Aloha

Constitutional Claims Against County Government and its Employees

A review of recent cases of interest

Steven D. Strauss, Deputy Corporation Counsel, County of Hawai‘i

aided by David Lau, 2L
William S. Richardson School of Law at University of Hawai‘i

What is not covered

- Hawai‘i State constitutional claims

  - not “self executing”

  $ vs. Injunctive / declaratory relief

- prisoner cases, except one (just too many to deal with)

42 U.S.C §1983 Elements

- Every "Person"
- Color of Law
- Proximate Causation
- Deprivation of Rights

Municipal Liability

- Express Policy
- Widespread Practice, Custom, or Usage
- Final Policymaking Authority
- Deliberate Indifference or Failure

Equal Protection – "Class of One"

Village of Willowbrook v. Olech (2000)

U.S. Supreme Court recognized an equal protection violation where:

1. government acted in irrational or wholly arbitrary or capricious manner AND (maybe)
2. coupled with or fueled by *animus*

- *15 foot backyard taking vs. 33 foot backyard taking*
- Trend: 2100 citations thru year 2011, 2300 citations since

Limits to *Olech* Class of One

- No longer applicable to public employment

Enquist v. Oregon Department of Agriculture, 553 U.S. 591 (2008)

6 to 3 majority decision

Public employment exception

- "crucial difference" between the government exercising "the power to regulate or license, as lawmaker" and acting "as proprietor, to manage [its] internal operation"

  - *Enquist*

- The constitutional rights of government employees must be "balanced" against the realities of the employment context

- In this context, "balanced" means "ignored"

When is government action Arbitrary?

- According to the *Enquist* majority,

when departures from a clear standard of conduct can be readily assessed.

In public employment context, however, "treating similarly situated individuals differently…is par for the course."

Hmmm.

The Future of "Class of One"?

- *Mathis v McDonough* (USDC Md. 2014)

  2014 WL 3894133

Pro Se Plaintiff alleged that "he was singled out for prosecution and unlawful oppression"

Issue: after *Enquist*, are "class of one" claims viable in the context of discretionary decision-making?

Limits to "Class of One"?

8th Circ: Police officer's investigative decisions cannot be attacked in a class of one equal protection claim

7th Circ: Class of one a "poor fit" in context of **prosecutorial discretion**

USDC Md. – not viable in **public education** context

Class of One and Qualified Immunity

In context of discretionary and individualized decision-making,

"class of one" may be insufficiently clear such that every reasonable official would have understood that their enforcement actions violated such right

- *Mathis v. McDonough*

Heffernan v. City of Patterson, N.J.

SCOTUS (April 2016) 136 S.Ct. 1412

1st Amendment Retaliation

- Public employee picking up campaign signs
- Signs advertised gov't official's rival
- Employee demoted for "overt involvement" in campaign

Heffernan Cont…

SCOTUS (April 2016) 136 S.Ct. 1412

General Rule

"The 1st Amendment generally prohibits gov't officials from dismissing/demoting an employee because of the employee's engagement in constitutionally protected political activity."

Heffernan Cont…

SCOTUS (April 2016) 136 S.Ct. 1412

Issue

- Employee did favor for bedridden mother
- Meaning… he never actually "engaged in protected political activity"
- Did his demotion deprive him of a "right"?

Heffernan Cont…

SCOTUS (April 2016) 136 S.Ct. 1412

Holding

- Yes! Employee's demotion deprived him of a "right"
- Gov't's ***motive*** is what matters
- Factual mistake is immaterial

Sialoi v. City of San Diego

9th Cir. (May 2016) 2016 WL 2996138

Unlawful Arrest

- Report: Two armed black males
- Response: 20+ Officers w/assault rifles
- Instead of suspects, police encountered Samoan family's birthday celebration

Sialoi Cont…

9th Cir. (May 2016) 2016 WL 2996138

- Officers began detaining/searching family members
- Plaintiff objected & temporarily disobeyed orders
- Handcuffed & placed in police car

Sialoi Cont…

9th Cir. (May 2016) 2016 WL 2996138

- Officers found nothing
- Plaintiff released
- No charges filed
- Plaintiff alleges Unlawful Arrest

Sialoi Cont…

9th Cir. (May 2016) 2016 WL 2996138

Disposition

- Officers claim Qualified Immunity

Sialoi Cont…

9th Cir. (May 2016) 2016 WL 2996138

Rule – Qualified Immunity

Officers' argument:

- No constitutional right violated

or

- Right not clearly established

Sialoi Cont…

9th Cir. (May 2016) 2016 WL 2996138

Holding – Qualified Immunity denied

- Seizure violated 4th Amendment
  - Found: No required probable cause
  - Temporary noncompliance, in itself, not valid basis for arrest

Sialoi Cont…

9th Cir. (May 2016) 2016 WL 2996138

Holding – Qualified Immunity denied

- Right clearly established
  - No "reasonably arguable" probable cause existed
  - Presence in high-crime area insufficient

O'Brien v. Welty

9th Cir. (April 2016) 2016 WL 1382240

- First Amendment Restrictions: Government restrictions on expressive conduct at state universities are constitutional if not overbroad, vague, and do not punish constitutionally protected speech when applied to an individual case.

- First Amendment Retaliation: University student can properly state a §1983 retaliation claim if he sufficiently alleges that sanctions imposed by university faculty and administrators, under government regulation constitutionally restricting expressive conduct, were substantially motivated by student's protected activity.

Seattle Mideast Awareness Campaign v. King County 781 F.3d 489 (9th Cir, 2015)

- First Amendment – Limited Public Forums: **Exclusion** from county's program allowing paid advertisements on exterior of county buses, for speech that was so objectionable under contemporary community standards as to make it reasonably foreseeable that it would result in harm to, disruption of, or interference with the transportation system, **was reasonable**, as required under First Amendment for subject-matter or speaker-based exclusion from a limited public forum

- Key point: limited vs. designated public forum

Town of Greece, NY v Galloway
134 S.Ct. 1811 (2014)

- First Amendment – Establishment clause
- Held: Town did not violate First Amendment by opening town board meetings with prayers typically invoking a Christian God that comported with tradition of the U.S.
- Lengthy 5 to 4 decision; two concurring opinions, two dissents
- Abrogated *County of Alleghany v. ACLU*

  (display of nativity scene outside municipal building violated Establishment clause)

Hamby v. Hammond

9th Cir. (May 2016) 2016 WL 1730532

- Deliberate Indifference to Prisoner/Detainee Medical Care: Qualified immunity afforded to officials who decided conservative treatment over surgery for plaintiff's hernia because chosen method of "treatment" (i.e., monitoring / doing nothing) was arguably medically acceptable for management of his hernia.

Ragasa v. County of Kaua'i

D. Hawai'i (Feb. 2016) 2016 WL 543118

- First Amendment Retaliation: Public employment context where employee has non-supervisory/managerial duties.

- Plaintiff Ragasa alleged that the County of Kauai Fire Department ("KFD") and KFD supervisors retaliated against him after he reported improper conduct by fellow KFD employees that included gas theft, on-duty drug use, and the falsification of time sheets. Because issues of fact persisted with respect to Ragasa's 42 U.S.C. § 1983 First Amendment retaliation claim against the individually named Defendants the motions for summary judgment were DENIED as to those claims. The motions were GRANTED with respect to the Section 1983 municipal liability claim against the County.

Williams v. County of Alameda

N.D. California (Feb. 2014) 26 F.Supp.3d 925

Police respond to domestic disturbance call. No probable cause, warrantless entry, search and arrest, no exigent circumstances, injury to Plaintiff

- Unlawful Entry and Arrest: In absence of exigent circumstances or emergency, entry and arrest requires a warrant under the Fourth Amendment.

- Equal Protection Class of One Claim: Plaintiff's §1983 Class of One claim survives motion to dismiss where his claim sufficiently alleges that he was treated differently from his fiancé who was engaged in exactly the same conduct plaintiff was arrested for but was not arrested.

Felarca v. Birgeneau

N.D. California (Jan. 2016) 2016 WL 324351

- Fourth Amendment Excessive Force: Failure to fully or immediately comply with an officer's orders neither rises to the level of active resistance nor justifies the application of a non-trivial amount of force

- cf. Hawai'i law, where it is unlawful to resist even and unlawful arrest… now subject to attack?

Wynn v. San Diego County

USDC S.D. Cal. 2015 2015 WL 472552

- Unlawful Arrest and Excessive Force: When a routine traffic stop goes wrong.

Birchfield v. North Dakota

SCOTUS (June 23, 2016) 2016 WL 3535398

- Fourth Amendment Searches: The Fourth Amendment permits warrantless **breath tests** incident to arrests for drunk driving but not warrantless **blood tests**. Thus, implied consent laws imposing criminal penalties for refusing to submit to warrantless blood tests are unconstitutional.

- Impact on §1983 Claims: Plaintiffs can no longer claim violations of their Fourth Amendment rights when punished for refusing a warrantless **breath test** conducted as an incident to arrest.

References

- Practising Law Institute, 31st Annual Section 1983 Civil Rights Litigation, Volume 1, Chair Martin Schwartz, 2014

- *Qualified Immunity for Government Officials under Hawai'i Law*, Richard B. Rost

  14 January Hawai'i Bar Journal 20 (2010)

Mahalo