RECENT FEDERAL CASES OF INTEREST TO CITIES

TEXAS CITY ATTORNEYS ASSOCIATION
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I. FIRST AMENDMENT

Harris v. Pontotoc County Sch. Dist., 635 F.3d 685 (5th Cir. 2011)

Eighth grader Derek Harris was accused of hacking into the school's computer system through his mom's school computer and causing the computer system to go down. Harris denied any wrongdoing though he clearly was the hacker.

Harris was sent to alternative school; his mother was reassigned to an assistant teacher's position to limit her access to computers. After a verbal altercation with the school superintendent, Mrs. Harris was terminated.

Derek Harris sued the school district and the superintendent for violation of his due process rights and defamation. Mrs. Harris sued for wrongful termination in retaliation for protected First Amendment speech.

With respect to Derek, the Fifth Circuit found that a transfer to an alternative education program does not deny access to public education and therefore does not violate the Fourteenth Amendment. The Court also looked at Harris' temporary suspension, the issues being whether Derek was adequately informed of the specific charges from which the suspension was derived and whether he was given an opportunity to present his side of the story. Because Derek had been given explanations of the accusations against him and an opportunity to respond (he denied the accusations), his due process rights were not violated. The Fifth Circuit also found that the allegedly defamatory statements were either hearsay, which are inadmissible at trial, or statements made directly to him. In order for the statements to be actionable, they must be made to a third party.

With respect to Mrs. Harris, the Fifth Circuit found that the First Amendment did not apply. Mrs. Harris alleged that she was terminated for protesting the actions against her son and threatening to take legal action. However, the First Amendment protects a public employee's speech only if the speech addresses a matter of "public concern." In this case, Mrs. Harris speech was about matters that were personal – the treatment of her son. Thus, Mrs. Harris failed to allege a violation of her First Amendment rights.

Arizona Christian School Tuition Org. v. Winn, 131 S.Ct. 1436 (2011)

In this "taxpayer standing" case, the Supreme Court held that Arizona taxpayers do not have standing to challenge tax credits for contributions to religious schools. Arizona provides tax credits for contributions to school tuition organizations, which provide scholarships to students attending private schools. Respondents challenged the tax credit as a violation of the Establishment Clause. In a sharply divided 5-4 opinion, the Court held that respondents, merely by virtue of being taxpayers, do not have standing to challenge the tax credit for contribution program; a tax credit does not constitute government spending: "When the government declines to impose a tax…there is no such connection between dissenting taxpayer and alleged establishment. Any financial injury remains speculative. And awarding some citizens a tax credit allows other citizens to retain control over their own funds in accordance with their own consciences." In dissent, Justice Kagan dismissed this distinction as a formality.

Snyder v. Phelps, 131 S.Ct. 1207 (2011)

The Supreme Court held that political picketing at a military funeral is protected by the Constitution if it addresses publicly important issues, even if the speech is highly offensive. Snyder, the father of a deceased military service member, brought an intentional infliction of emotional distress and invasion of privacy suit against the fundamentalist Westboro Baptist Church and its members. At trial, Snyder was awarded millions of dollars in compensatory and punitive damages. Westboro challenged the verdict as grossly excessive and sought judgment as a matter of law that the First Amendment fully protected its speech.

In holding that the First Amendment shields Westboro from tort liability for its picketing, the Court stressed that it was ruling only on the facts presented by this particular demonstration and no other: Westboro obeyed the orders given by police for the protest; the demonstration took place on public land next to a public street approximately 1000 feet from the funeral, and separated by several buildings; the protest was peaceful and relatively quiet; and the messages conveyed by their signs involved issues of public policy, including the morality of homosexuality and the sins of the Roman Catholic Church and the sins of America as a whole, including the military's tolerance of homosexuality. While the parties disagreed with the legal interpretations of this speech, the majority of the Court declined to react emotionally to the message of Westboro or the context of Westboro's choice to convey the message at the service member's funeral: "On the facts before us, we cannot react to that pain [incurred by Westboro's speech] by punishing the speaker. As a nation, we have chosen a different course — to protect even hurtful speech on public issues to ensure that we do not stifle public debate." The sole dissenter, Justice Alito, agreed with Snyder that the Constitution's guarantee of free speech applies only to public issues, and does not apply at all in the exclusively private setting that the family believed to have existed at the funeral.

***McKinley v. Abbott,* 643 F.3d 403 (5th Cir. 2011)**

The Fifth Circuit upheld the constitutionality of §§38.12(d)(2)(A) and 38.12(d)(2)(C) of the Texas Penal Code, which limit attorneys, chiropractors, and other professionals from solicitation of employment during the first 30 days following an accident, holding that the provisions do not violate the free speech portions of the Texas and United States Constitutions. In so holding, the Fifth Circuit found that the State has a substantial interest in protecting the privacy of accident victims. In addition, the 30 day period addresses a real harm and does so in a manner which materially alleviates the harm. Finally, the 30 day period is both reasonable and in proportion to the interests served. It should be noted that this case addresses the statute after the 2009 amendments, which include solicitations by telephone and in person, in addition to written solicitations.

***United States v. Cardenas-Guillen v. Hearst Newspapers, LLC,* 641 F.3d 168 (5th Cir. 2011)**

In this case involving the sentencing of a notorious Mexican drug kingpin, the Fifth Circuit determined that the First Amendment requires that the media and public have access to sentencing hearings. Cardenas-Guillen led a drug cartel known as the Gulf Cartel and was charged with involvement in conspiracies to distribute huge amounts of marijuana and cocaine, violation of the "drug kingpin statute," and threatening federal officers. Almost all of the filings in the case were made under seal. The Houston Chronicle intervened in the case, requesting that documents be unsealed and that the district court provide notice and an opportunity to be heard before proceedings were closed. Ultimately, Cardenas-Guillen pled guilty to the charges, but this fact was not made public.

Citing public safety concerns, the prosecution moved to close the sentencing hearing to the public, and the United States District Court for the Southern District of Texas granted the motion under a sealed order. Houston Chronicle staffers discovered the closed hearing and filed a motion requesting the district court to open the hearing and give the Chronicle an opportunity to be heard on the closure. The district court declined to hear the motion, continued the closed hearing, and sentenced Cardenas-Guillen, later denying the Chronicle's motion as moot. Shortly thereafter, a record of the hearing was publicly docketed, and a recording and transcript made available to the public.

The Chronicle again moved to intervene. The district court granted the motion to intervene and denied the Chronicle's request for public notice of all future hearings and for an opportunity to be heard if closure was being

contemplated. On appeal, the Fifth Circuit reversed, holding that the press and the public have a First Amendment right of access to sentencing proceedings and that the Chronicle's right of access was denied without due process when the district court refused to give notice and an opportunity to be heard before it closed the sentencing hearing.

EQUAL PROTECTION AND DUE PROCESS

***United States v. Allen,* 625 F.3d 830 (5th Cir. 2010)**

ICE Agents executed a search warrant in Allen's home, seizing computers and external hard drives. Forensics discovered approximately 3300 child pornography images on his computer. Allen filed a motion to suppress evidence, contending that the search warrant was invalid under the Fourth Amendment because it lacked particularity and was not supported by probable cause. After his motion was denied, Allen pled guilty pursuant to a plea agreement, but reserved the right to appeal the motion to suppress.

On appeal, the Government conceded that the warrant was not sufficiently particularized. However, they argued that the agents involved in the search reasonably believed the warrant was valid because the warrant application, affidavit and attachments had been reviewed by several ICE agents and the US Attorney's Office prior to submission to the magistrate judge, who also reviewed the materials before signing the warrant. Thus, the seizure falls under the good-faith exception to the exclusionary rule. The Fifth Circuit agreed: the evidence made it clear that the agent who sought the warrant reasonably believed the warrant was proper and supported by probable cause. He prepared the application for the warrant, the affidavit and the warrant; he had the US Attorney's Office review it before he submitted it to the magistrate judge; the magistrate judge took the time to review the affidavit and search warrant before signing the warrant; and before the search, the agent gave a copy of the affidavit, warrant and list of items to be seized to every agent who participated in the search. In short, the Court found that although the language of the warrant was flawed, a reasonable officer could have easily concluded that the warrant was valid based on the many levels of review the warrant had been subjected to.

***United States v. Gomez,* 623 F.3d 265 (5th Cir. 2010)**

Austin Police Dispatch received a 911 call from a person identified as "Mike." Mike stated that he had witnessed a Hispanic male brandishing a black and gray pistol at people at a gas station and then had hopped into a car with two other passengers. Mike provided a detailed description of the male, the passengers, and the car, including the license plate. The phone call originated from a pay phone. Dispatch forwarded the information to responding officers but never told the officers that the tip came from a pay phone.

The responding officers spotted the car and conducted a felony stop. When they removed the driver, who fit the description provided, the driver informed police that there was a handgun in the back of the car, belonging to the Hispanic passenger (riding in the back seat). The police removed Gomez at this point and spotted the handgun protruding from underneath the back of the driver's seat in plain view. Gomez was a convicted felon and was arrested for illegally possessing a weapon.

Gomez moved to suppress the evidence but was denied. On appeal, the Fifth Circuit reviewed to see whether the officers had reasonable suspicion to conduct a felony stop. In making this determination, the Court looked at four factors: (1) the credibility and reliability of the informant; (2) the specificity of the information contained in the tip; (3) the extent to which the information in the tip can be verified by the officers in the field; and (4) whether the tip concerns active or recent activity or has instead gone stale. The Court determined that all but the first factor were present. Thus, the only major dispute was whether the "anonymous" nature of Mike's call to 911

precluded a finding of reasonable suspicion. However, because the officers testified that they had no reason to believe they were acting on an anonymous tip since they were given a name, phone number and address of the informant, the officers reasonably believed they were acting on a credible and reliable tip. Accordingly, the Fifth Circuit affirmed the district court's denial of Gomez's motion for suppression.

***United States v. Olivares-Pacheco,* 633 F.3d 399 (5th Cir. 2011)**

Border Patrol agents spotted a truck occupied by 5 people driving on Interstate 20 near Odessa. While following the truck, agents noticed that the truck was dragging some brush. They pulled the truck over and noted that none of the passengers would make eye contact with them. At one point, one of the passengers pointed to the field off to the right of the truck and all the passengers turned and looked at the field (away from the agents). The agents thought this was an "obvious attempt to avoid eye contact" and pulled the truck over. At that point, the passengers admitted they were in the US illegally.

Appellant moved to suppress the evidence from the traffic stop, contending that it was not supported by reasonable suspicion and was thus in violation of the Fourth Amendment. The district court denied his motion.

In order to temporarily detain a vehicle, the Border Patrol agent on roving patrol must be aware of specific articulable facts together with rational inferences that warrant a reasonable suspicion. In this sort of stop, the Fifth Circuit emphasizes eight factors: (1) the area's proximity to the border; (2) the characteristics of the area; (3) usual traffic patterns; (4) the agents' experience in detecting illegal activity; (5) the driver's behavior; (6) the aspects or characteristics of the vehicle; (7) information about recent illegal trafficking of aliens in the area; and (8) the number of passengers and their behavior. In this specific case, the truck was stopped over 200 miles from the border, so proximity was not a factor. The piece of brush that was being dragged – over 200 miles from the border – could have been picked up in a myriad of unsuspicious ways. The avoidance of eye contact is not entitled to any weight – the agents could not even confirm if the passengers were even aware of their presence. And the stretch of this portion of Interstate 20 was not known for smuggling aliens.

The Fifth Circuit reversed the district court and vacated the sentence against the Appellant. The facts known to the officers at the time of the stop portray an unremarkable and suspicionless situation.

EMPLOYMENT LAW

***Granger v. Aaron's, Inc.*, 636 F.3d 708 (5th Cir. 2011)**

Angel Granger and Casey Descant claimed that their store manager engaged in a pattern of sexual harassment. They reported it to Aaron's, but Aaron's failed to halt it. Both employees ultimately resigned and sought legal counsel jointly. Their attorney filed complaints of discrimination with the Office of Federal Contract Compliance Programs ("OFCCP"), an agency within the US Department of Labor that enforces equal employment opportunities for employees of federal contractors. The OFCCP could not resolve these claims because Aaron's was not a federal contractor; instead, Granger and Descant should have filed a complaint with the EEOC. The OFCCP never informed the Appellees or their attorney that they had filed with the wrong agency until after the 300-day period expired. At that point, the OFCCP closed their files and transferred the complaints to the EEOC. The EEOC assured Appellees their complaints would be treated as timely and issued Right to Sue letters.

When Appellees filed their complaints in federal court, Aaron's filed a motion to dismiss, arguing that Appellees had failed to file a charge of discrimination with the EEOC within 300 days of their separation. Appellees argued that their claims were constructively filed with the OFCCP, pointing to a Memorandum of Understanding ("MOU") between the EEOC and the OFCCP that requires discrimination claims

timely filed with the OFCCP to be treated as "dual-filed" with the EEOC. Alternatively, the Appellees argued that their 300-day deadline should be equitably tolled because of the OFCCP's representations that they were processing their claims. The district court held that the MOU did not apply because the OFCCP never had jurisdiction over Appellees' claims. The court did agree to equitably toll the deadline, however. The district court certified its decision for interlocutory appeal.

The Fifth Circuit affirmed on equitable tolling and did not address the interpretation of the MOU. Instead, the Court found that the Appellees and their attorney exercised due diligence in pursuing Appellees' rights: the Appellees secured counsel soon after their resignation, their signed complaints were submitted to the government months before the 300-day period expired, their attorney's staff made repeated contacts with the OFCCP who represented that the claims were being investigated, and Aaron's had failed to show that it was prejudiced by the delay.

***Harris v. Tunica, Inc.*, 628 F.3d 237 (5th Cir. 2010)**

Harris was a revenue auditor for Sam's Town Casino, which is owned by Tunica, Inc. She alleged that she was being discriminated against based on religion when they terminated her employment. On December 11, 2008, the EEOC issued Harris a "right to sue" letter informing her that she had 90 days to file suit. Harris hired a lawyer to file on her behalf. However, the lawyer's paralegal miscalculated the 90-day deadline and Harris' filing was outside the 90-day period. The district court dismissed Harris' suit, declining to extend equitable tolling. Harris appealed.

The Fifth Circuit affirmed the dismissal. Equitable tolling is typically extended only where "the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 & nn. 3-4 (1990). The Supreme Court further noted that "under our system of representative litigation, each party is deemed bound by the acts of his lawyer-agent." *Irwin*, 111 S.Ct. at 456. The Fifth Circuit concluded that the negligence of Harris' attorney and his staff did not entitle Harris to equitable tolling – a party is bound by the acts of their attorney.

***EEOC v. Philip Services Corp.*, 635 F.3d 164 (5th Cir. 2011)**

Nine employees of Philip Services ("PSC") filed charges with the EEOC, alleging racial discrimination. The EEOC found reasonable cause to support the charges and initiated the conciliation process as required by Title VII. After two weeks of negotiations, PSC withdrew from negotiations. The EEOC filed suit, alleging breach of contract against the PSC, arguing that there was a verbal agreement at the time PSC withdrew. The suit was dismissed on the grounds that Title VII's confidentiality provision was an "insurmountable impediment" to the EEOC's attempts to enforce the oral conciliation agreement.

Title VII provides that "[n]othing said or done during and as a part of such informal endeavors (conciliation) may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned." 42 U.S.C. § 20003-5(b). The statute does not make an exception as to the disclosure of conciliation material. Thus, an inquiry as to whether an oral agreement to settle occurred during conciliation violates this clear prohibition. As the Fifth Circuit stated, "Keeping private what is 'said or done' during conciliation is necessary to encourage voluntary settlements." As this case addressed a matter of first impression, the Court declined to create any type of exception to the confidentiality provision of Title VII.

***Thompson v. N. Am. Stainless, L.P.*, 131 S.Ct. 863 (2011)**

Thompson's fiancée filed a sex discrimination charge with the EEOC against their employer, NAS. NAS subsequently fired Thompson. Thompson then filed his own EEOC charge and a subsequent Title VII suit contending that his firing was retaliation for his fiancée's EEOC charge. The District Court granted summary judgment on the ground that third-party retaliation claims were not permitted by Title VII, and the Sixth Circuit affirmed, reasoning that Thompson had not engaged in any activity protected by Title VII and thus was not entitled to sue.

The Supreme Court reversed the Sixth Circuit, deciding that an employer may no more fire an employee for a relative or close associate's sex discrimination claim than it can fire the complaining employee. That is, Title VII's prohibition of workplace retaliation against employees who complain of discrimination also protects that worker's fiancée; further, the fired employee could sue the employer for violating Title VII. The Court took a common sense approach to this analysis, reasoning that permitting employers a loophole through which they could retaliate against close family members while prohibiting such actions against complaining employees did not make sense. However, the Court attempted to limit the reach of its decision by making clear that the "close family member" might extend to spouses and future spouses, but probably not to more distant acquaintances.

***NASA v. Nelson,* 131 S.Ct. 746 (2011)**

Contract employees of the Jet Propulsion Laboratory sued NASA over a 2004 Bush administration antiterrorism initiative that extended the requirement of a standard background check to federal contract employees with long-term access to federal facilities. The lab employees did not have security clearances and were not involved in classified or military activities. Assuming without deciding that there is a right to informational privacy, the Court (in an opinion written by Justice Alito) held that NASA's background checks on independent governmental contractors were constitutional. The Court determined that questions about a history of counseling, drug treatment, or drug use did not violate any right to informational privacy as they were reasonable. In a pointed concurrence, Justice Scalia criticized the concept of informational privacy as having no Constitutional support. Justice Kagan took no part in consideration of the case.

***Kasten v. Saint-Gobain Performance Plastics Corp.,* 131 S.Ct. 1325 (2011)**

Kasten brought an antiretaliation suit against his former employer under the FLSA, claiming he was discharged because of his oral complaints regarding the placement of timeclocks in locations that prevented workers from receiving credit for time spent putting on and taking off work-related protective gear. The Supreme Court was faced with the question of whether, for purposes of the FLSA, an oral complaint was formal enough to be considered "filed," or whether complaints must be made in writing.

Holding that the purpose of the Act would be undermined if all complaints were required to be written, the majority held that a complaint could be "filed" orally. The Court did not reach the issue of to whom such an oral complaint could be made to be considered "filed" and therefore qualify for statutory protection, as the issue was not raised in the lower courts.

In dissent, Justices Scalia and Thomas found that the term "filing" implies a formality indicative of a legal action. As they did not agree that a mere complaint was sufficiently formal to merit FLSA protection, they did not reach the issue of whether a complaint must be in writing.

***Staub v. Proctor Hospital,* 131 S.Ct. 1186 (2011)**

Staub, a lab technician at Proctor Hospital in Peoria, Illinois, was required to attend occasional weekend training for the U.S. Army Reserves as well as a two-week training program during the summer. The Hospital fired Staub in 2004, and he later filed a lawsuit claiming that his supervisor was out to get him as a result of disapproval of his military service. However, the ultimate firing decision was made by a more senior executive, not Staub's supervisor. Staub prevailed at trial and was awarded damages. The Seventh Circuit reversed the trial court judgment, holding that there was no evidence that the decision-maker shared the supervisor's anti-military bias.

In a unanimous decision written by Justice Scalia, the Supreme Court reversed the Seventh Circuit, holding that an employer can be found liable for the discriminatory acts of supervisors, who do not themselves make employment decisions but do influence the employment decision-makers: "If a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable." So long as the supervisor intends that the adverse action occur for discriminatory reasons, that intent is sufficient to impose liability on the employer.

Justice Alito, joined by Justice Clarence Thomas, concurred in the judgment but wrote that he would hold employers liable if the person making the firing decision "merely rubberstamps" a biased supervisor's recommendation, or when the decision-maker is "put on notice that adverse information about an employee may be based on antimilitary animus but does not undertake an independent investigation of the matter." Justice Kagan took no part in consideration of the case.

***Frame v. City of Arlington* ___ F.3d ___ (5th Cir. Sept. 15, 2011)**

Plaintiffs, who are disabled persons, sued the City of Arlington, alleging that the City violated the ADA by failing to make certain public sidewalks accessible. The District Court originally dismissed the complaint, holding that the cause of action accrued from the date of the City's construction or alteration of the subject sidewalks; accordingly, the complaint was time-barred under Texas's two-year personal-injury statute of limitations. The Fifth Circuit held that sidewalks are "services, programs, or activities" under the ADA, and that the District Court erred by requiring plaintiffs to plead dates of construction. The court concluded that, although the ADA does not require accessibility "at any cost," individuals are granted private rights of action to ensure ADA compliance so long as the accommodations they seek are reasonable. Further, plaintiffs' cause of action did not accrue until the plaintiffs knew, or should have known, of the inaccessible sidewalks, not the moment the non-compliant sidewalk was built or altered.

***Hale v. King,* 642 F.3d 492 (5th Cir. 2011)**

Hale brought claims against his prison superintendent and various other state officials, alleging they had discriminated against him because of his physical and mental disabilities, including chronic Hepatitis C, chronic back problems, and psychiatric conditions (including PTSD). The Court concluded that Hale's complaint adequately pleaded two of the three elements necessary for relief under Title II of the Americans with Disabilities Act; the Court's analysis focused on whether he sufficiently stated a claim that he had a qualifying disability.

Under the ADA, the conditions in question must limit one or more major life activities. The complaint stated that plaintiff

needed certain medical treatment for his conditions, or else he would suffer pain, anxiety, and potentially life-threatening complications. The complaint also alleged that plaintiff had lost thirty-six pounds since coming to prison, that he suffered panic attacks, and that his liver was being destroyed. The Court held that these allegations and the medical files that accompanied them were sufficient only to show that plaintiff had the specified conditions—not that they impaired any major life activity.

Title II also allows for relief if Plaintiff could show he was discriminated against because the discriminators believed (mistakenly) that his disabilities limited one or more of his major life activities. The Court determined that the complaint established only that Defendants denied Plaintiff access to prison facilities and programs because of his disability and the facilities' inability to treat him, not because they believed his disability limited his major life functions. The Court acknowledged that "it is possible that the Appellees denied Hale access to these facilities because they mistakenly perceived Hale's impairments as substantially limiting his ability to go to school or work in the prison kitchen, but we cannot say that such a conclusion would be plausible on these facts." Thus the complaint failed to meet the pleading standard articulated by the Supreme Court in *Twombly* and *Iqbal*. However, the Fifth Circuit remanded the case to the District Court to allow Hale to amend his Title II allegations.

***Black v. Pan American Laboratories, LLC*, 646 F.3d 254 (5th Cir. 2011)**

Black alleged various sex discrimination claims and a Title VII retaliatory termination claim against her former employer, complaining that she was subjected to a discriminatory sales quota, compared to a similar male employee. Black contended that her complaints regarding the quota were met with a vice president's reply that the quota shouldn't matter to her, because "you're not the breadwinner anyway." Black also complained about sexually explicit remarks made by management personnel about her body. Some of these same executives eventually decided to terminate Black, allegedly because she failed to attend sessions at a National Sales Meeting.

At trial, the jury returned a verdict for Black on all three of her discrimination claims (discriminatory sales quota, termination, and retaliation), awarding her in excess of $3 million. The District Court reduced the award to compensate for double recovery of back pay on overlapping claims and to comport with the damages cap under Title VII.

On appeal, the Fifth Circuit found that there was ample evidence to support the jury's finding of sex discrimination, based on comments made by various management employees' sexist comments and sexually inappropriate comments regarding Black's body, as well as one executive's propositioning Black. Furthermore, the Court found that there was sufficient evidence to support the jury's quota discrimination verdict, given the evidence that permitted the jury to conclude that Black's higher sales quota than a similarly situated male employee was motivated, at least in part, by her gender. However, the back pay award on the quota claim was reversed and remanded to the District Court for calculation based on what Black's commission should have been had she had the similarly situated male employee's quota. Finally, the Fifth Circuit found that the District Court correctly applied the § 1981a(b) and Texas law compensatory and punitive damage caps to the total of Black's claims rather than to each claim. Consistent with the D.C., Sixth, Seventh and Tenth Circuits, the Fifth Circuit concluded "that the plain language of § 1981a(b)'s cap applies to each party in an action."

USERRA

***Carder v. Continental Airlines*, 636 F.3d 172 (5th Cir. 2011)**

Continental pilots who were members of the Reserves and National Guard filed a class action, alleging that management had "repeatedly chided and derided plaintiffs for their military service through the use of discriminatory conduct and derogatory

comments regarding their military service and military leave obligations." Such comments included "Continental is your big boss, the Guard is your little boss" and telling pilots to choose between Continental and the military. The pilots also alleged the company had placed "onerous restrictions" on military leave and these restrictions affected the pilots' "opportunity to log flight hours toward participation in a retirement fund."

The sole issue on appeal was the trial court's dismissal of the plaintiffs' hostile environment claim on the basis that USERRA does not provide for such a claim. The Fifth Circuit affirmed dismissal of the hostile environment claim. The Court described the issue as one of interpreting the language in USERRA prohibiting the denial of any "benefit of employment" to a member of the uniformed services based on such membership or the performance of service. Noting differences between the statutory language of USERRA prohibiting the denial of benefits and Title VII's statutory language prohibiting discrimination with respect to "conditions" of employment (which permits claims for hostile environment), the Court held USERRA's language would not permit a hostile environment claim absent a denial of a tangible benefit.

The Fifth Circuit did note at least two caveats in reaching this decision. First, a number of courts, including the Eighth and Ninth Circuits, have recognized constructive discharge claims under USERRA. A constructive discharge claim might arise where an employee could show his working conditions became "'so intolerable that a reasonable person would have felt compelled to resign.'" *Penn. State Police v. Suders*, 542 U.S. 129 (2004). Second, the Court noted the term "benefits of employment" under USERRA is quite broad and the issues raised by the plaintiffs in Carder might still permit recovery if they could show they lost such benefits because of their employer's actions.

IV. SECTION 1983

Fox v. Vice, 563 U.S. __ (June 6, 2011)

In this unanimous opinion written by Justice Kagan, the Supreme Court held that when a Section 1983 suit includes both frivolous and non-frivolous claims, a court may award reasonable attorneys' fees to a defendant that the defendant would not have incurred, but for the frivolous claims.

Vice was the incumbent police chief in Vinton, Louisiana. Fox successfully challenged him, overcoming what he called "dirty tricks" by Vice's campaign. Vice was later convicted of extortion for his conduct in the campaign; nevertheless, Fox sued him in Louisiana state court for state law claims such as defamation as well as federal civil rights claims. Vice removed the case to federal court. After some discovery, Vice filed a motion for summary judgment on the federal claims, which Fox ultimately agreed were not valid. The district court granted the motion and remanded the state law claims to state court.

Vice filed a motion seeking attorneys' fees under 42 U.S.C. § 1988, which the district court granted, awarding Vice fees for all of the work his attorneys had done in the case, even though the state law claims remained pending in state court. On appeal, the Fifth Circuit affirmed, agreeing that the litigation had focused on the frivolous state law claims.

The Supreme Court vacated the Fifth Circuit, remanding the case for consideration of what fees Section 1988 permits: "if the defendant would have incurred [attorneys' fees] anyway, to defend against non-frivolous claims, then a court has no basis for transferring the expense to the plaintiff." That is, a prevailing defendant can receive only that portion of fees that he would not have paid but for the frivolous claim. The Court clarified that no costs related to non-frivolous claims would be recoverable; rather, in some circumstances prevailing defendants could recover fees arising from work relating to both frivolous and non-frivolous claims, for example when a defendant

demonstrated that "a frivolous claim involved a specialized area that reasonably caused him to hire more expensive counsel for the entire case." The Court gave district courts significant discretion to achieve what it described as "the essential goal in shifting fees:" "to do rough justice."

***Cuadra v. Houston Indep. Sch. Dist.*, 626 F.3d 808 (5th Cir. 2010)**

Cuadra served as a network specialist at a Houston high school and was responsible for reporting the school's student drop-out data to the State. Cuadra alleges that he was instructed by the Principal and Vice Principal to delete some of the student names from the drop-out list. After a local news station investigated and discovered that the high school had falsified the drop-out data, an investigation was commenced. A school official contacted the District Attorney and informed the DA of the allegations at the school. The then DA declined to prosecute. Cuadra eventually resigned after multiple reassignments within the school district.

A year after Cuadra's resignation, the new District Attorney sought and obtained a grand jury indictment against Cuadra for knowingly making a false alteration to a government record. After the indictment was quashed, a second grand jury re-indicted him. Cuadra's attorney met with the DA and presented a document – a "smoking gun" – that the Appellees possessed and did not disclose to the DA. The DA dismissed the indictment.

Cuadra turned around and filed a § 1983 suit, alleging violations of the Fourth and Fourteenth Amendment. After the district court granted summary judgment, Cuadra appealed. Cuadra argued that the Appellees violated his Fourth Amendment rights by intentionally withholding information and manipulating evidence to procure his indictment. Cuadra further argued that the Appellees violated his Fourteenth Amendment substantive due process right based on his prosecution.

The Fourth Amendment may be violated if the criminal charges were initiated without probable cause. However, if facts supporting an arrest are presented to an intermediary – such as a grand jury – the intermediary's decision breaks the chain of causation. The only exception is if the defendant tainted the deliberations of the intermediary. In this case, Cuadra only alleged "taint" instead of showing how the deliberations had been tainted. Allegations of tainting alone are not sufficient to overcome summary judgment.

With respect to Cuadra's Fourteenth Amendment claim, the Fifth Circuit found that such claim was foreclosed by the Supreme Court's decision in *Albright v. Oliver*, 510 U.S. 266 (1994). In *Albright*, the Court held that there was no Fourteenth Amendment due process right to be free from criminal prosecution unsupported by probable cause; rather, prosecution without probable cause falls under the Fourth Amendment. Accordingly, the Fifth Circuit affirmed the summary judgment on Cuadra's Fourteenth Amendment claim

***Kovacic v. Villarreal*, 628 F.3d 209 (5th Cir. 2010)**

Kovacic was escorted from a bar by Laredo Police after he had become intoxicated and was causing problems. The officers intended to take Kovacic to jail but the jail was overcrowded. The officers called Kovacic's friends at the bar and told them they were taking Kovacic to his hotel. However, Kovacic insisted that they drop him at a convenience store 5 miles from the hotel and he would call his wife at the hotel to come get him. The officers left him at the store and 30 minutes later, Kovacic was struck and killed by a car while he was walking on the roadway.

Kovacic's family filed suit against the officers and for false arrest, excessive force and failure to protect. The court granted the officers motion to dismiss on all claims except a § 1983 due process claim under the "special relationship" theory. The officers filed an interlocutory appeal.

Although there is a substantive due process right to be free from bodily harm caused

by the state, there is no constitutional duty that requires state officials to protect persons from private harms. An exception to this general rule is when there is a "special relationship" between the individual and the state. This relationship is formed when the state restrais an individual's freedom to act on his own behalf thru incarceration or other similar restraint. In that situation, the state does have a constitutional duty to protect individuals from danger, including private violence in certain situations.

In this case, the Appellees argued that the officers had a special relationship with Kovacic because they had taken him into custody. However, the accident occurred after Kovacic had been released from custody. The Court also found that there was no evidence in the record that shows the officers had any reason to think that Kovacic was not going to call his wife to pick him up or that Kovacic was lacking the resources to secure another way home. The Court concluded that reasonable, competent officers would not have determined that it would violate Kovacic's constitutional rights to honor his request to let him out at the convenience store; thus, the officers were entitled to qualified immunity.

***Rundus v. City of Dallas,* 634 F.3d 309 (5th Cir. 2011)**

Twice, Rundus has attempted to hand out free Bible tracts at the Texas State Fair, only to have his efforts thwarted by the State Fair of Texas ("SFOT"), a private corporation that runs the Fair. Rundus filed suit against SFOT and the City of Dallas, alleging that they had violated his First Amendment rights. The trial court found no state action was involved and dismissed Rundus' claims.

Rundus argued that the SFOT was a state actor by virtue of running the Fair. In order to show state action, Rundus most show either: (1) the restriction represents an official City policy or custom, or (2) SFOT's conduct in enacting and enforcing the restriction is "fairly attributable" to the City of Dallas. He argued that the Fair was a joint venture between the City and the SFOT, that the SFOT pays a portion of Dallas police officers' wages earned during the Fair, that both the City and the SFOT had committed substantial financial sums to improve Fair Park, and that SFOT was required to maintain a reserve fund to ensure that the Fair would be held during times of financial distress.

The Fifth Circuit found that SFOT is a private corporation that runs a private event on public property. SFOT is not a state actor simply because they take advantage of law enforcement services provided to the public. And the City has no say in SFOT's internal decision making or SFOT's decision to enact or enforce the restriction on the distribution of literature during the Fair. Thus, the Fifth Circuit affirmed the district court's decision that no state action was involved and thus no First Amendment violation.

***Carnaby v. City of Houston,* 636 F.3d 183 (5th Cir. 2011)**

Houston police pulled Carnaby over for speeding. When Carnaby identified himself to police, he stated he was a "CIA Agent." The police attempted to verify this thru several calls but were unable to. When they approached the car again, Carnaby was on the phone. He handed the phone to the officers and said the man on the phone was a Houston officer who could verify he was an agent. The officer on the phone stated to the police that he believed Carnaby to be a CIA agent but had never confirmed that. The officers handed the phone back to Carnaby. The officers returned to their squad car to continue calls to the department. When they again approached Carnaby's vehicle, Carnaby took off in his car. The chase lasted 15 minutes until Carnaby pulled over. The officers approached the car from both sides, but Carnaby refused to lower his window and get out of the car. They smashed his window to pull him out. Carnaby leaned toward the floor of his car and his hands were not visible. With the door now open, Carnaby began to exit the vehicle but swung his hands – one holding an object. Seeing that, one of the officers fired and shot Carnaby in the back. He later died from his injuries. Carnaby did not have a weapon on him but did have three guns in his car.

The family sued the officers for excessive force along with a host of other claims. The district court granted the officers' motions for summary judgment based on qualified immunity as well as the City's motion for summary judgment because the City cannot be liable if the officers did not violate the Fourth Amendment.

The Fifth Circuit examined the Fourth Amendment excessive force claim on the basis of whether the use of deadly force was unreasonable in that situation. The use of deadly force is not unreasonable when an officer has reason to believe that the suspect poses a threat of serious harm to the officer. In this case, Carnaby reached down in his vehicle for a few seconds before exiting the car and swinging his hands towards the officer. Combined with the high speed chase that immediately preceded the incident, it was objectively reasonable for the officers to believe that Carnaby had a firearm and the use of deadly force was objectively reasonable. Thus, the officers were entitled to qualified immunity.

Mrs. Carnaby also argued that the City failed to train the officers properly in how to approach a high-risk vehicle and that this led to Carnaby's death. The Fifth Circuit stated that they had yet to address whether a municipality can ever be held liable for failure to train its officers when the officers did not commit any constitutional violation. The Court declined to address this issue here, specifically because Mrs. Carnaby failed to meet all the requirements for municipal liability.

***Connick v. Thompson,* 131 S.Ct. 1350 (2011)**

Thompson elected to not testify in his own defense at his murder trial in fear that the prosecution would bring up a prior conviction for armed robbery to challenge his credibility. Thompson was convicted, sentenced to death, and served seventeen years in prison. A month before his execution, a crime lab report was discovered which would have exonerated Thompson in the armed robbery case; a subsequent trial resulted in Thompson's acquittal of the murder charges.

Thompson brought a § 1983 suit against the District Attorney's office, alleging that the prosecutors had failed to disclose the crime lab report in violation of *Brady v. Maryland*. Thompson contended that this violation was caused by the DA's deliberate indifference to an obvious need to train prosecutors to avoid such constitutional violations. The jury found the DA's office liable for failure to train and awarded damages to Thompson, and the Fifth Circuit affirmed.

The Supreme Court reversed in a 5-4 split. While the prosecutors should have given Thompson's attorneys the blood evidence, misconduct by prosecutors which leads to a wrongful conviction can lead to liability for the DA's office only if there is awareness of a pattern of similar bad behavior, but a training program for prosecutors addressing the problem is not put in place. The failure to train must constitute deliberate indifference to the rights of persons with whom the untrained prosecutors come into contact; without notice that a training program is deficient (*i.e.* that there is a pattern of similar constitutional violations), decision-makers cannot be said to have deliberately chosen a training program to cause violations of constitutional rights.

The dissent pointed to the fact that several prosecutors acted in concert to withhold the blood evidence, as well as four reversals for Brady violations in the ten years preceding Thompson's robbery trial; based on this, the District Attorney should have been able to see that his office's failure to train prosecutors could have led to this kind of failure to follow the law.

***Los Angeles County v. Humphries,* 131 S.Ct. 447 (2011)**

The California Child Abuse and Neglect Reporting Act requires law enforcement to investigate allegations of child abuse; agencies must report all instances of reported abuse that the agency finds "not unfounded," even if it is "inconclusive or unsubstantiated." The statute

does not provide for review of reports or challenges to individuals' inclusion in a central index maintained by the State.

The Humphries were accused of child abuse but were later exonerated. However, they could not have their names removed from the central child abuse index as there was no proper mechanism for doing so, which effectively meant their names would remain available to various state agencies for at least ten years. The Humphries were awarded damages in a § 1983 action brought against the California Attorney General, the Los Angeles County sheriff, two detectives in the sheriff's office, and the County of Los Angeles. The County denied liability, arguing that as a municipality, it could only be liable under *Monell* for § 1983 claims if a municipal policy or custom caused deprivation of a federal right. As it was a state—rather than county—policy that brought about any deprivation, the County contended it was entitled to the protection of *Monell*.

The Supreme Court agreed. *Monell* applies to § 1983 claims against municipalities for prospective relief as well as to claims for damages. Nothing in the text of § 1983 suggests that the causation requirement in the statute should change with the form of the relief sought. In the absence of a county policy or custom depriving people of their constutitional rights, the Humphries could not sue the County to recover damages.

***Enochs v. Lampasas County,* 641 F.3d 155 (5th Cir. 2011)**

Enochs filed Section 1983 and 1985 federal law claims in state court against Lampasas County. In addition, Enochs brought state law violations, including the Texas whistleblower statute. The County removed the case to federal district court. The District Court found removal was proper and that the District Court could exercise supplemental jurisdiction over the state law claims. Enochs then moved to amend his complaint to delete his federal law claims and to remand the case to state court for decision on the remaining pendent state law claims. The District Ccourt granted Enochs' motion to drop his federal claims, but denied the motion to remand the case to state court.

Summary judgment was granted to the County, whereupon Enochs appealed the decision to retain the case in federal court. The Fifth Circuit reversed the denial of Enochs' request to remand the case to state court and ordered the District Court to remand the state law claims to the state district court where they were originally filed. The Court identified four factors set forth in 28 U.S.C. § 1367(a): (1) whether the state claims raise novel or complex issues of state law; (2) whether the state claims substantially predominate over the federal claims; (3) whether the federal claims have been dismissed; or (4) whether exceptional circumstances or other compelling reasons exist to decline jurisdiction. Additionally, courts must consider other common law factors, including judicial economy, convenience, fairness, and comity. The Fifth Circuit panel found that all of these factors weighed, at least to some degree, in favor of remand to state court. The Court also considered whether the possibility of forum manipulation on Enochs' part militated against remand, but concluded that the possibility of forum manipulation did not outweigh other factors that supported remand to state court.

***Lampton v. Diaz,* 639 F.3d 223 (5th Cir. 2011)**

A federal prosecutor (Lampton) prosecuted Diaz, a Mississippi Supreme Court justice, and his wife for fraud, bribery and tax evasion. The justice was acquitted but his wife pleaded guilty to tax evasion. Lampton then filed a complaint with the Mississippi Commission on Judicial Performance regarding Diaz' conduct, including copies of tax records obtained during the criminal investigation. That complaint was later dismissed.

The Diazes brought a § 1983 suit against Lampton, complaining of the release of the tax records (under various federal statutes that prohibit the release of tax returns obtained by public officials in the course of their duties) and also incorporating state law claims. Lampton

filed a Rule 12(b)(6) motion to dismiss the § 1983 claim under absolute prosecutorial immunity. The District Court denied the motion, and Lampton appealed.

The Fifth Circuit affirmed the District Court's decision, explaining that at the time of the enactment of §1983, common-law prosecutorial immunity extended only to "conduct that is intimately associated with the judicial phase of the criminal process." Lampton's conduct took place after the prosecution was over and was thus not part of the "judicial phase;" furthermore, the state ethics proceeding was not part of the "criminal process." The Court also rejected Lampton's contention that his ethical duty to report the alleged misconduct under the Mississippi Rules of Professional Conduct should have allowed him to invoke absolute immunity. The Fifth Circuit noted that Lampton could have satisfied his ethical duty and reported the Diazes' misconduct to the Commission without releasing their tax records. Finally, the Court explained that the various policy concerns underlying prosecutorial immunity, including the goal of protecting prosecutors from liability on the basis of their independence and judgment, did not justify immunity in this context.

V. MISCELLANEOUS CASES

Gary G. v. El Paso Indep. Sch. Dist., 632 F.3d 201 (5th Cir. 2011)

Gary G. hired an attorney when he felt like the EPISD was not providing his special needs son with the full amount of therapy he was entitled to. The EPISD admitted in a letter its failure to provide the full amount and offered, in settlement, compensatory hours of therapy but did not offer to pay Gary G.'s attorney's fees. Gary G. rejected the offer. The day after the EPISD made its offer and it had been rejected, the school again made the offer; it was again rejected. That same day, Gary G. filed a complaint with the Texas Education Agency, asserting that the EPISD had deprived his son of free appropriate public education and requesting a due process hearing. Gary G.'s attorney then notified the EPISD that he represented Gary G. Two weeks later, the parties held a resolution meeting wherein Gary G.'s attorney inquired as to his attorney's fees. The EPISD stated that the fees were not justified because the written offer had been made before both the due process hearing request and the EPISD being notified that Gary G. was represented by counsel. At the due process hearing, the special education hearing officer determined that limitations applied to part of Gary G.'s claim but that he was entitled to compensatory therapy for the other part. Gary G. filed with the district court to challenge the limitations ruling and to establish that he was a prevailing party and entitled to attorney's fees. The district court eventually ruled that Gary G. was a prevailing party but that he was not entitled to all of his attorney's fees.

On appeal, the Fifth Circuit addressed whether a party who rejects a settlement offer and obtains from either an administration hearing officer or the district court no more educational relief than that offered by the settlement is an IDEA "prevailing party" for attorney's fees purposes; and, even if so, whether that prevailing party, if offered all requested educational relief, but not attorney's fees, is not substantially justified in rejecting that offer or unreasonably protracts final resolution of the controversy, requiring part, or all, of the requested fees to be denied.

To receive attorney's fees under the IDEA, the requesting party must be a "prevailing party." The Court concluded that a party who rejects a settlement offer and obtains from a hearing officer or the district court no more educational benefit than the settlement offer is technically a prevailing party under the IDEA. Thus, Gary G. was considered a prevailing party. However, prevailing parties are not automatically entitled to attorney's fees – they are only eligible. At issue is whether Gary G., who rejected a settlement offer that did not include attorney's fees, was substantially justified in, or unreasonably protracted the final resolution of the controversy by rejecting it. The Court found that Gary G. was not substantially justified in rejecting the offer – at the time of EPISD's first offer of settlement, Gary G.'s

attorney had only performed 13.8 hours of work. Instead of accepting that offer and paying for minimal attorney's fees, Gary G. protracted the matter, causing it to last an additional three years. However, the Court did find that Gary G. was entitled to his attorney's fees up to the first offer of settlement (i.e., the 13.8 hours of work). Gary G. was not entitled to any fees that he incurred after the first settlement offer.

***Milner v. Dept. of the Navy*, 131 S.Ct. 1259 (2011)**

Milner, a resident of Puget Sound, submitted Freedom of Information Act ("FOIA") requests for the U.S. Navy's Explosive Safety Quantity Distance ("EQSD") information for the naval magazine at Indian Island. EQSD data includes maps calculating and visually portraying the magnitude of hypothetical detonations. The Navy refused to release the data, relying on Exemption 2 to FOIA, which protects from disclosure material "related solely to the internal personnel rules and practices of an agency." The District Court and Ninth Circuit supported the Navy's refusal, and the Supreme Court took up the case to resolve a circuit split on the issue.

The Supreme Court held that FOIA Exemption 2 only precludes the disclosure of certain records pertaining to human resources and employee relations issues. As EQSD data does not fall under the exception, the Navy's withholding of the maps was improper. The Court's analysis, in part, focused on statutory interpretation and consideration of Congressional intent in passing FOIA. The Court determined that the adjective "personnel" plainly refers to human beings; accordingly, the Navy erred in interpreting it more broadly. In addition, the Court noted that Congress wanted government to be transparent, a goal that was circumvented by interpreting Exemption 2 too broadly.

***FCC v. AT&T*, 131 S.Ct. 177 (2011)**

The Supreme Court unanimously held that corporations do not have a right of "personal privacy" under the Freedom of Information Act. The Court's analysis turned on the word "personal." Chief Justice Roberts rejected the contention that "personal" applied to a corporation—which is legally a person—as standard dictionary definitions do not ordinarily relate to artificial persons. Finding the plain meaning of the term to be clear, and observing that many adjectives do not reflect the meaning of corresponding nouns (corn and corny, crank and cranky, *et al.*), the Court held that AT&T could not hide behind the personal privacy exemption to FOIA. In closing, Chief Justice Roberts commented, "We trust that AT&T will not take it personally."

***Ortiz v. Jordan*, 131 S.Ct. 884 (2011)**

Ortiz brought a §1983 case alleging she was sexually assaulted by a corrections officer while incarcerated in the Ohio Reformatory for Women, that prison authorities did not act to protect her against future assaults, and that she was retaliated against for her reporting of the assaults in violation of the Eighth and Fourteenth Amendments. Prison authorities moved for summary judgment on qualified immunity grounds, but the district court denied summary judgment, finding that the qualified immunity defense turned on material facts genuinely in dispute. The prison officials did not appeal the denial of summary judgment. The case proceeded to trial and Ortiz obtained favorable verdicts against the prison authorities. The prison officials did not file Rule 50(b) motions challenging the legal sufficiency of the evidence. The authorities appealed the denial of summary judgment to the Sixth Circuit, which reversed the jury verdict and held that qualified immunity sheltered the authorities from Ortiz' suit.

The Supreme Court reversed the Sixth Circuit, holding that a party in a federal civil case may not appeal a denial of a motion for summary judgment after a District Court has conducted a full trial on the merits. Rather than await a full trial, the prison officials should have filed an interlocutory appeal. However, once the case proceeded to trial, the trial record superseded the summary judgment record, and the qualified immunity defense must be

evaluated in light of the evidence received by the trial court. As the law surrounding qualified immunity was not in dispute, but rather the facts giving rise to a potential qualified immunity claim, the Sixth Circuit should not have reconsidered the jury's decision on official liability.

***Sossamon v. Texas,* 131 S.Ct. 1651 (2011)**

Sossamon, an inmate in the Texas prison system, sued the State and various officials in their official and individual capacities under RLUIPA, arguing he was denied access to the chapel and religious services while he was on cell restriction for disciplinary infractions. The district court held that sovereign immunity barred Sossamon's claims for monetary relief. The Fifth Circuit affirmed, holding the officials could not be sued in their individual capacities under RLUIPA as the Act was passed pursuant to Congressional Spending Power and not under the Fourteenth Amendment.

The Supreme Court affirmed the holdings of the lower courts. In a 6-2 decision, Justice Thomas reasoned for the majority that the States, by accepting federal funds, "do not consent to waive their sovereign immunity to private suits for money damages under RLUIPA." Thus, sovereign immunity bars suits for damages because no statue expressly and unequivocally includes such a waiver.

***DeMoss v. Crain,* 636 F.3d 145 (5th Cir. 2011)**

DeMoss, a Muslim prison inmate, challenged various policies of the Texas Department of Criminal Justice as violating the RLUIPA. The Fifth Circuit rejected his challenges to the prison policies that required inmate-led religious services to be tape recorded when there is no staff member or outside volunteer present; barred inmates from carrying a pocket-sized Bible or Qur'an; required inmates to be clean-shaven; and did not permit inmates to stand for extended periods of time in prison dayrooms. Each of the policies was demonstrated to be the least restrictive means of serving compelling penological interests without imposing substantial burdens on the inmate's religious practices. DeMoss' challenge to a policy that prohibited inmates confined to their cells for disciplinary infractions from attending religious services was dismissed as moot since the policy had been changed.

***Kentucky v. King,* 563 U.S. __ (2011)**

In this opinion, the Supreme Court examined the application of the "exigent circumstances" exception to the Fourth Amendment. Lexington, KY police officers followed a suspected drug dealer to an apartment complex after an undercover drug bust. The suspect went into a breezeway and the officers heard a door shut, but the officers could not see which of two apartments the suspect entered. Smelling marijuana coming from one apartment, the officers knocked on that door, assuming the suspect had entered that apartment. No one came to the door. Hearing noises they believed constituted destruction of evidence, the officers kicked down the door, finding King (who was not the suspected drug dealer) with marijuana and cocaine.

King argued that the exigent circumstances rule does not apply when—as here—the police effectively create the emergency justifying a warrantless search of a residence. In an 8-1 vote, the Supreme Court disagreed. Writing for the majority, Justice Alito held that unless the police threatened to do, or actually did, something that violated the Fourth Amendment, the "exigent circumstances" rule still applies. In reaching this decision, the Court pointed out that occupants of a residence have other protections against warrantless searches. If they fail to take advantage of those protections (for example, telling the police that they cannot enter), it is their own fault. This case is important as it helps resolve the varied and inconsistent manner in which different states have treated police-created emergencies differently for purposes of the exigent circumstances rule.

***Virginia Office for Protection and Advocacy v. Stewart,* 131 S.Ct. 1632 (2011)**

VOPA is an independent state agency created under federal statutes and dedicated to advocacy for persons with developmental disabilities or mental illnesses. VOPA sued state officials to obtain mental health records for persons committed to state mental facilities after two people died in the facilities and another was injured. VOPA sought to investigate allegations of wrongdoing in the facilities, but Virginia refused to voluntarily disclose the records. The Supreme Court's analysis revolved around *Ex parte Young*, 209 U.S. 123 (1908), in which the Court held that the Eleventh Amendment rule prohibiting lawsuits against the state did not extend to suits against state officials, at least not when the lawsuit is filed to stop the state from violating federal law. Based on *Ex parte Young*, the 6-2 majority held that the "identity of the plaintiff" is not important; that is, even though a state agency was suing a state official from the same state, such suits were permitted. This opinion extends the *Young* doctrine just enough to permit state agencies to make sure that same-state officials comply with federal law.

***The Elijah Group, Inc. v. City of Leon Valley,* 643 F.3d 419 (5th Cir. 2011)**

The City of Leon Valley is landlocked by the City of San Antonio. It maintained a zoning code allowing churches to obtain Special Use Permits in certain business zones until 2007, when the City amended its zoning code for the announced purpose of stimulating local economy along the Bandera Road retail corridor. SUPs were no longer available for church use in those zones. The Elijah Group ("Church") sought to purchase property and conduct religious activities in one such zone, but the City denied the rezoning request, permitting the Church to offer day care services on the property, but specifically disallowing "any church use."

The Church nevertheless began to hold religious services on the property, at which time the City obtained a temporary restraining order against the Church. The Church sued the City, claiming that the zoning restriction on religious use violated RLUIPA, as well as the U.S. Constitution and state law. The District Court granted summary judgment for the City and dismissed the Church's claims. On appeal, the Fifth Circuit reversed on the RLUIPA claim, finding that the imposition of the ordinance violated that statute's "Equal Terms Clause."

The Fifth Circuit focused on the Equal Terms Clause in RLUIPA, which provides that "no government shall impose a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." By its nature, this clause requires that the religious institution's treatment be compared to that of a nonreligious counterpart, or "comparator." The Court noted that different circuits have adopted different tests for deciding who/what the comparator should be in a given case. For example, the Second, Third and Seventh Circuits use the same comparator for all ordinances – similarly situated non-religious institutions – although there are slight differences in how each of these circuits defines who is similarly situated. By contrast, the Eleventh Circuit approach looks at the nature of the zoning ordinance – whether it is facially neutral or facially discriminatory – and uses a different comparator for each.

Ultimately, the Fifth Circuit chose not to adopt another circuit's approach. Instead, it concluded that because the ordinance on its face completely prohibited the Church from applying for an SUP while allowing certain nonreligious and nonretail uses to apply for an SUP, it did not treat the Church on equal terms with nonreligious organizations. While the Equal Terms Clause requires a church to show more than that its religious use was forbidden while some non-religious uses were allowed, it does not allow a City to prohibit a church from applying for an SUP when that option is available to non-religious groups whose uses are also inconsistent with the zoning ordinance. The Fifth Circuit concluded, "At bottom, the ordinance treats the Church on terms that are less than equal to the terms on which it treats

similarly situated nonreligious institutions." The District Court's summary judgment was reversed, and the case remanded for further proceedings.

VI. CRIMINAL LAW

Skinner v. Switzer, 131 S.Ct. 1289 (2011)

Skinner's trial attorney did not seek to have all available evidence tested prior to his capital murder trial. Six years after his conviction and death row sentence, Texas enacted Article 64, which permits prisoners to gain postconviction DNA testing in limited circumstances. Skinner twice moved for such testing, which was denied. Skinner then filed a § 1983 action claiming that the prosecutor's refusal to allow him access to biological crime scene evidence violated his right to due process. The District Court adopted the Magistrate Judge's recommendation that the case be dismissed for failure to state a claim, based on the rationale that postconviction requests for DNA evidence fall under habeas corpus rather than § 1983, and the Fifth Circuit affirmed.

The Supreme Court reversed. Prisoners need not rely on federal habeas proceedings (which may be more restrictive); rather, federal civil rights laws (such as § 1983) may be used to file suits to have DNA evidence tested. As Skinner was challenging the postconviction DNA testing statute "as construed" by Texas courts, not the prosecutor's conduct or the decisions of the Texas courts, the statute or rule governing the decision may be challenged in a federal action, but not the decision itself. The Court emphasized that Skinner would not necessarily win the suit to have the DNA tests run; the decision is limited to Skinner's ability to bring the claim in the manner in which he did.

Michigan v. Bryant, 131 S.Ct. 1143 (2011)

This is a Confrontation Clause case. Michigan police found Covington mortally wounded. Covington told the police he had been shot by "Rick" (referring to Bryant) outside Bryant's house and had then driven himself away. At Bryant's trial, the officers testified to Covington's statements. Bryant was convicted of second-degree murder. The Michigan Supreme Court reversed the conviction under the Sixth Amendment's Confrontation Clause, holding the statements to be inadmissible testimonial hearsay.

The Supreme Court, much to Justice Scalia's dismay, reversed, holding that Covington's statements (identifying Bryant and the location of the shooting) made during an emergency are admissible not as testimonial statements, but because they had a primary purpose to enable police assistance to meet an ongoing emergency. Therefore, admission of the statements did not violate the Confrontation Clause.

Justice Scalia's dissent follows his rationale in *Crawford v. Washington*, the Court's 2004 landmark case, and its progeny, in which Justice Scalia held that the Confrontation Clause cases makes clear that the Constitution prohibits such out-of-court statements, even though evidentiary rules allowed juries to hear them under some circumstances. Covington's statements should not have been admissible, because the police were investigating a crime when the victim said that Bryant had shot him. Because they were in the course of an investigation, the intent of the police in eliciting the accusation was "testimonial," or intended for use at a future trial. Justice Sotomayor considered that the informality of Covington's interrogation, while awaiting the arrival of emergency medical services, was "fluid and somewhat confused," given the uncertainties of the situation and what officers perceived to be an ongoing emergency with a shooter whose whereabouts were unknown.

United States v. Aguilar, 645 F.3d 319 (5th Cir. 2011)

Aguilar, an ambulance driver and EMT, was arrested at a border checkpoint with 388 pounds of marijuana hidden in his ambulance. He was tried and convicted for conspiracy to possess with intent to distribute and possession

with intent to distribute over 100 kilograms of marijuana. In this direct appeal, the Fifth Circuit concluded that the prosecutor's improper closing argument deprived Aguilar of a fair trial, vacating the conviction and remanding the case for a new trial.

Aguilar's interview by DEA agents wherein he allegedly confessed was neither recorded nor reduced to a written statement. At trial, two agents testified to their recollections of Aguilar's confession. The Fifth Circuit found that after the defense attorney suggested that the agents might lie, the prosecution was entitled to show—during the direct examination of the agents—that they had no motive to lie. Accordingly, as the prosecutor did not give a personal opinion regarding the agents' veracity but rather only elicited testimony from an agent that a conviction would not benefit him or his career, and that he could be prosecuted for perjury if he lied in court, this testimony was proper to respond to the defense's suggestions about the agents' motive.

However, the Fifth Circuit took issue with the prosecutor's closing argument that the agents were "getting a sad deal" when they were called liars in the courtroom, as that was an "improper emotional appeal that transmitted the message that the agents' testimony should be believed because they were [government] agents." The Court further found that this error was clear and obvious, and that such improper bolstering of the credibility of the government agents could not be excused as mere rebuttal. As the Court found that the outcome of the trial depended on whether the jury believed Aguilar or the DEA agents, the erroneous bolstering affected Aguilar's substantial rights, requiring vacation of the conviction and remand for a new trial.

***United States v. Potts,* 644 F.3d 233 (5th Cir. 2011)**

Potts appealed his conviction for being a felon in possession of a firearm. During a traffic stop, Potts did not immediately comply with the police officer's instructions to show his hands, and the officer ordered Potts to exit the car, at which point a firearm was visible under the seat. Potts was handcuffed and asked whether the gun belonged to him, to which Potts did not respond. A search was conducted, yielding additional firearms and ammunition. Potts was then arrested.

At trial, the prosecution asked the arresting officer about Potts' silence, to which Potts objected. Rather than ruling on the objection, the trial court suggested that it could make a curative instruction that Potts had no obligation to answer the officer's question, and that it was not against the law to do so. Potts agreed to the instruction (without reasserting his objection, objecting to the instruction, or moving for a mistrial), which the trial court then gave. During closing argument, the prosecutor again brought up Potts' silence; Potts objected, not on Fifth Amendment grounds but arguing that the prosecution was attempting to shift the burden of proof. Potts was convicted.

The Fifth Circuit conducted a plain error review—rather than *de novo*—of Potts' constitutional objection to the officer's testimony on his silence because Potts had not properly preserved his claim. In short, in order to preserve his claim, Potts should have continued his objections to the testimony and moved for a mistrial rather than agreeing to the curative instruction. The Fifth Circuit determined that there was no plain error in the trial court's proceedings, as the Fifth Circuit had not yet conclusively addressed whether the use of pre-*Miranda* silence as substantive evidence of guilt is a Fifth Amendment violation.

***United States v. Hernandez,* 647 F.3d 216 (5th Cir. 2011)**

The Fifth Circuit upheld the warrantless GPS tracking of a vehicle, holding that the Fourth Amendment was not violated when law enforcement officers placed a GPS tracking device on the vehicle and used it to track a suspect's movements.

The DEA placed a GPS device on the car of Angel Hernandez without a warrant. Angel's brother, the defendant Jose Hernandez,

drove the vehicle while it was being tracked and was eventually caught using the vehicle to transport twenty pounds of methamphetamine. Jose moved to suppress evidence of the drugs, arguing that the Fourth Amendment prohibited the placement of the GPS device on Angel's car without a warrant, as well as its later use to track Jose. The Fifth Circuit upheld the District Court's denial of the motion to suppress. As to the "placement" claim, the Fifth Circuit held that Jose lacked standing to challenge the placement of the device on Angel's vehicle, as Jose lacked a sufficient possessory interest in the vehicle. On the "tracking" claim, while Jose had standing to challenge the use of the GPS to track his location, the Fifth Circuit found that the government's actions did not violate the Fourth Amendment. Specifically, the GPS device was not intrusive, and it was part of a permissible surveillance scheme (incidentally initiated on Angel, and only later expanded to include Jose). Further, the tracking was not "extensive" as Jose was tracked on only one trip and with only occasional location updates.

***Wilson v. Cain*, 641 F.3d 96 (5th Cir. 2011)**

Wilson, a Louisiana state prisoner, appealed the dismissal of his federal habeas corpus (28 U.S.C. §2254) petition. During his imprisonment, Wilson was interviewed at the prison without being given *Miranda* warnings after a fight with a fellow inmate. The questioning was conducted by members of the prison staff, using the prison's routine immediate "post-fight" procedure (including handcuffing and isolating him from other inmates for the interview) to ensure the safety of the general prison population. The Fifth Circuit found that it was not objectively unreasonable for the state court to conclude that this was more like general "on-the-scene" questioning rather than a custodial interrogation of the type addressed by the Supreme Court in *Mathis v. United States* and *Maryland v. Shatzer*. The state court's determination that *Miranda* warnings were not required for admission of Wilson's incriminating statements as evidence at his trial did not constitute an unreasonable application of clearly established federal law. The Fifth Circuit affirmed the state court's judgment dismissing the petition.

***Dediol v. Best Chevrolet, Inc.*, ___ F.3d ___ (5th Cir. Sept. 12, 2011)**

In this case, the Fifth Circuit extended the Title VII framework for hostile work environment claims to actions arising under the Age Discrimination in Employment Act (ADEA). Dediol, a car salesman, sued his former employer, alleging he was a victim of a hostile work environment based on his age and religion. He also alleged constructive discharge. Dediol identified a pattern of verbal insults related to his age and religion, as well as physical threats and intimidation, leading to his resignation. The Fifth Circuit reversed the District Court's summary judgment in favor of the employer, determining that a hostile work environment can serve as the basis for an ADEA claim, and further that there existed genuine issues of material fact on Dediol's discrimination and constructive discharge claims.

Coming into line with the Sixth, Seventh, and Ninth Circuits, the Fifth Circuit for the first time formally extended Title VII's hostile work environment analysis to claims of age-based discrimination. The Court recognized a common purpose in "the elimination of discrimination in the workplace" in both Title VII actions and ADEA actions, noting the common substantive features shared by the two statutes. Applying longstanding Title VII hostile work environment precedent to Dediol's case, the court focused on the requirement that the harassment be objectively offensive. Reviewing Dediol's claims in the light most favorable to him, the court identified genuine issues of material fact on the question of the objective offensiveness of the conduct and accordingly reversed the district court's grant of summary judgment on the age discrimination claim. The Court also reversed summary judgment on the religious discrimination and constructive discharge claims, finding that Dediol had pled enough facts to create genuine issues of material fact related to those claims.

***Hernandez v. Yellow Transportation, Inc.*, 641 F.3d 118 (5th Cir. 2011)**

In this case, the Fifth Circuit considered whether harassment of employees of one race supports a harassment claim by employees of another race. Plaintiffs, two Hispanic employees, experienced acts of racial harassment that, standing alone, were not so "severe or pervasive" as to create an abusive working environment. However, they also offered evidence of harassment of black employees, which the District Court rejected on the ground that a hostile environment claim requires proof that Plaintiffs personally experienced harassment because of their race. On appeal,

the Fifth Circuit declined to decide whether, categorically, harassment toward one racial group could support a hostile environment claim by another racial group. Cross-category harassment evidence might be persuasive depending on the nature of the evidence, but the evidence was not probative in this case; to wit, the hostility allegedly directed at black employees neither physically threatened nor unreasonably interfered with the Hispanic employees' (Plaintiffs') work performance.

***United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011)**

18 U.S.C. §922(g)(5) forbids illegal aliens from possessing firearms. Portillo-Munoz, a citizen of Mexico, illegally entered the U.S. was working as a ranch hand when he was arrested after local police investigating a disturbance found a .22 caliber handgun in his car. Portillo pled guilty to violating the statute; however, he reserved his right to appeal the conviction on the grounds that the statute violated the Second Amendment.

In a split decision, the Fifth Circuit affirmed the conviction, holding that the law prohibiting an illegal alien from possessing a firearm did not conflict with the Second Amendment. The Court's analysis centered on whether Portillo-Munoz was one of "the people" allowed to "keep and bear Arms" under the Second Amendment and found guidance in the Supreme Court's 2008 decision in District of Columbia v. Heller. Though Heller did not address the question of whether an alien has the right to bear arms, it stated that the Second Amendment involves the rights of "law-abiding responsible citizens," "members of the political community" and "all Americans." Noting that illegal aliens are neither "law-abiding citizens," "members of the political community," nor "Americans," the Fifth Circuit held that illegal aliens are not protected by the Second Amendment.

The Court rejected Portillo-Munoz' argument that he had sufficient connections with the United States to be included in the definition of "the people," finding a distinction between the rights offered by the Second and Fourth Amendments: because the Fourth Amendment is at core a protective right, whereas the Second Amendment grants an affirmative right, the Court found it reasonable to think that fewer groups would be extended the Second Amendment right. The Fifth Circuit also observed that Congress has greater leeway to regulate the activities of illegal aliens than it does to regulate its citizens, and that Congress often makes laws that distinguish between citizens and aliens and between lawful and illegal aliens. In sum, the Fifth Circuit resolved that "the phrase 'the people' in the Second Amendment of the Constitution does not include aliens illegally in the United States."