Arkansas Law Review

Volume 72 | Number 4 Article 5

May 2020

Recent Developments

Peyton Hildebrand
University of Arkansas, Fayetteville

RECENT DEVELOPMENTS

Peyton Hildebrand*

RODGERS V. BRYANT

The Eighth Circuit upheld preliminary injunctive relief in favor of the plaintiffs who challenged Arkansas's anti-loitering law for violating their free speech rights. Though Arkansas claimed that it would not enforce the anti-loitering statute against "'polite' and 'courteous' beggars like [plaintiffs]," because the law's plain language applied to the plaintiffs' intended activities, they had an objectively reasonable fear of prosecution.[1] Thus, they had a constitutional injury as required for standing.

The Court affirmed that the plaintiffs were likely to succeed on their claim that Arkansas's anti-loitering law violates the First Amendment. Asking for money is protected First Amendment speech, and protected content-based speech can only be regulated if the regulation is "narrowly tailored to serve a compelling state interest."[2] Arkansas argued its compelling interest is "public and motor vehicle safety through the prevention of aggressive conduct and traffic hazards."[3] However, the Court concluded that even if the state's interest is compelling, the law is not narrowly tailored because it is underinclusive. The law targets only charitable solicitation even though political and commercial solicitation could present equal issues for public and motor vehicle safety. The Court then affirmed that the other preliminary injunction factors were met and, thus, injunctive relief was proper.

---

* J.D. Candidate, University of Arkansas School of Law, 2020.

1. Rodgers v. Bryant, 942 F.3d 451, 455 (8th Cir. 2019).

2. *Id.* at 456 ("Arkansas's anti-loitering law is a content-based restriction because it . . . applies only to those asking for charity or gifts, not those who are, for example, soliciting votes, seeking signatures for a petition, or selling something.").

3. *Id.* at 457.

Lastly, it concluded the district court did not abuse its discretion when it applied the injunction statewide instead of limiting it to the plaintiffs. The extension was proper because the violation established by the plaintiffs "impacts the entire state of Arkansas."[4]

CORREIA V. JONES

A former Henderson State University employee filed a § 1983 Complaint against the University's President after being fired. The district court granted a motion for summary judgment in the University President's favor, concluding he was entitled to qualified immunity because the former employee did not show a violation of a constitutional right.

To establish that her constitutional right was violated, the former employee needed to show "she was deprived of 'a property right in continued employment without due process.'"[5] The court concluded, based on Arkansas law, she was an at-will employee even though (1) the Board of Trustees passed a proposed budget which included her name, title, and salary; and (2) the employee had an employment contract that expired less than one month prior to her being placed on administrative leave.

Additionally, the Court held she did not have a protected liberty interest in her reputation, which would have entitled her to a name-clearing hearing. At-will employees are entitled to such hearings only when their public employers make significant stigmatizing allegations, which generally involve claims of "direct dishonesty, immorality, criminality or racism."[6] In this case, the University President did not directly allege that the employee stole or mismanaged. In contrast, he (1) wrote an email to university faculty and staff, which "contained no direct references" to the plaintiff; (2) attached an audit report to that email mentioning the plaintiff, which he did

---

4. *Id.* at 458 (stating "one of the 'principles of equity jurisprudence' is that 'the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class'" (quoting Califano v. Yamasaki, 442 U.S. 682, 702 (1979))).

5. Correia v. Jones, 943 F.3d 845, 847 (8th Cir. 2019) (quoting Floyd-Gimon v. Univ. of Ark. for Med. Sci., 716 F.3d 1141, 1146 (8th Cir. 2013)).

6. *Id.* at 848.

not author; and (3) commented in newspaper articles, in which he did not identify or discuss the plaintiff.[7] Because the former employee could not show a constitutional violation, the Eighth Circuit affirmed that the University President was entitled to qualified immunity.

RIDGELL V. CITY OF PINE BLUFF

A Pine Bluff City Collector sued the city and its mayor under 42 U.S.C. §§ 1981 and 1983 for race discrimination after the recently elected Caucasian mayor fired him. Although the City Council reinstated him, the mayor subsequently fired the collector again. Although the jury returned a verdict in favor of the mayor, it found against the City and awarded $24,080 on the employee's race discrimination claim. On appeal, the City argued that the jury's verdict in favor of the mayor barred its verdict against the City because a municipality can only act through its employees.

Even though a municipality's liability can depend on the actions of more than one official,[8] the plaintiff rested his case almost entirely on the mayor's alleged discrimination. Thus, the Court concluded that because the mayor could not be held liable for discrimination, neither could the City.[9]

TOFURKY ISLAND FOODS SPC V. SOMAN[10]

Turtle Island Foods SPC d/b/a The Tofurky Company (Tofurky), the popular plant-based meat producer, challenged Arkansas law banning the representation of a product as beef, poultry, livestock, etc. when not derived from the requisite animal.[11] The law effectively prevents Tofurky from using words such as "meat," "beef," and "sausage" despite its clear

7. *Id.* at 849.

8. *See* Speer v. City of Wynne, 276 F.3d 980, 986 (8th Cir. 2002).

9. Ridgell v. City of Pine Bluff, 935 F.3d 633, 637 (8th Cir. 2019) ("Because there was no race discrimination in violation of § 1981, the City cannot be held liable for damages under § 1983."). Additionally, the collector ultimately did not challenge the jury's verdict in favor of the mayor.

10. Order, Turtle Island Foods SPC v. Soman, No. 4:19-cv-00514-KGB (E.D. Ark. Dec. 11, 2019).

11. *See* Ark. Code Ann. § 2-1-305.

product identification as vegetarian, vegan, or plant-based. The stated legislative purpose "is to protect consumers from being misled or confused by false or misleading labeling of agricultural products that are edible by humans."[12]

Tofurky requested preliminary injunctive relief on the basis that the law violates its Free Speech and Due Process rights under the First and Fourteenth Amendments, respectively. The federal district court for the Eastern District of Arkansas granted Tofurky injunctive relief, analyzing the issue as an as-applied constitutional challenge.

Preliminary injunctive relief requires the court to weigh four factors: (1) whether the movant will likely succeed on the merits (generally the determining factor in First Amendment cases); (2) the threat of irreparable harm to the movant; (3) the state of the balance between this harm and the injury that granting the injunction will inflict on other interested parties if relief is granted; and (4) the public interest.[13] The Court concluded Tofurky is likely to succeed on the merits because its food labels indicating the products are not meat-based likely dispel consumer confusion regarding the product and are not inherently misleading. Thus, the commercial speech is subject to intermediate scrutiny. Because the Court concluded Tofurky is likely to prevail on its argument that its labeling is neither false nor misleading, even if the State's interest in "protect[ing] consumers from being misled or confused by false or misleading labeling of agricultural products that are edible by humans"[14] is substantial, the law does not directly and materially advance this interest. Tofurky will also likely successfully show that the law's restriction is more extensive than necessary to achieve its stated purpose.

Second, Tofurky demonstrated a likelihood that it would suffer irreparable harm without injunctive relief by showing that it could face enormous civil liability if subjected to the law's penalties. Third, Tofurky is faced with "substantial detrimental impact" if injunctive relief is not granted and it is forced to comply with Arkansas law. Likely, Tofurky would either (1)

12. *Id.* § 2-1-301.

13. Dataphase Sys. Inc. v. CL Sys., 640 F.2d 109, 113 (8th Cir. 1981).

14. Order at 26, Turtle Island Foods SPC v. Soman, No. 4:19-cv-00514-KGB (E.D. Ark. Dec. 11, 2019).

face extreme civil penalties; (2) have to create specialized marketing and packaging practices for Arkansas specifically at great financial cost; (3) have to change its marketing and packing practices nationwide; or (4) wholly refrain from marketing and selling its products in the state. Thus, the balance of equities tilts in Tofurky's favor.

Lastly, public interest favors an injunction because the case involves the protection against violations of constitutional rights. For all these reasons, the Court granted Tofurky's motion for a preliminary injunction, enjoining the defendants "from enforcing the six provisions of Act 501 challenged by Tofurky and as applied to Tofurky: Arkansas Code Annotated §§ 2-1-305(2), (5), (6), (8), (9), and (10)."[15]

15. *Id.* at 33.

ARKANSAS LAW REVIEW