer in supervising student-attorneys in a range of client representation, including federal cases involving the civil rights of incarcerated citizens, employment discrimination, housing discrimination, and other constitutional claims.

U.S. District Judge and Cardozo Law Professor Share Insights on the Art of Pleading in Civil Rights Cases[1]

by Robin Wagner, Pitt McGehee Palmer & Rivers, PC, Royal Oak, MI
Secretary, Civil Rights Law Section, FBA

Professor Alexander A. Reinert of the Benjamin N. Cardozo School of Law in New York joined United States District Judge Judith E. Levy, Eastern District of Michigan, at the Levin Courthouse in Detroit on March 23, 2018, to share insights on the impact several Supreme Court decisions from the past ten years have had on civil pleading standards in employment discrimination and civil rights cases. One of these cases, *Iqbal v. Ashcroft* (2009), was argued by Professor Reinert, who represented Javaid Iqbal from the trial court to the Supreme Court.

From L to R: FBA E.D. Mich. Chapter President Saura Sahu, FBA Member Robin Wagner, U.S. District Judge Judith E. Levy, FBA E.D. Mich. Chapter Secretary/Treasurer Fred Herrmann, Professor Alexander Reinert, and FBA E.D. Mich. Chapter Past President Jeffrey Appel.

The speakers' bottom line to the group of over thirty practitioners who attended was that the principles of "notice pleading" established over fifty years ago have not changed and that notice remains the overriding purpose of a pleading. That said, there are structural and substantive considerations spelled out by the Supreme Court in *Iqbal* and others that require attention when filing a lawsuit and considering a motion to dismiss.

"Use a thesaurus" was one simple, but often-overlooked piece of advice from the speakers. Professor Reinert suggested, and Judge Levy confirmed, that sometimes avoiding having an allegation labeled as "conclusory" is as simple as alleging that a defendant *knew* about a situation and nonetheless *ignored* it, rather than alleging that the defendant was "deliberately indifferent" to the situation.

While both Judge Levy and Professor Reinert expressed their concern that "judicial experience and common sense" should not play a decisive role in evaluating a complaint, they acknowledged that the Supreme Court opened the door for it. Their advice was that if there are commonly understood phenomena in the world that either amplify or cast doubt on the plausibility of the allegations, then by all means, incorporate them into your brief.

Informational asymmetry—particularly where plaintiffs lack knowledge of key facts to support their claims and that knowledge is held by the defendants—is often a hallmark of employment and civil rights cases. Professor Reinert shared a statistical study he conducted, in which it was shown that employment and civil rights cases have experienced far higher rates of dismissal through 12(b)(6) motions than other types of lawsuits in the post *Iqbal-Twombly* world. The speakers addressed this issue at length, noting that informational asymmetry is at its height in claims that include a state-of-mind element, such as discrimination. Professor Reinert drew the audience's attention to *Mills v. Barnard*, 869 F.3d 473 (6th Cir. 2017) as an example of how to structure allegations of intent or state of mind. The *Mills* court held that intent had been sufficiently alleged because one could infer the intent through the other allegations.

U.S. District Judge Judith E. Levy and Professor Alexander Reinert.

Judge Levy specifically advised attorneys to brief their arguments regarding conclusoriness and plausibility separately—ideally in distinct sections. She observed that attorneys have tended to conflate these two concepts and brief them passingly, often in one paragraph. Professor Reinert further explained that it is common to see court opinions conflate plausibility with probability, even though the latter is only applicable to super-heightened pleading requirements under specific statutes. Judge Levy suggested that separating and expanding on each concept in its own subsection can more effectively guide the reader through your argument for or against the sufficiency of the complaint.

Professor Reinert generously provided a substantial survey and summary of relevant Sixth Circuit and E.D. Mich. caselaw addressing pleading standards as a takeaway for attendees. If you wish to receive a copy, please contact me at rwagner@pittlawpc.com. ■

Endnote:

[1]This program was organized as part of Civil Rights Étouffée, a CLE initiative of the Civil Rights Law Section of the Federal Bar Association, and co-sponsored by the Eastern District of Michigan Chapter of the Federal Bar Association and the Labor and Employment Law Section of the State Bar of Michigan.

New Application Process and Criteria for Requesting Amicus Briefs in Civil Rights Cases

by Kevin Golembiewski, Berney & Sang, Philadelphia, PA

Amicus briefs serve a critical role in civil rights litigation. Part of our job as civil rights attorneys is to educate the court. We must explain why an issue is important and how a particular ruling will impact the communities we represent. But sometimes we can't do this by ourselves. Sometimes we lack, for example, the policy expertise needed to fully educate the court. Enter amicus briefs. They complement our advocacy, ensuring that the court has all the information needed to make a sound decision.

Recognizing the critical role of amicus briefs, the Civil Rights Section is committed to building a robust and active Amicus Committee. To that end, this year the Section developed an application process for those who seek amicus support, and it established formal criteria for granting applications.

Application Process

Only an FBA Civil Rights member in good standing, or a person or organization sponsored by a member may apply for amicus support. The individual or organization must submit an application to the Amicus Co-Chairs (Jared Kosoglad, jared@jaredlaw.com and Kevin Golembiewski, kgolembiewski10@gmail.com).

The application must (1) describe the nature of the support sought, (2) identify the court and the judge overseeing the case, (3) state relevant deadlines, (4) summarize the facts, (5) summarize the legal arguments, (6) list the interested persons, (7) identify the participating amici, and (8) explain why the Section should serve as an amicus.

The Section aims to complete its review of each application in nine calendar days.

Criteria

Three foundational criteria govern the Section's review of an application:

- Whether the application asks the Section to take a position that is inconsistent with positions that it has previously taken.
- Whether the position conflicts with the FBA's mission or policies.
- Whether the application presents an issue of compelling public interest.

If the application satisfies these criteria, the Section then considers the necessity of an amicus brief, the court before which the case is pending, and the level of support among FBA members for the position presented in the application.

Spread the Word

Please let your colleagues know that the Amicus Committee is accepting applications. And contact the Amicus Co-Chairs identified above if you have any questions about the new application process or criteria. ■

FBA Annual Meeting and Convention

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September 13–15, 2018

Federal Bar Association