RECENT FEDERAL CASES OF INTEREST TO CITIES

TEXAS CITY ATTORNEYS ASSOCIATION
SOUTH PADRE ISLAND, TEXAS
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D. RANDALL MONTGOMERY
M. AMES HUTTON
D. Randall Montgomery & Associates, P.L.L.C.
12400 Coit Road, Suite 560
Dallas, Texas 75251
(214) 292-2602
rmontgomery@drmlawyers.com
ahutton@drmlawyers.com

(Special thanks to Alyssa Barreneche for her assistance)

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I. First Amendment

Federal Election Commission v. Wisconsin Right to Life, Inc., 127 S.Ct. 2652 (2007)

Section 203 of the Bipartisan Campaign Reform Act of 2002 bans corporations from using its funds to pay for any "electioneering communication" within 30 days of a federal primary and within 60 days of a federal general election in the jurisdiction where the candidate is running. Wisconsin Right to Life ("WRTL") began broadcasting advertisements on July 26, 2004, advising the public that a group of Senators were filibustering in an attempt to block federal judicial nominees and encouraging voters to contact Wisconsin's two senators and tell them to oppose the filibuster. WRTL planned to air the ads during August of 2004, using the corporation's funds, despite the fact that August 15th was 30 days prior to the Wisconsin primary. In a preemptive move, WRTL filed suit against the FEC, seeking declaratory and injunctive relief, and alleging that §203 was unconstitutional as applied to WRTL's three ads they sought to run as well as future ads. The District Court denied the injunction and WRTL did not run its ads during the "black out period." The court subsequently dismissed the complaint.

Upon review by the Supreme Court, the Court found that the case fit under the exception to mootness for disputes capable of repetition. In this case, WRTL planned to air future ads. The majority found that §203 was unconstitutional as applied to the subject ads because the speech at issue was not the "functional equivalent" of express campaign speech. The Court found that the content of the ads was consistent with genuine issue ads. Likewise, the ads did not mention an election, primary, candidate, political party, or take a stand on a candidate's character or qualifications for office. Accordingly, the Court found that §203 was unconstitutional as applied to these ads.

Since the ruling in this case, the FEC has announced that it will write a new rule into the Commissioner's Regulations, reflecting the Court's ruling with regards to WRTL.

Sole v. Wyner, 127 S.Ct. 2188 (2007)

Winning a battle but losing the war doesn't count, as one Floridian found out. Wyner, a nudist, notified the Florida Department of Environmental Protection ("DEP") in mid-January that she intended to create an antiwar artwork at a state beach park on Valentine's Day. Her proposed artwork consisted of nude individuals assembled into a peace sign. DEP responded that she had to comply with Florida's "bathing suit rule", which requires at least thongs to cover the lower half of individuals, and bikini tops for women. Wyner filed suit under 42 U.S.C. §1983, invoking the First Amendment and requesting immediate injunctive relief. The District Court granted her relief and the artwork was staged, although not in compliance with the District Court's suggestion that the artwork be screened from the public. After the Valentine's Day display, Wyner proceeded with her lawsuit, seeking to obtain a permanent injunction so that she could conduct future, nude activities. Ultimately, she lost. However, because §1983 provides that a prevailing party can recover reasonable attorney's fees, the District Court awarded Wyner her fees since she prevailed in obtaining the preliminary injunction.

The Supreme Court unanimously reversed the decision, holding that the "prevailing party status" does not apply on a preliminary injunction that is reversed, dissolved, or otherwise undone by the final decision in the same case.

Davenport v. Washington Education Association, 127 S.Ct. 2372 (2007)

The National Labor Relations Act allows States to regulate their labor relationships with their public employees. Many States, including Washington, authorize a union and a government employer to enter into "agency-shop" agreements which entitle the unions to levy fees on employees who are not union members but who are represented by the union

in collective bargaining. In Washington, where such agency-shop agreements are in place, unions can charge nonmembers an agency fee equivalent to the full membership dues of the union and to have the employer collect the fee through payroll deductions. However, under §760 of Washington's Fair Campaign Practices Act, unions are prohibited from using a nonmember's fees to make contributions or expenditures to influence an election unless the nonmember affirmatively authorizes such.

The Washington Education Association ("WEA") collected fees from nonmembers that it represented in collective bargaining. In order to comply with the law, WEA would send a *Hudson* packet to nonmembers, notifying them of their right to object to paying fees for nonchargeable expenditures. The packet gave the nonmembers three choices: (1) pay the fees in full by not objecting within 30 days; (2) object to paying for nonchargeable expenses and receiv a rebate as calculated by WEA; or (3) object to paying for nonchargeable expenses and receive a rebate as calculated by an arbitrator. WEA was subsequently sued because none of these options complied with §760, requiring an affirmative authorization for use of the funds. The State Supreme Court ultimately held that although a nonmember's failure to object after receiving the *Hudson* packet did not satisfy §760's affirmative-authorization requirement, that requirement violated the First Amendment. The Supreme Court reversed, finding that it was not a First Amendment violation for a State to require its public-sector unions to receive affirmative authorization from a nonmember before spending that nonmember's agency fees for election-related purposes.

***Davis v. McKinney, M.D.*, 518 F.3d 304 (5th Cir. 2008)**

Defendants McKinney and Chaffin brought an interlocutory appeal challenging the denial of their summary judgment motion seeking dismissal based on qualified immunity from the Plaintiff's §1983 suit for retaliatory discharge in violation of the First Amendment.

Plaintiff filed this suit against two individual defendants (McKinney and Chaffin) as well as several divisions of the University of Texas system where she served as an IS Audit Manager at the UT Health Science Center in Houston, Texas. When the Plaintiff learned of a restructure in December 2003, she told the director she would like to apply for the new position, and was at that time given an indication she would likely get the job.

In August 2003, the Vice President for Facilities Planning requested an audit of the computer systems of his department because he suspected that employees were reviewing pornography on work computers. At a subsequent meeting, the Plaintiff presented evidence of 300 or more employees who were accessing pornography and was authorized to confiscate computers from employees if she had a clear indication that the access was intentional. After the meeting, the Plaintiff had 11 computers confiscated with one believed to have some child pornography on it. Plaintiff attempted to meet again as requested with her superiors but never could get her calls returned and had even received a call to have some of the confiscated computers returned to certain physicians. After continuing her investigation and being denied another meeting, she concluded that the upper management were turning a blind eye to the investigation. In September 2003, Plaintiff asked to be taken off the investigation because she felt like it created a hostile work environment and the requirement that she review this repugnant pornography materials denigrated her as a woman.

Around September 11, 2003, plaintiff applied for the newly created Assistant Director position but at the same time sought assistance from the Employee Assistance Program to cope with the stress of dealing with the pornography and receiving no support in her investigation. She also contacted the EEOC about discriminatory behavior of UT's upper management.

Plaintiff claimed that shortly after that her work responsibilities were reduced to mundane tasks and that she heard from others

that upper management was pressuring for her to be terminated. In October 2003, the Plaintiff wrote a letter to the president accusing the upper management of unethical and alleged illegal activities claiming that the upper management had a pattern of sweeping pornography and investigations under the rug and not terminating or disciplining offending employees. She also outlined a pattern of treating certain employees, white men, physicians, and faculty members more lenient than black employees. The complaint letter also alleged that the president was creating an excessive number of highly paid upper management positions to the detriment of the division's budget as well as accusations that he was not fulfilling his responsibilities to the University and others. Near the end of the complaint letter, Plaintiff wrote because she was no longer confident that the UT system could investigate itself, she had contacted the FBI concerning possible child pornography on eight computers and the EEOC about discriminatory practices.

In November 2003, Plaintiff was advised that the position for which she applied and was almost assured would have was frozen and it would not be filled. Plaintiff contends that this action was taken in retaliation of her complaint letter and the related reports to the FBI and the EEOC. Defendant asserts that he froze the position because he was considering outsourcing the entire internal audit function. In December 2003, Plaintiff feeling that termination was imminent, resigned. She was diagnosed with depression and felt like her work place conditions had grown so deplorable that she had been constructively discharged.

In February 2004, the FBI concluded its investigation and found no child pornography. Plaintiff filed suit and May 2005 alleging that the individuals McKinney and Chaffin violated her civil rights pursuant to the Fourteenth Amendment and §1983 by retaliating against her for her First Amendment speech rights in her complaint letter and related communications to the FBI and EEOC.

While addressing the qualified immunity issues in its opinion, the Court continues its analysis of the First Amendment claims and specifically addressed the change in the law after the *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951, 1654 L.Ed.2d 689 (2006) case, noting that under *Garcetti* the Court must shift its focus from the content of the speech to the role of the speaker occupied when the person said the statement. The Court notes that the Seventh Circuit has framed the new test in a manner in which the Court find persuasive as follows:

> *Garcetti*…holds that before asking whether the subject matter of a particular speech is a topic of public concern, the court must decide whether the Plaintiff was speaking "as a citizen" or as part of her public job. Only when government penalizes speech that a Plaintiff utters "as a citizen" must the court consider the balance of public and private interests, along with the other questions posed *Pickering* and its successors….

The Court also liked the way it was stated in an educational law treatise as follows:

> The inquiry whether the employee's speech is constitutionally protected involves three considerations. First, it must be determined whether the employee's speech is pursuant to his or her official duties. It is it, then the speech is not protected by the First Amendment. Second, if the speech is not pursuant to official duties, then it must be determined whether the speech is on a matter of public concern. Third, if the speech is on a matter of public concern, the *Pickering* test must be applied to balance the employee's interest in expressing such a concern with the employer's

> interest in promoting the efficiency of the public services it performs through its employees.

Ronna Greff Schneider, 1 Education Law: First Amendment, Due Process and Discrimination Litigation § 2:20 (West 2007).

The first task is to determine whether the Plaintiff's speech was part of her official duties was whether she spoke as a citizen or as part of her public job. The Court noted that activities undertaken in the course of performing one's job are activities pursuant to official duties and not entitled to First Amendment protection. Cases from other circuits appear to be consistent in holding that when public employees raise complaints or concerns up the chain of command at their workplace about his job duties, the speech is undertaken in the course of performing a job. If, however, the public employee takes the job concerns to people outside of their job in addition to raising them up the chain of command, then the those external communications are usually seen as being made by a citizen, not an employee.

Whenever there is a "mixed" speech case, the courts have supported the analysis of looking at each of the communications separately both by topic and recipients. The court also noted that the aspects of the plaintiff's communications were made as a citizen qualify for First Amendment protection if they raise a matter of public concern.

Both of the defendants argued that the court erred in denying qualified immunity to them in their individual capacities because their actions were objectively reasonable. To evaluate a claim for qualified immunity it involves a two step inquiry: first, a court must decide whether if the allegations are true establish a violation of a clearly established right. Second, if the plaintiff has alleged a violation the court must then decide whether the conduct was objectively reasonable in light of a clearly established law at the time of the incident. The courts also note that even if the government official's conduct violates a clearly established right, the official is entitled to qualified immunity if his conduct was objectively reasonable.

The court concluded that the complaints about the university's inadequate response to the employees' computer pornography investigation for the Internal Audit Department directed at the president of the university and to her immediate supervisor was not protected speech under the First Amendment; complaints to the chancellor's university system were not protected speech and complaints about the presence of possible child pornography on the university's computers directed to the FBI and about racial discrimination to the EEOC were not made pursuant to the employee's official duties and that genuine issues of material fact barred summary judgment.

II. Equal Protection and Due Process

Fry v. Pliler, 127 S.Ct. 2321 (2007)

John Fry was convicted of two murders despite presenting witness testimony linking another individual, "X", to the killings. Fry sought to present one additional witness who planned to testify that she had heard X discussing homicides that sounded like the murders involved in this case. The trial court excluded the testimony, ruling that the defense had provided insufficient evidence to link the homicides described by X to the actual murders involved in the trial.

On appeal, Fry argued that the exclusion of evidence violated *Chambers v. Mississippi*, 410 U.S. 284 (holding that a combination of erroneous evidentiary rulings rose to the level of a due-process violation). The appellate court, in affirming, failed to specifically address *Chambers* but instead said that no possible prejudice could have resulted from the exclusion. Fry then filed a federal habeas petition raising a due process claim. The federal court concluded that although the state appellate court failed to apply the *Chambers* standard, under the standard set forth in *Brecht v. Abrahamson*, 507 U.S. 619, there was an insufficient showing that the improper exclusion

had a "substantial and injurious effect" on the jury's verdict.

The Supreme Court granted certiorari to consider whether *Brecht* or *Chapman* provides the appropriate standard of review when constitutional error in a state-court trial is first recognized by a federal court. In *Chapman*, the Court held that a federal constitutional error can be considered harmless only if a court finds that it was harmless beyond a reasonable doubt. In *Brecht*, the Court considered whether the *Chapman* standard applied on collateral review of a state-court criminal judgment under 28 U.S.C. § 2254. In rejecting the *Chapman* standard, the Court adopted the more forgiving standard of review applied to nonconstitutional errors on direct appeal from federal convictions. That is, an error is harmless unless it "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 631. The Court concluded that *Brecht* would apply in virtually all 28 U.S.C. §2254 cases, such as the present one, regardless of whether the state appellate court recognized the error and reviewed it under the *Chapman* standard of review. The Court did not address whether the exclusion of the witness's testimony substantially and injuriously affected the jury's verdict since that argument was not encompassed in the certified question presented.

***Winkelman v. Parma City School District,* 127 S. Ct. 1994 (2007)**

The primary entitlement created in the 30-year-old Individuals with Disabilities Education Act (IDEA) is the right for a child with disabilities to an appropriate public education in the least restrictive environment, pursuant to an individualized education program (IEP). Throughout the statute, parents are given rights to participate in the determination of eligibility of the child for special education services and the formulation of the child's IEP. Parents also have the right to challenge any decision of the school district regarding the disabled child's eligibility and the educational services provided to the child by initiating an administrative hearing process. Parents also may choose to reject the educational program offered by the school district, enroll their child in private school, and initiate an administrative hearing to obtain tuition reimbursement. Parents must prove in that hearing that the school district's program did not allow the child to make reasonable progress and the school they selected was appropriate. Decisions of the administrative hearing officer may be appealed to federal district court.

In *Winkelman*, the parents of Jacob Winkelman participated with the Parma City School District in Ohio in the development of an IEP for their autistic son. Ultimately, however, they felt that the program offered to Jacob was not appropriate to meet his needs, and they enrolled him in a private school. In accordance with the procedural rights provided to them by the IDEA, they filed for an administrative hearing. They claimed that the program in the public school offered to Jacob did not provide him with a "free, appropriate public education." They also complained of a number of procedural violations that deprived them of a real role in the formulation of Jacob's IEP. They asked the hearing officer to order tuition reimbursement and other costs. Unsuccessful in the administrative process, the Winkelmans appealed to federal district court, and when again unsuccessful, to the Court of Appeals for the Sixth Circuit. Although they had the assistance of an attorney at times, they filed the appeals in federal court without a lawyer. The Sixth Circuit refused to let the case go forward unless the Winkelmans hired counsel. Basing its decision on its previous ruling in *Cavanaugh v. Cardinal Local School District*, the appellate court held that the IDEA does not grant parents the right to represent their children in federal court. The court acknowledged that the IDEA allows the parents to pursue their child's right to a free, appropriate public education in the administrative process, but could find no exception in the statute to the usual common-law rule that non-lawyers may not represent the claims of others in court.

The Supreme Court reversed the Sixth Circuit's ruling, holding that parents have rights all of their own – enforceable by them in court – to assure that their child gets a free public

education that fits the child's special needs. Justice Kennedy, writing for the majority, stated that parents, under the IDEA, are full legal partners to the child and not just the guardians of the child's own rights. The Court stated that, in going to court, the parents may act as their own attorneys.

***Rigley v. FEMA*, 512 F.3d 727 (5th Cir. 2008)**

Recipients of federal disaster relief "rental assistance" payments following Hurricanes Katrina and Rita sued for "continued rent assistance" for periods following the initial three month payment after being found ineligible for the longer period and sought certification of a class of similarly-situated individuals. In essence, plaintiffs challenged the denials (and system itself) as confusing, unresponsive, and deficient. The trial court certified a class and entered a preliminary injunction, enjoining FEMA from terminating rental assistance to members of the class without providing adequate written notice.

In this interlocutory appeal, FEMA successfully argued that the class members do not have a property interest in continued rental assistance payments that would rise to due process claims. While Plaintiffs described "an overly bureaucratic and frustratingly unresponsive agency that misapplies its own rules and standards, uses incomprehensible codes to inform applicants of its decisions on their requests for assistance, and failed to offer any meaningful review of those decisions on administrative appeal," Plaintiffs had not established a likelihood of success on the merits, given that continued rental assistance payments could be granted or denied at the government's discretion, which eliminates a property interest in the payments. In order for a government benefits program to give rise to a property interest in a stream of benefits, a plaintiff must identify an independent source governing the program that entitles him to receive recurring benefits upon an initial showing of eligibility (*e.g.*, welfare and social security disability programs). As nothing in FEMA's enabling legislation requires the provision of benefits on a continuing basis, no due process property interest was created.

***Burdick v. Quarterman*, 504 F.3d 545 (5th Cir. 2007)**

Burdick was indicted for capital murder and pleaded guilty to a lesser murder charge, for which a jury assessed a 45 year sentence. Burdick then filed a habeas petition, claiming her plea was involuntary as the trial court did not admonish her as to the range of punishment and her trial counsel was thus ineffective. The Fifth Circuit reluctantly determined that her plea was entered voluntarily, and thus her due process rights were not violated.

Due process required Burdick to be advised and understand the consequences of her guilty plea, including the maximum prison term and fine for the offense charged. This task is best left to the trial court, which failed to discharge its duty to Burdick. However, the Fifth Circuit found that as Burdick had been advised of the consequences of her guilty plea by another source (her attorneys), it was not reasonable to conclude that her plea was knowingly voluntarily entered, thus mooting her due process claim.

***Baranowski v. Hart*, 486 F.3d 112 (5th Cir. 2007)**

Baranowski, a Texas prisoner, filed suit against employees and officials of the TDCJ, alleging violations of his rights under the First Amendment, the Fourteenth Amendment, and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 et seq., for failing to provide weekly Sabbath and other holy day services, by failing to allow Jewish prisoners to use the chapel for their religious services, and by failing to provide him with a kosher diet. Baranowski also claims that prisoners of other religious faiths were treated more favorably than Jewish prisoners. He also alleges that he was improperly denied appointment of counsel, an evidentiary hearing, and his right to a jury trial. The Court of Appeals affirmed the district court's order

granting summary judgment in favor of the defendants-appellees.

The Court ruled that a prison regulation that impinges on an inmate's constitutional rights is valid if it is reasonably related to penological interests. The Court considered: (1) whether a valid and rational connection exists between the prison regulation and the legitimate governmental interest put forward to justify it; (2) whether there are alternative means of exercising the right that remain open to prison inmates; (3) the impact of the accommodation on prison guards, other inmates, and the allocation of prison resources generally; and (4) whether there are "ready alternatives" to the regulation in question. The Court noted that of the 145,000 offenders currently confined in TDCJ, only 900 are self-described as Jewish. Of those, only 70 to 75 are "recognized" as actually practicing their faith, with 90 in the conversion process. These numbers are very small when compared to the number of observant Protestants, Catholics, and Muslims. Applying these factors to the summary judgment evidence, the Court found that the defendants' financial, safety, space, and security concerns for the prison, its inmates, and employees, and the goal of maintaining a neutral policy of religious accommodation for all recognized religious faiths, are compelling governmental interests.

Regarding Baranowski's equal protection claim that the defendants favored other religions over Judaism, the Court stated that the Fourteenth Amendment does not demand that every religious sect or group within a prison—however few in numbers—must have identical facilities or personnel. Rather, prison officials must afford prisoners reasonable opportunities to exercise the religious freedom guaranteed by the First and Fourteenth Amendments.

***Marco Outdoor Advertising, Inc. v. Regional Transit Authority*, 489 F.3d 669 (5th Cir. 2007)**

A disappointed bidder on a contract to advertise on the Regional Transit Authority's vehicles, transit shelters, and transit benches brought suit under § 1983 to recover for an alleged breach of its due process rights in awarding the contract to another company that had allegedly submitted an inferior bid. The U.S. District Court for the Eastern District of Louisiana concluded that Louisiana's Public Bid Law did not apply to the advertising contract at issue and did not create any property right in receiving the contract in the disappointed bidder of a kind required to support its due process claims. The case was dismissed and the disappointed bidder appealed.

Under Louisiana jurisprudence, the Public Bid Law creates a property right in the highest responsible bidder to receive a contract that will generate revenue for a state entity.

The Court of Appeals declined to decide the issue of whether the Public Bid Law applied to the contract in question because, even assuming the Law did apply to create a property interest in the contract, Louisiana state courts provide an adequate procedural remedy for the alleged deprivation. Thus, the Court affirmed the dismissal of the bidder's complaint for failure to state a federal claim.

The Court found that the state provides unsuccessful bidders with adequate notice and hearing. Specifically, the state provides adequate notice when RTA announces a contract award, which puts losing bidders on notice that they will be deprived of any alleged property interest in the bid if they fail to take further action. Furthermore, the state guarantees unsuccessful bidders the right to a hearing through the Public Bid Law, which authorizes any unsuccessful bidder to sue in Louisiana state court to enjoin the public entity from awarding the contract. The Court determined that this policy provides an adequate pre-deprivation remedy.

***Haspel & Davis Milling & Planting Co. Ltd. v. Board of Levee Commrs. of the Orleans Levee Dist.*, 493 F.3d 570 (5th Cir. 2007)**

In 1924, the State of Louisiana authorized the Levee Board to acquire land to

build the Bohemia Spillway. However, in 1984, the Louisiana legislature directed the Levee Board to return the land to its former owners and to "provide a thorough accounting…concerning all revenues received from the affected property." The Levee Board issued quitclaim deeds to the landowners (or their successors), but did not pay the landowners the mineral royalties that the Levee Board received between June 1984 and the time the land was returned.

In February 1988, the landowners filed a class action in state court seeking a declaratory judgment decreeing that title to the mineral and other royalties vested with the original owners as of the effective date of the Act ordering return of the land. The landowners subsequently amended and supplemented their petition to assert a claim that an unconstitutional taking occurred when the Levee Board continued to collect and failed to return the mineral royalties.

After 12 years of litigation in state court, the parties entered into a Settlement Agreement which was approved by the state court via a Consent Judgment. In the Agreement, the landowners settled all their claims against the Levee Board in return for a payment of $2,318,263.72 immediately and another $18,767,145.26 "as and if funds are appropriated thereof." Pursuant to the Agreement, if the Levee Board did not pay at least $2,600,000 per year, the landowners could exercise their rights to enforce the Consent Judgment "in accordance with [the] Agreement and law." The payments made by the Levee Board were less than what the Agreement required, and the landowners filed this action in federal court, alleging an unconstitutional taking.

The Court of Appeals concluded that, by entering into the Settlement Agreement, the landowners compromised their takings claim against the Levee Board, and thus extinguished any takings claim they may have had, the landowners' only legal recourse is to enforce their rights under the Settlement Agreement and Consent Judgment.

***Reliable Consultants, Inc. v. Earle,* 517 F.3d 738 (5th Cir. 2008)**

Plaintiffs, two businesses that sell sexual devices, filed suit challenging the constitutionality of a Texas statute which made it a crime to promote or sell sexual devices. Plaintiffs filed a declaratory action alleging that the statute violated the substantive liberty rights protected by the Fourteenth Amendment and the commercial speech rights protected by the First Amendment. The district court held that the statute did not violate the Fourteenth Amendment because there was no constitutionally protected right to publicly promote obscene devices.

The Fifth Circuit, in reversing the district court, found that there was no governmental interests for the statute and therefore could not be constitutionally enforced. Moreover, the Court found that businesses can assert the rights of its customers when bans on commercial transactions involving a product unconstitutionally burden individual substantive due process rights. The Court concluded that the statute burdened the individual's substantive due process right to engage in private intimate conduct of his or her choosing.

III. Employment Law

A. Title VII

***Barrow v. Greenville Independent School Dist.*, 480 F.3d 377 (5th Cir. 2007)**

Barrow, a teacher in the Greenville ISD, applied for the position of assistant principal at a Greenville middle school. Barrow was qualified for the position. The District's Superintendent inquired as to whether Barrow would move her children from a private Christian school to public school so that she could be considered for the job. Barrow affirmed her interest in the job but stated she would not sacrifice her children's religions education. Another person was hired for the job. Subsequently, the Superintendent told Barrow that he did not recommend her for the job because her children went to private

school; he also stated that Barrow had "no future" at the District while that was the case.

Barrow sued the Superintendent and the District under §1983, claiming a denial of constitutional rights, disparate impact and treatment in violation of Title VII, and several violations of state law. The District moved for summary judgment, which the court granted in part and denied in part. Regarding §1983, the district court concluded that the Board of Trustees, not the Superintendent, was the policymaker because the Superintendent only recommended job candidates while the Board had final approval. The district court also held that the circumstance that the Board rubber-stamped the Superintendent's recommendations was legally irrelevant and that a patronage requirement was not custom or practice establishing District policy. The court denied summary judgment, however, finding that Barrow sufficiently alleged that the District actually knew of the Superintendent's behavior, knowledge the court concluded was sufficient to establish District policy if proved. The court granted summary judgment for the District on the Title VII claims, concluding that the failure to promote was due to Barrow's choice to put her children in private school, not because of her religion or the religious nature of the private school she chose, and that Barrow presented no evidence of disparate impact upon constitutionally protected conduct.

The remaining claims were tried to a jury, which found against the Superintendent and for the District. Barrow appealed the court's grant of summary judgment to the District, contending that the Superintendent was a policymaker.

School districts in Texas are required by statute to adopt a personnel policy giving superintendents "sole authority to make recommendations to the board regarding the selection of all personnel." The Fifth Circuit noted that this system of bifurcating recommendation and approval authority neither gives the Superintendent policymaking authority nor abrogates the board's general policymaking authority. An official whose discretionary decisions on a particular matter are final and unreviewable, meaning they can't be overturned, is constrained if another entity has ultimate power to guide that discretion, at least prescriptively, whether or not that power is exercised. Accordingly, the Fifth Circuit affirmed the summary judgment for the District.

***Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S.Ct. 2162 (2007)**

Ledbetter was an employee of Goodyear Tire for nineteen years. When she retired in 1998, her salary (a product of a series of annual raises) was between 40-50% lower than her male counterparts. Ledbetter filed an EEOC charge, claiming that she had been sexually discriminated against with regards to her pay.

At trial, Ledbetter introduced evidence that during the course of her employment she received several poor job evaluations due to her sex and that the evaluations negatively affected her pay raises. Although Goodyear argued that the evaluations were nondiscriminatory, the jury found in Ledbetter's favor. On appeal, Goodyear argued that Ledbetter's claim was time barred as to all pay decisions made before September 26, 1997 – 180 days before Ledbetter filed her EEOC charge – and that no discriminatory act relating to Ledbetter's pay occurred after that date. (Title VII claims must be brought within 180 days after "the alleged unlawful employment practice occurred.") The Eleventh Circuit agreed and then concluded that there was insufficient evidence to prove that Goodyear acted with discriminatory intent in making the only two pay decisions that occurred in 1997 and 1998 to deny Ledbetter a raise.

On cert, the Supreme Court agreed with the Eleventh Circuit, holding that Ledbetter should have challenged the intentionally discriminatory pay decision within 180 days of the decision itself. The Court expressed concern that, to find otherwise, would allow "a single discriminatory pay decision made 20 years ago [that] continued to affect an employee's pay today" to serve as a basis of a lawsuit today, "even if the employee had full knowledge of all

the circumstances relating to the 20-year-old decision at the time it was made."

***Alvarado v. Texas Rangers,* 492 F.3d 605 (5th Cir. 2007)**

Alvarado, a female trooper, applied multiple times for a Sergeant position with the Rangers, each time being rejected. After her fifth rejection, she filed suit alleging that she was denied a position because of her sex in violation of Title VII. The Department of Public Safety (DPS) successfully moved for summary judgment, arguing that the Rangers' position was a lateral move, and not a promotion, since Alvarado was already a Sergeant. Furthermore, the court found that there was no indication that there was anything inherently discriminatory in the job selection process that Alvarado participated in (an oral and written exam).

On appeal, the Fifth Circuit reviewed the applied for position to determine whether it was a lateral move or a promotion. The Court concluded that the denial of a transfer *may* be the objective equivalent of the denial of a promotion, and thus qualify as an adverse employment action, even if the new position would not have entailed an increase in pay or other tangible benefits; if the position sought was objectively better, then the failure to award the position to the Plaintiff can constitute an adverse employment action. In this objective inquiry, the Court outlined several factors that should be taken into account, including whether the position: entails an increase in compensation or other tangible benefits; provides greater responsibilities or better job duties; provides greater opportunities for career advancement; requires greater skill, education, or experience; is obtained through a complex competitive selection process; or is otherwise objectively more prestigious. The Court found that, in this case, there was sufficient evidence to raise a genuine issue of material fact as to whether Alvarado's non-selection was an adverse employment action.

Because Alvarado did raise genuine issues of material fact, DPS was required to produce evidence tending to show that it had a legitimate, nondiscriminatory reason for not appointing Alvarado to the Rangers. After finding that DPS failed to meet its burden, the Court reversed and remanded the case for further proceedings.

***Federal Express Corp. v. Holowecki,* 128 S.Ct. 1147 (2008)**

The ADEA requires a worker to file a timely charge of bias with the EEOC before bringing a lawsuit to pursue a claim. The charge must be filed within 180 days after the act of discrimination, or within 300 days if the state where the incident arose has its own age bias law. In this case, a FedEx carrier filed a Form 283 "Intake Questionnaire" with the EEOC and a detailed affidavit supporting her contention that FedEx's programs discriminated against older couriers in violation of the ADEA. However, the EEOC did not treat the questionnaire and affidavit as a filing of a charge and did not start an investigation. When Holowecki filed an ADEA suit against FedEx, FedEx moved to dismiss the action contending that Holowecki had failed to file the requisite "charge" required under the ADEA (29 U.S.C.§626(d)). The District Court agreed with FedEx and dismissed the case.

After the Second Circuit reversed, the Supreme Court concluded that a "charge" must include enough substance so that it can be "reasonably construed" as a request for the EEOC to take action to protect the workers' rights or to settle a dispute over those rights. In upholding the Second Circuit's ruling, the Supreme Court found that the combination of the questionnaire and accompanying affidavit were sufficient enough to constitute a "charge" in that the questionnaire contained all the information outlined in 29 U.S.C. §1626.8 (which outlines the requisite information for a charge) and the affidavit asked the EEOC to force FedEx to end its age discrimination plan.

***Lauderdale v. TDCJ,* 512 F.3d 157 (5th Cir. 2007)**

Lauderdale, a female correctional officer, sued her former employer and supervisor

under Title VII alleging she was sexually harassed and constructively discharged. Arthur, Plaintiff's supervisor, pursued a relationship with her over four months. After Arthur's advances became increasingly aggressive, Lauderdale refused to return to work and ultimately resigned, later filing a formal EEO complaint against Arthur for sexual harassment. Arthur was suspended and put on probation; he later resigned. Prior to her resignation, Lauderdale was able to perform all her duties fully and had no adverse actions taken against her; further, Lauderdale had only one discussion with a supervisor about Arthur and never complained to anyone else.

The district court granted TDCJ's motion for summary judgment, holding Arthur's behavior to be neither severe nor pervasive, and therefore did not create a hostile work environment. The Fifth Circuit disagreed, finding that Arthur's ten to fifteen telephone calls per night for almost four months constituted pervasive harassment, and his other advances created an altered work environment. Having determined there was a viable Title VII hostile work environment claim, the Fifth Circuit then turned to TDCJ's affirmative *Ellerth/Faragher* defense. The Court, observing that Title VII encourages saving actions which would mitigate damages and allow employers to remediate situations of harassment, determined that once Lauderdale knew her single complaint was ineffective, it was unreasonable for her not file a second complaint as TDCJ had provided multiple avenues for complaints. Accordingly, TDCJ's affirmative defense was upheld.

The Fifth Circuit then determined that Arthur's behavior created a §1983 claim for which qualified immunity was not available. As the same analysis of "perrasiveness" applied to individuals under §1983 as to employers under §1981, and as the Court had previously determined his behavior was pervasive, summary judgment was not appropriate. Further, the Fifth Circuit observed "qualified immunity can never offer protection for sexual harassment because, if it is actionable at all, the harassment is by definition objectively offensive and unreasonable, and qualified immunity protect only the objectively reasonable. Finally, the Court held that Plaintiff offered no additional facts to establish the "greater degree of harassment" necessary for constructive discharge, and accordingly that claim was properly dismissed.

B. Other Employment Cases

Rockwell Int'l Corp. v. U.S., 127 S.Ct. 1397 (2007)

James Stone, a qui tam relator, brought an action against Rockwell, a government contractor, alleging that it violated the False Claims Act (FCA) while operating a nuclear weapons plant. Rockwell filed a motion to dismiss based on Stone's alleged failure to qualify as an "original source" under the FCA. The motion was denied. The government intervened and, together with Stone, filed a joint amended complaint alleging, among other things, that Rockwell committed environmental violations when it stored a form of processed toxic waste. Following a jury trial, the District Court entered judgment in favor of the plaintiffs and awarded treble damages. The only question on appeal to the Supreme Court was whether Stone qualified as an "original source" in order to collect on the judgment.

The FCA allows individuals, acting on the government's behalf, to file fraud suits against companies that do business with the government. If they prevail, they receive a portion of what the contractor must pay the government. Once allegations are disclosed publicly, often by the media, individuals face a higher hurdle in bringing fraud suits on the government's behalf. The exception to this rule is if an individual is an original source of the information, which Stone said he was.

The case turned on whether Stone provided information that a jury eventually used to find fraudulent claims. Rockwell said Stone was not an original source since he was laid off one year before Rockwell began submitting false claims to the government. Justice Scalia agreed, stating that "Stone did not have direct and

independent knowledge of the information upon which his allegations were based."

Writing for the Court, Justice Scalia said Stone was not an original source of the information that resulted in Rockwell being ordered to pay the government nearly $4.2 million for fraud connected with environmental cleanup at the nuclear plant. Though Rockwell must pay the entire penalty, Jones may not collect on the judgment. Dissenting, Justice Stevens (joined by Justice Ginsburg) said whistleblowers should have to show only that their information led the government to the fraud, not that the claims ultimately proved to a jury must also have come from them.

***Morgan v. Potter,* 489 F.3d 195 (5th Cir. 2007)**

Morgan, a US postal employee, filed a formal Equal Employment Opportunity claim against her employer, alleging that she was discriminated against based on race, sex, and age. After her complaint proceeded through the administrative steps, the Office of Federal Operations issued its final decision by letter on March 3, 2005, denying her claim. The letter stated that Morgan had a right to file a civil action to contest the decision but, pursuant to 42 U.S.C. §2000e-16(c), she had 90 days from receipt of the letter to file suit. The letter further stated that, "For timeliness purposes, the Commission will presume that this decision was received within five calendar days after it was mailed."

Morgan filed suit in Louisiana state court ninety-seven days after the letter was mailed. Defendant removed the suit to federal court and then successfully moved to dismiss the case as untimely. The court found that the case was filed two day too late.

On appeal, the Fifth Circuit acknowledged that there is a presumption of receipt when the actual date of receipt was unknown. Presumptions in place in the Fifth Circuit range from three to seven days. Morgan's suit would be timely under the seven-day presumption but untimely under any more stringent presumption. The Court ultimately resolved the timeliness issue based on the five-day presumption stated in the March 3, 2005 because the presumption was reasonable. That is, because the Fifth Circuit has a three to seven day presumption, the five-day presumption within the letter falls within the acceptable range. Accordingly, the Fifth Circuit found that Morgan's complaint was untimely.

C. Americans with Disability Act (ADA)

***Jenkins v. Cleco Power, LLC,* 487 F.3d 309 (5th Cir. 2007)**

Jenkins severely injured his leg when he fell from a utility pole in 1993. From 1993 through May of 2000, Cleco attempted to accomodate Jenkins disability, switching him to different jobs in an attempt to find a job he could perform without aggravating his leg or incurring pain. In 2000, Cleco determined that a suitable position for Jenkins was "Call Center Specialist" and began training Jenkins for such a job. During Jenkins' training, Jenkins' doctor sent a letter to Jenkins' boss stating that Jenkins could try the call center position so long as he could alternate between sitting and standing. Jenkins was unaware of this letter. After Jenkins completed training, he was offered the job as a call center specialist. Jenkins began to express concern about the job and was given several days off to think about it. Eventually, he declined the job saying that he could not meet the physical requirements of sitting. Jenkins was terminated two months later. Liberty Life denied Jenkins' claim for continuing disability benefits.

Jenkins filed suit against Cleco and Liberty Life, asserting claims under ERISA, the ADA, and the LEDL. The district court granted Liberty Life summary judgment on Jenkins' ERISA claim, concluding that Liberty had not erred in determining that Jenkins was not totally disabled. The court further concluded that Jenkins had failed to establish that he was disabled as defined by the ADA and, regardless, was unable to prove that Cleco failed to reasonably accomadate him.

The Fifth Circuit affirmed the lower court in both respects. As to Liberty, the long term disability plan states that continuing disability benefits are provided to those who are: "unable to perform, with reasonable continuity, all of the material and substantial duties of his own or any other occupation for which he is or becomes reasonably fitted by training, education, experience, age and physical and mental capacity." Liberty's "Vocational Case Management" report identified an available job at a local newspaper that someone with Jenkins' characteristics could fill. This rebuts the proposition that Jenkins was unable to perform, with reasonable continuity, all of the material and substantial duties of his own or any other occupation.

Turning to Cleco, the Fifth Circuit stated that, assuming that Jenkins was disabled under the ADA, Cleco had placed Jenkins in several different positions, in an effort to find the most optimal accomodation. The record simply did not reflect that Cleco was responsible for Jenkins' rejection of the Call Center Specialist position. Furthermore, the Fifth Circuit found no evidence that Cleco fired Jenkins out of retaliation. Thus, the Fifth Circuit affirmed the trial court.

D. <u>Family Medical Leave Act (FMLA)</u>

***Greenwell v. State Farm Mutual Automobile Insurance Co.*, 486 F.3d 840 (5th Cir. 2007)**

Greenwell had an issue with excessive absences from work, such that she was put on probation, requiring her to provide 24-hour advanced notice if she was going to miss work. Despite the notice requirement, she missed work one day due to her son being sick and without her providing the required notice. Greenwell returned to work the following day but decided to not request protection under the Family Medical Leave Act (FMLA) for her absence. She was terminated two days later.

Greenwell filed suit against State Farm claiming violations of FMLA and Title VII. The district court dismissed with prejudice her Title VII claim. With respect to her FMLA claim, the court found that Greenwell failed to provide State Farm with sufficient notice and granted judgment in favor of State Farm.

On appeal, the Fifth Circuit examined whether Greenwell provided sufficient FMLA-notice. Greenwell argued that she provided such notice although she refused to fill out a FMLA form because she had no doctor's excuse. Greenwell argued that the form was not required under FMLA except when an employer needs additional medical information for entitlement to benefits. Under FMLA, in the case of unforeseeable absences, an employee should provide an employer with notice "as soon as practicable under the facts and circumstances of the particular case." Employees do not even have to mention FMLA but need only state that leave is needed. However, the employee must provide enough information to the employer to reasonably apprise the employer of the employee's request to take time off for a serious health condition.

Upon review of the communications that Greenwell provided to her employer, the Court found that Greenwell failed to provide sufficient information to connect Greenwell's absence with a serious health condition. In fact, Greenwell had emailed human resources stating simply that her son got skinned up playing in the creek and she stayed home with him. The Court found that this communication failed to satisfy FMLA-notice and accordingly affirmed the district court's ruling.

IV. Section 1983

***Morse v. Frederick*, 127 S.Ct. 2618 (2007)**

Joseph Frederick, a senior at an Alaskan high school, was suspended after unfurling a banner declaring, "Bong Hits 4 Jesus" during a school-sanctioned event. Morse, the principal, reasoned that the banner was promoting illegal drug use. Frederick filed suit under 42 U.S.C. §1983, alleging that the school board and Morse had violated his First Amendment rights. The District Court granted summary judgment to the

school board and Morse based on qualified immunity and that they had not infringed on Frederick's speech rights. The Ninth Circuit reversed, finding a First Amendment violation because the school punished Frederick without demonstrating that his speech threatened substantial disruption and further concluding that Morse was not entitled to qualified immunity because a reasonable principal in Morse's position would have known that Morse's actions were unconstitutional.

The Supreme Court reversed and remanded the Ninth Circuit's decision, putting new limits on student speech rights in the process. The Court reasoned that because schools may take steps to safeguard their students from speech that can reasonably be regarded as encouraging illegal drug use, the school board and Morse did not violate the First Amendment by taking away Frederick's banner and suspending him. Chief Justice Roberts stated in the majority's opinion, "[t]he First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers." Significantly, this is the Court's first ruling on student speech rights in almost two decades.

***Wilkie v. Robbins,* 127 S.Ct. 2588 (2007)**

Robbins owns over forty miles of land in Wyoming, where he operates a private cattle and commercial guest ranch. Occasionally, this land is interspersed with government-owned land. The previous owner of the land granted an easement to the US to use and maintain a road running through the ranch to the federal land in return for a right-of-way to maintain a section of road running across federal land to otherwise isolated parts of the ranch. When Robbins purchased the land, he took title free of the easement, which the government had not recorded. Once the government realized there was no easement, an official demanded Robbins regrant it. When he refused, several government employees began harassing and trying to intimidate Robbins. Robbins filed suit for damages and declaratory and injunctive relief, asserting a RICO claim that defendants repeatedly tried to extort an easement from him and a *Bivens* claim that the defendants violated his Fourth and Fifth Amendment rights. The defendants asserted that they were entitled to qualified immunity and successfully moved to dismiss the case.

After an appeal to the Tenth Circuit, the district court changed its mind and held that the defendants were not entitled to qualified immunity. On appeal, the Tenth Circuit affirmed. The Supreme Court granted certiorari and reversed, holding that Robbins does not have a private action for damages of the sort recognized under *Bivens,* and that RICO does not give Robbins a claim against defendants in their individual capacities.

***Brown v. Miller,* 519 F.3d 231 (5th Cir. 2008)**

Brown, a black male, was convicted in 1984 of rape and sentenced to life in prison. Twenty years later, DNA testing cleared his name and he was released from jail. Brown filed suit against, among others, Miller, the lab technician who had performed an "ABO test" on Brown, alleging a Section 1983 claim for violating Brown's due process rights. Miller filed a motion to dismiss, claiming that Brown had failed to state a claim and that Miller was entitled to qualified immunity. The trial court denied Miller's motion and he appealed.

The Fifth Circuit affirmed the district court's denial of Miller's motion to dismiss. In doing so, the Court held that the deliberate or knowing creation of a misleading and scientifically inaccurate serology report amounted to a violation of a defendant's due process rights, and that a reasonable laboratory technician in 1984 would have understood that those actions violated those rights. The Court further held that the law was sufficiently clear in 1984 that a state crime lab technician would have known that suppression of exculpatory blood test results would violate a defendant's rights. Accordingly, the Fifth Circuit held that the district court did not err in denying the qualified immunity defense.

***Jordan v. Ector County*, 516 F.3d 290 (5th Cir. 2008)**

Jordan was an employee of the Ector County District Clerk's office. In 2002, she ran for District Clerk against another employee. Although Jordan lost, she did not quit her job and remained in the Clerk's office. The new District Clerk, however, did demote Jordan from Chief Deputy to Assistant Chief Deputy. In 2005, a state's attorney needed an order signed quickly but the file was locked in the judge's office. Jordan had a security officer unlock the judge's office, entered the office, and removed the file. The judge became upset at Jordan's action and complained to the District Clerk. The District Clerk fired Jordan. Notably, this event occurred with the looming 2006 election, in which the District Clerk assumed Jordan was going to run for office again.

Jordan filed suit under Section 1983 alleging violations of her First Amendment rights, due process, and equal protection. The due process claim was dismissed before trial. At trial, Jordan got a directed verdict on her equal protection claim but was denied a verdict on her First Amendment claim. Defendants appealed the final judgment.

In reviewing the case, the Fifth Circuit noted that in order for a public employee to prevail on a First Amendment retaliation claim, she must prove that (1) she suffered an adverse employment decision; (2) she was engaged in protected activity; and (3) the requisite causal relationship between the two exists. Further, in order for a government employee's speech to be protected, the speech must address a matter of public concern. The Fifth Circuit noted that Jordan's 2002 run for office involved matters of public concern. Combined with the fact that Jordan's political affiliation differed from the District Clerk's, the 2006 upcoming election was a source of protected political activity. Although Jordan never officially stated that she was running for office, there were subtle signals that Jordan continued to be a political rival to the District Clerk. Accordingly, the Fifth Circuit, in affirming the final judgment, concluded that Jordan was within the reach of the First Amendment, further noting that the First Amendment can protect against distant retaliation.

V. Warrant Issues

***U.S. v. Mata*, 517 F.3d 279 (2008)**

In Mata, the Fifth Circuit examined the "protective sweep" exception to the Fourth Amendment, which prohibits warrantless searches. In this case, police officers were observing a business where they knew a truck full of marijuana was located. When the truck started to leave the premises, the police blocked the truck, identified themselves as police, and ordered the individuals standing outside the truck to stop. Immediately after the raid, the police performed a "safety personnel sweep," based on the concern that other suspects may have been present and which could have posed a danger to the officers. During the sweep, the officers did not find any individual officers but did find in plain view substantial amounts of marijuana and firearms. After the sweep, the officers left the building and waited for a search warrant. The warrant never arrived. However, the owner of the building and his wife did arrive on the scene. Mata, the owner, gave verbal consent to search the building but refused to sign the consent form. Mata's wife, however, did sign the form.

At pretrial, Mata filed a motion to suppress evidence, arguing that the search was warrantless and relied on legally invalid consent. The motion was denied and Mata was later convicted. Mata appealed the district court's denial of his motion to suppress, arguing that the protective sweep exception to the Fourth Amendment did not apply because the officers lacked any specific, articulable facts required under the exception. He further argued that his consent was invalid, the fruit of the illegal seizure, and not free and voluntary. He further argued that his wife's consent was invalid because the seizure of the marijuana occurred before she arrived. The government countered that the initial search was valid because it was incident to arrest and that the Mata's consented to the search of their property.

The Fifth Circuit found that the protective sweep exception was applicable because the officers had articulable facts plus rational inferences that allowed a reasonable officer to suspect that an individual dangerous to the officers was located in the area. The Court began its analysis by stating that the government need not prove that the sweep was incident to a lawful arrest. Further, the Court found that the officers' entrance was lawful because there was exigent circumstances allowing the officers to enter without a warrant (the officers thought the truck was a "load vehicle" and if they didn't stop it, some or all of the marijuana would be gone). Further, the Court found that the officers could not have obtained a warrant prior to the search because a warrant requires a specific description of the place to be searched – the officers arrived at the location only two hours before the white truck tried to leave. The Court further found that the officers knew with absolute certainty that suspect individuals possessed contraband and therefore were justified in conducting a protective sweep.

With regards to the consent issue, the Fifth Circuit concluded that Mata's verbal consent was voluntary – he was not under arrest, the police did not use coercive procedures, no officer had his gun drawn or threatened Mata. Although Mata refused to sign the consent form, he did not withdraw his verbal consent to search. Accordingly, the Court found that the consent to search was voluntary and thus valid.

VI. Miscellaneous Cases

***Permanent Mission of India to the United Nations v. City of New York,* 127 S.Ct. 2352 (2007)**

Under New York law, foreign governments have tax exemptions for the diplomatic mission section of their properties used exclusively for diplomatic offices and for the quarters of certain diplomats. However, the City argued that governments must pay taxes for the space that houses lower-level employees. After India and Mongolia refused to pay over $18 million in property taxes and interest, the City filed suit seeking to establish the validity of tax liens on the two properties. The two countries removed the case on the basis that they were immune from suit under the Foreign Sovereign Immunity Act ("FSIA"). The district court rejected the immunity argument, invoking the "immovable property" exception to FSIA, which applies when "rights in immovable property situated in the United States are in issue." After the Second Circuit affirmed that the exception applied, the Supreme Court granted certiorari to determine whether the declaration of a tax lien falls within the "immovably property" exception and whether the City may look to international treaties, not signed by the U.S., for guidance towards interpreting the underlying intent of the FSIA exception.

In a 7-2 decision, Justice Thomas delivered the opinion of the Court, holding that FSIA does not immunize a foreign government from a lawsuit to declare the validity of tax liens on its property. In making its decision, the Court examined the text of FSIA, emphasizing that the exception focuses more broadly on rights in property. After concluding that liens are interests in real property, the Court determined that the text of the "immovable property" exception makes it plain that a suit to establish the validity of a tax lien falls within the exception. The Court also found that Congress' purpose in enacting FISA also supported the Court's textual analysis: "adoption of the restrictive view of sovereign immunity and codification of international law at the time of the FSIA's enactment."

The Court's narrow holding provides the City with some relief as it tries to collect over $18 million in unpaid property taxes. However, the Court left open a much broader issue: whether a U.S. court may look to international treaties, not signed by the United States, for guidance in interpreting the underlying intent of U.S. statutes.

***Ali v. Federal Bureau of Prisons,* 128 S.Ct. 831 (2008)**

While preparing to transfer to a new prison, prisoner Abdus-Shahid Ali temporarily

left two bags of his possessions with a police officer. When Ali's bags arrived at his new cell, Ali noticed several items were missing. Ali filed an administrative tort claim with the Bureau of Prisons seeking to recover the missing items. After the claim was denied, Ali filed his claim in U.S. District Court where it was dismissed for lack of jurisdiction based on the government having sovereign immunity from tort claims under the Federal Tort Claims Act. The Eleventh Circuit affirmed, holding that the "detention of goods exception" in the Act, which excepts from waiver of immunity any claim arising in respect to the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, was a broad grant of sovereign immunity covering any instance of detention of goods by law enforcement officers.

The Supreme Court, in affirming the Eleventh Circuit's decision, held that the use of the word "any" should be given its normal interpretation, encompassing all federal officers whether or not they were involved in enforcing customs or excise laws.

***Gonzalez v. United States*, ___ S.Ct. ____, 2008 WL 2001954 (May 12, 2008)**

The Federal Magistrates Act, 28 U.S.C. §636(b)(3), provides that a "magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." Such additional duties include presiding at voir dire if the parties consent and there is no objection. In Gonzalez, Petitioner's counsel consented to the Magistrate Judge presiding over jury selection. Petitioner himself was not asked for his consent. The jury returned a guilty verdict for all of the felony counts against Petitioner. Petitioner filed an appeal and alleged for the first time that it was error not to obtain his consent to the Magistrate Judge presiding over voir dire.

After the Fifth Circuit affirmed the convictions, the Supreme Court held that express consent by counsel suffices to permit a magistrate judge to preside over jury selection in a felony trial. In so holding, the Supreme Court recognized that there were certain rights that an attorney can waive without the consent of the client. The Court found the acceptance of a magistrate judge to be one such right, since the decision by Petitioner's counsel was a tactical one that was well suited for the attorney to make.

***United States v. Atlantic Research Corp.*, 127 S.Ct. 2331 (2007)**

Atlantic Research Corporation retrofitted rocket motors for the US government at a facility in Arkansas. Because of the nature of the work, the soil and groundwater became contaminated with rocket propellant residue. Atlantic acknowledged the problem and voluntarily cleaned up the site in accordance with CERCLA. Pursuant to Sections 107(a) and 113(f)(1) of CERCLA, Atlantic filed a lawsuit in federal district court seeking to recover a portion of its cleanup costs. However, shortly after the initiation of litigation, the Supreme Court issued its opinion in *Cooper Industries, Inc. v. Aviall Services, Inc.*, holding that a party could only rely on 113(f)(1) to obtain contribution if the site clean up was part of a state or federal enforcement action. As a result of *Cooper*, Atlantic dropped its 113(f)(1) action and proceeded under 107(a). After the US successfully moved to dismiss the case under pre-*Cooper* precedent (holding that 113(f)(1) was the sole remedy for a liable party), the Eighth Circuit reversed, holding that a party that has voluntarily cleaned up a site could seek to recover some of their costs under 107(a).

In affirming the Eighth Circuit's decision, the Supreme Court explained that CERCLA provides for two distinct remedies under 107(a) and 113(f)(1). The latter authorizes a potentially responsible party ("PRP") to bring a contribution action against a third party either before or after the establishment of common liability in an enforcement action. By contrast, 107(a) provides for the recovery of cleanup costs, but not a right to contribution, for a private party who cleans up a site. Of significance, this case encourages PRPs to voluntarily clean up

polluted sites even though they have not yet been required to do so under an enforcement action.

***Parents Involved in Community Schools v. Seattle School District No. 1,* 127 S.Ct. 2738 (2007)**

Note: This case was decided together with *Meredith, Custodial Parent and Next Friend of McDonald v. Jefferson County Bd. of Ed.*, No. 05-915.

Both Seattle School District No. 1 and Jefferson County, Kentucky utilized student assignment plans based on race. Seattle classified children as either "white" or "non-white" and used the racial classification as a tiebreaker to allocate slots in particular high schools. Jefferson adopted a plan to classify students as black or "other" in order to assign students to certain elementary schools and to rule on transfer requests. Parents Involved in Community Schools (PIC) and the mother of a Jefferson County student filed these lawsuits, alleging that allocating children to schools based solely on race violates the Fourteenth Amendment's equal protection guarantee. In both cases, both the district courts and the appellate courts affirmed the school plans, finding that the plans satisfied strict scrutiny because they were narrowly tailored to serve a compelling government interest.

In a split decision by the Court, Justices Roberts, Scalia, Kennedy, Thomas, and Alito found that the school districts failed to demonstrate that their use of racial classifications was "narrowly tailored" to achieve a "compelling" government interest. The Court pointed out that, although remedying the effects of past discrimination is a compelling interest, such interest was not present here. Seattle schools were never segregated nor court-ordered to desegregate. Likewise, Jefferson County schools were no longer subject to a desegregation decree. Moreover, because the districts utilized race as a determinative factor, the fact that the districts also looked to other factors didn't matter – under each plan, when race came into play, race was the sole factor. The districts also failed to show they considered alternative methods to achieve their goals. Narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives." Chief Justice Roberts concluded, "Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons."

VII. Civil Rights Cases

***Bowles v. Russell*, 127 S.Ct. 2360 (2007)**

In 1999, Keith Bowles was convicted of murder and sentenced to 15 years to life imprisonment. After losing his direct appeal on his conviction and sentence, Bowles petitioned for federal habeas relief. The district court denied Bowles habeas relief as well as his motion for a new trial. However, the court never served Bowles nor his attorney with the order denying Bowles' motion for new trial, the entry of which triggered the start of the thirty-day period in which Bowles could timely appeal the district court's denial of his habeas petition.

Due to the defective notice to Bowles, the district court reopened the time to file an appeal under Fed. R. App. P. 4(a)(6). However, Rule 4(a)(6) provides only for a fourteen-day period to file; the district court gave Bowles seventeen days. Bowles filed his notice of appeal on the sixteenth day – in compliance with the district court's order but outside the fourteen-day period prescribed by Rule 4(a)(6). The Sixth Circuit dismissed Bowles' appeal for lack of jurisdiction, stating that the fourteen-day period prescribed in Rule 4(a)(6) could not be extended for any reason.

The Supreme Court ruled in a 5-4 decision that the filing deadlines set forth in the Federal Rules of Appellate Procedure control and that an appellate court lacks jurisdiction to consider the appeal. Justice Thomas, on the behalf of the majority, stated that the limits in Rule 4(a)(6) are jurisdictional, and thus not

waivable, by virtue of Congress' specific decision to codify the time limit by statute. Thomas also rejected Bowles argument based on the "unique circumstances" doctrine, stating that the use of the doctrine was "illegitimate" because the "Court has no authority to create equitable exceptions to jurisdictional requirements."

***Panetti v. Quarterman,* 127 S.Ct. 2842 (2007)**

In 1995, Panetti was convicted by a Texas jury for the 1992 slaying of his in-laws and received the death penalty. Eight years later, after an execution date was set and after Panetti had filed an appeal and a habeas petition, Panetti claimed for the first time that he was mentally incompetent to be executed. In May of 2004, however, the state trial court, relying on evaluations by court-appointed experts, found Panetti competent. In doing so, the court closed Panetti's case without ruling on Panetti's requests for a competency hearing and for funds to hire his own expert. After Panetti turned to the federal district court, filing his second habeas petition, the district court concluded that the state-court competency proceedings failed to comply with Texas law and were constitutionally inadequate under *Ford v. Wainright*, 477 U.S. 399 (holding that the Eighth Amendment prohibits States from inflicting the death penalty upon insane prisoners). The district court held an evidentiary hearing at which four mental health professionals all agreed that Panetti suffered some degree of mental illness. Nonetheless, the district court held that Panetti was competent to be executed under Fifth Circuit precedent because he was aware of his pending execution and the factual predicate for the execution. The Fifth Circuit affirmed.

The Supreme Court reversed in a 5-4 vote. After rejecting the state's jurisdictional argument, the Court found that the state court's determination of Panetti's competency was not entitled to deference since the court failed to provide Panetti with the minimum procedures required under *Ford*. In this case, the court failed to give Panetti an opportunity to submit psychiatric evidence to rebut the court-appointed experts.

Turning to Panetti's Eighth Amendment claim, the Court rejected the Fifth Circuit's test as "too restrictive" in that it "treats a prisoner's delusional belief system as irrelevant if the prisoner knows that the State has identified his crimes as the reason for his execution." The Court further stated, "[a] prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it. *Ford* does not foreclose the latter." The Court then remanded the case to the district court, reminding the court that there was legal precedent to guide it in conducting its Eighth Amendment analysis.

***Uttecht v. Brown,* 127 S.Ct. 2218 (2007)**

Cal Brown was convicted and sentenced to death for the rape, torture and murder of a woman. During jury selection, one potential juror – Juror Z – gave several inconsistent statements, demonstrating his confusion over the instructions he had been given. For instance, the potential jurors were instructed that Brown could only be sentenced to death or to life in prison without parole. Juror Z was told at least four times that Brown could not be released from prison; however, Juror Z stated upon examination that he could consider the death penalty only if there was no possibility that Brown would be released. The State challenged Juror Z arguing that he was confused about when the death penalty could be imposed and seemed to believe it was only appropriate when there was a risk of release. The defense did not object to Juror Z, and the state court excused him.

On appeal, the Ninth Circuit reversed, finding that the state court had violated Brown's Sixth and Fourteenth Amendment rights under *Witherspoon v. Illinois*, 391 U.S. 510, by excusing Juror Z for cause on the ground that he could not be impartial in deciding whether to impose the death penalty.

The Supreme Court reversed and remanded under a split Court, 5-4, stating that they owed the trial court deference since it was in a superior position to determine a potential juror's demeanor and qualifications. In reviewing the record, the Court found that the trial court acted within its discretion in granting the state's motion to excuse Juror Z. Juror Z's answers could have led the trial court to believe that he would be substantially impaired in his ability to impose the death penalty unless there existed the possibility that Brown could be released. The Court further stated that the trial court was entitled to deference in that it was able to observe Juror Z's demeanor. Additionally, the state's challenge, Brown's waiver of an objection, and the trial court's excusal support the conclusion that all parties thought that excusal was appropriate under *Witherspoon*.

***Roper v. Weaver,* 127 S.Ct. 2022 (2007)**

In *Roper*, the Supreme Court dismissed cert as improvidently granted. The Court had previously granted cert to determine whether the Eighth Circuit's decision to set aside Weaver's death sentence due to inflammatory remarks made by the prosecutor during the penalty phase exceeded the court's authority under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). In letting the Eighth Circuit's decision stand, the Court showed an apparent act of compassion based on the case's history.

After Weaver had been convicted in state court and exhausted his appeals, Weaver sought cert in the Supreme Court. He also filed a habeas petition in the federal district court **before** AEDPA went into effect. The district court dismissed Weaver's petition without prejudice as premature due to Weaver's cert petition. This decision was in error under the Supreme Court's recent ruling in *Lawrence v. Florida*, which held that a prisoner need not seek cert to exhaust state court remedies prior to filing a habeas petition. Because of this error, after the Court denied Weaver's cert, Weaver had to file a new habeas petition after AEDPA became effective, thus subjecting Weaver to AEDPA's more stringent standard of review. This procedural history, together with the fact that Weaver's codefendant had obtained pre-AEDPA habeas relief, led the Court to dismiss cert and allow the Eight Circuit's decision to stand.

***Brendlin v. California,* 127 S.Ct. 2400 (2007)**

Brendlin was a front-seat passenger in a car when a police officer pulled the car over for driving with expired tags. After Brendlin identified himself to the officer, the officer learned from his dispatcher that Brendlin was a parolee at large. The officer ordered Brendlin out of the car and searched the vehicle, discovering in the process drug paraphernalia. Brendlin was charged with various narcotics offenses, which he moved to suppress at trial on the basis of an unlawful stop and seizure. The trial court denied his suppression motion, concluding that Brendlin had not been seized for Fourth Amendment purposes. Brendlin then entered a guilty plea, pending appellate review on the suppression issue.

The Supreme Court issued a unanimous decision, ruling that a police traffic stop of a car amounts to at least a temporary detention of all passengers in the vehicle; thus, passengers, and not just the driver, can challenge the legality of the stop. The decision created a bright line test for evaluating traffic stops and seizures: "whether a reasonable person [riding as a passenger in a stopped car] would have believed himself free to terminate the encounter."

***Los Angeles County v. Rettelle,* 127 S.Ct. 1989 (2007)**

Max Rettelle and Judy Sadler were at home in bed (naked) when police entered their house with a search warrant. The police ordered the couple out of bed and would not allow them to put clothes on, despite the fact that the couple was white and the search warrant was looking for three black individuals. After two minutes, the police apologized to the couple and left.

After the federal district court dismissed the couples' civil rights lawsuit, the Ninth

Circuit ruled that the ordering of the couple out of bed constituted an undue invasion of their privacy. The Supreme Court disagreed: "Officers executing search warrants on occasion enter a house when residents are engaged in private activity, and the resulting frustration, embarrassment and humiliation may be real, as was true here." The Court concluded that the officers acted reasonably in ordering the naked couple out of bed. Blankets and bedding can conceal a weapon and one of the suspects was known to carry a firearm. This in despite of the fact that the suspect was black, not white.

***Erickson v. Pardus,* 127 S.Ct. 2197 (2007)**

While imprisoned in Colorado, Erickson was diagnosed with Hepatitis C and prescribed a drug protocol involving weekly self-injections of medicine for a year. After the medical staff noted a missing syringe, one was found in a communal trashcan, modified for illegal drug use. Prison officials concluded that Erickson was the offender and terminated his medical treatment. Erickson brought a Section 1983 claim, arguing that the withholding of his medical treatment constituted a violation of his Eighth Amendment right to be free of the unwanton and unnecessary infliction of pain. The district court dismissed Erickson's complaint on the ground that he failed to allege that the withholding of medicine caused him substantial harm. The Tenth Circuit affirmed, explaining that Erickson had only provided conclusory allegations in his complaint.

In reversing the ruling, the Supreme Court held that the Tenth Circuit erred in concluding that Erickson's allegations were too conclusory for pleading purposes. Pointing to Federal Rule of Civil Procedure 8(a)(2), the Court pointed out that a complaint must only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Furthermore, under *Bell Atlantic v. Twombly* (a Supreme Court decision rendered two weeks prior to this case), the Court stated that specific facts are not necessary since the complaint need only give the defendant fair notice of the claims and what they are based on. The Court concluded that Erickson's case cannot be dismissed because his allegations of harm are too conclusory in his complaint.

***Longoria v. Dretke,* 507 F.3d 898 (5th Cir. 2007)**

Prisoner, a member of a security threat group called the Mexican Mafia, requested permission to grow his hair in connection with his Native American heritage. (The Great Spirit told him not to mutilate his hair.) Prisoner was denied an exemption to the unit's grooming policy, at which time he brought suit pro se. The district court dismissed Prisoner's claims as frivolous and for failure to state a claim.

The Fifth Circuit held that the TDCJ did not violate his rights under the Religious Land use and Institutionalized Persons Act (RLUIPA) by denying him permission to grow his hair. The Fifth Circuit had previously affirmed the same grooming policy under the Religious Freedom Restoration Act, which was subsequently struck down by the Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997). In response, Congress enacted RLUIPA, which has been held to pass constitutional muster. Here, Longoria met his threshold burden of establishing that the grooming policy placed a "substantial burden" on his exercise of religion, and he was disciplined for violating that policy. However, as the "significant interest in order and safety was sufficient to warrant the burden posed by the grooming policy on Longoria's ability to grow his hair in conformity with his religious practices," the court found the policy to be the least restrictive means to meet a compelling government interest. Accordingly, Longoria's RLUIPA claim was properly dismissed.

VIII. CRIMINAL LAW

***DeLeon v. City of Corpus Christi,* 488 F.3d 649 (5th Cir. 2007)**

DeLeon, a former criminal defendant who had pled guilty to aggravated assault on a police officer, and who had received deferred adjudication for a Texas state court, brought a

civil rights action to recover for the arresting officer's alleged false arrest, false imprisonment and malicious prosecution, as well as for allegedly excessive force used by the officer in macing, beating, and ultimately shooting him. The U.S. District Court for the Southern District of Texas entered an order dismissing the complaint as barred by the *Heck* doctrine, and DeLeon appealed.

The Court held that (1) deferred adjudication was the functional equivalent of a judgment of conviction for purposes of *Heck*; and (2) DeLeon's excessive force claim was not conceptually distinct from the aggravated assault charge underlying the deferred adjudication, so that the *Heck* doctrine also applied to prevent him from pursuing the excessive force claim.

In *Heck v. Humphrey*, 512 U.S. 477 (1994), the Supreme Court held that a civil tort action, including and action under Section 1983, is not an appropriate vehicle for challenging the validity of outstanding criminal judgments. When a plaintiff alleges tort claims against his arresting officers, the district court must first consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence. If so, the claim is barred unless the plaintiff demonstrates that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeus corpus under 28 U.S.C. § 2254.

***U.S. v. Bruno*, 487 F.3d 304 (5th Cir. 2007)**

Defendants were indicted for various narcotics trafficking and weapons offenses following federal and local agents' execution of a search warrant at one defendant's residence. The defendants filed a motion to suppress evidence obtained during the search, claiming that the officers did not knock and announce their identity and purpose when executing the search warrant, in violation of the Fourth Amendment and 18 U.S.C. § 3109. The district court granted the motion and the government appealed. The Court of Appeals reversed, holding that suppression of evidence is not the proper remedy for knock-and-announce violations since the knock-and-announce requirement does not protect an individual's interest in shielding "potential evidence from the government's eyes."

***U.S. v. Martinez*, 486 F.3d 855 (5th Cir. 2007)**

Based on a tip, the Houston police suspected that the defendant, Juan Angel Martinez, had witnessed a quadruple murder and might possess the weapons used therein. The tipster provided a street address and indicated that Martinez was staying there with his girlfriend. Rather than seed a warrant, the police set up a ruse to draw Martinez out of the house. Martinez and his girlfriend took the bait, exited the home and drove off in a vehicle, unaware that they were being watched. Police officers stopped the vehicle a few blocks away, placed the defendant in the back of a patrol car, and then asked his girlfriend for consent to search her home, which she gave. Police discovered three firearms inside, but soon learned that the tipster was wrong. Martinez had not witnessed the murders, nor were the guns used in such a crime. Martinez was charged with being an illegal alien in possession of a firearm and with being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(5)(A), 922(g)(1), and 924(a)(2).

Martinez filed a motion to suppress both the gun and any statements given to police. The district court decided to suppress the statements but not the guns. After a bench trial, Martinez was found guilty of being a felon in possession. On appeal, Martinez argued that the stop was not supported by reasonable suspicion, and that the guns must be suppressed as the fruit of that poisonous tree. The Court of Appeals agreed and reversed the district court's denial of the motion to suppress, vacated Martinez's conviction and sentence, and remanded for further proceedings.

The anonymous tip to police indicated only that a man named "Angel" might have been

a witness to the violent crime, might be in possession of the weapons used in the crime, and might be planning to flee to Mexico with the weapons. Martinez argued that the informant's tip was not itself reliable and specific enough to give rise to a reasonable suspicion that Martinez had engaged in criminal activity. He argued that the police might have established the reliability of the information by taking steps to corroborate it, but they did not adequately do so. Without reasonable suspicion, he said, the stop of his vehicle was unlawful, requiring suppression of the firearms.

The Court expressed a mistrust of anonymous tips, but stated that such a tip may, in certain cases, provide reasonable suspicion depending on various factors, including: the credibility and reliability of the informant; the specificity of the information contained in the tip; the extent to which the information in the tip can be verified by officers in the field; and whether the tip concerns active or recent activity, or has instead gone stale. The Court noted that the Supreme Court has stated that an anonymous tip that provides verifiable information as to a person's identity and location, without more, is insufficient to justify an investigative *Terry* stop.

***United States v. Bolden,* 508 F.3d 204 (5th Cir. 2007)**

In this case, the Fifth Circuit affirmed a trial court's denial of Bolden's motion to suppress evidence, holding that a police officers' *Terry* stop was reasonable in the context of the totality of the circumstances confronting him. Here, the officer heard gunshots and was told guns were being shot around the corner; upon turning the corner less than one minute later, the officer encountered a single, fast moving car which he stopped. The officer ordered the occupants to raise their hands; when they did not, the officer called for back up believed Bolden was "going for a gun." Ultimately a search of the vehicle revealed a semi-automatic pistol, cocaine, and other firearms.

The Fifth Circuit emphasized the short time that elapsed between the officer hearing the shots, received the report of gunplay, and observing a single vehicle departing the precise spot from which the officer had good reason to believe guns had just been fired. The officer was not required to have absolute certainty that the people he stopped were involved in the shooting, only a "reasonable" belief, which the officer had. Accordingly, the motion to suppress was properly denied.

IX. QUALIFIED IMMUNITY

***Freeman v. Gore,* 483 F.3d 404 (5th Cir. 2007)**

A suspect's mother sued sheriff's deputies under § 1983 alleging they subjected her to unlawful arrest and excessive force. The U.S. District Court for the Eastern District of Texas denied the deputies' motions for summary judgment based on qualified immunity. The deputies appealed.

Sheriff's deputies attempted to serve a felony arrest warrant on Kevin Freeman at his mobile home, but he was not there. Linda Freeman, Kevin's mother, lived in a mobile home adjacent to her son's. At some point, Linda emerged from her home and began yelling at the deputies. When deputies asked Freeman whether they could enter her home to search for Kevin, she responded that the last time deputies searched her house they had trashed it, and that she would not permit the deputies to enter her home unless they had a search warrant for her address. Deputy Gore then told Freeman that he could arrest her if she did not permit the deputies to search her home. Freeman responded by saying that the deputies would just have to arrest her. At that point, Deputy Gore instructed Freeman to place her hands behind her back, and another deputy handcuffed her and placed her in the back of his patrol car. After Freeman was put in the car, Deputy Gore sought and received permission from Freeman's daughter to search the house, but the deputies, apparently convinced by that point that Kevin was not inside, did not enter the house. Freeman asserted that she remained in the patrol car without air-conditioning or ventilation for 30 to 45 minutes. The deputies offered contradictory

accounts of how long Freeman was in the patrol car, ranging from 5 to 10 minutes, to 30 to 45 minutes. When Deputy Gore contacted his superior, he was told that he could neither search Freeman's home nor arrest her. Gore then released Freeman from the car and removed the handcuffs.

The Court of Appeals affirmed the District Court, holding that the deputies violated Freeman's constitutional rights and their actions were objectively unreasonable in light of clearly established law at the time of the conduct in question. The Court noted that the arrest warrant for Kevin Freeman was valid at his address, but did not permit the deputies to arrest or detain Linda Freeman outside of her own home, nor to search her home for Kevin.

***Meadours v. Ermel*, 483 F.3d 417 (5th Cir. 2007)**

Four City of La Porte police officers shot and killed Bob Meadours in October 2001. Meadours' estate, his parents, and sister brought a claim under 42 U.S.C. § 1983 asserting that the officers used excessive force. They also brought state law tort claims. The officers moved for summary judgment on the basis of qualified immunity and also official immunity under Texas law, but the district court denied the motion citing the existence of genuine issues of material fact. The officers filed an interlocutory appeal and the Court of Appeals affirmed, stating that it agreed with the district court that the factual disputes were material, but noting that it lacked jurisdiction to review the finding that genuine factual issues exist.

On the evening of October 29, 2001, Meadours' sister, Katie Raterink, contacted 911 to request mental health assistance for Meadours. Meadours, who had previously spent time in a secure mental hospital, was suffering a "mental episode" consisting of paranoia, delusions, and extremely bizarre behavior. In her call Raterink made it clear she was seeking mental health assistance for her brother and not reporting a crime. However, Raterink did inform the dispatcher that Meadours had "flipped out" and she did not know what he was going to do.

City of La Porte police officers, along with one EMS unit responded and contacted Raterink at the edge of Meadours' neighborhood. She informed them about some of Meadours' paranoid and delusional behavior and she requested that he be taken for treatment.

After the officers spoke with Raterink, they decided to contact Meadours and secure the scene prior to the EMS approaching him. One officer entered the backyard and observed Meadours sitting in a swing wearing between four and six baseball caps and a tool belt with a stuffed animal attached to it. He was also holding a large screwdriver. Meadours refused to drop the screwdriver and the officers shot him twice using a shotgun with a sub-lethal, beanbag round, but he did not drop the screwdriver. Meadours, now standing atop a doghouse, was shot a third time, although it is disputed whether the officers fired a beanbag round or a bullet. Meadours was knocked from the doghouse and began running away. The officers maintain that Meadours was running toward a fellow officer so they opened fire with their service weapons. A total of twenty-three shots were fired, with fourteen striking and killing Meadours.

The district court denied summary judgment on qualified immunity grounds citing the existence of a genuine issue of material fact as to whether the force utilized by the officers was unreasonable. The Court of Appeals faulted the district court because it found that the since the officers acted in unison, their conduct should be examined collectively. The Court noted that the actions of defendants should be examined individually in the qualified immunity context and remanded for a trial on the merits.

***Alice L. v. Dusek*, 492 F.3d 563 (5th Cir. 2007)**

An action was brought against a school district under Title IX and against an individual defendant, Jennifer Dusek, under § 1983. The U.S. District Court for the Western District of Texas denied the individual defendant's motion

to dismiss on qualified immunity grounds, and she appealed. Dusek moved to stay all district court proceedings pending review of the qualified immunity issue, or, in the alternative, for an order that the district court lacked jurisdiction over her personally. The Court of Appeals held that Dusek's appeal from the denial of qualified immunity did not divest the district court of jurisdiction to compel her compliance with discovery requests made in relation to the Title IX claim.

Dusek sought to stay all district court proceedings in the case pending her interlocutory appeal of the denial of qualified immunity, which Dusek sought in defense from the plaintiff's claim under 42 U.S.C. § 1983. Dusek's primary concerns were discovery requests the plaintiffs made related to their 20 U.S.C. § 1681 (Title IX) claims against Dusek's co-defendant, Eanes ISD. The discovery requests require Dusek to answer certain interrogatories and produce certain documents. The district court denied Dusek's request to stay the proceedings and ordered her compliance even while her appeal was pending.

Dusek argued that the district court had no authority to compel her compliance with the discovery orders because her interlocutory notice of appeal on the denial of qualified immunity divested the district court of jurisdiction over all claims in the case, including the plaintiffs' Title IX claim against Eanes ISD, or, at the very least, Dusek claimed the district court was divested of jurisdiction over her personally.

The Court of Appeals held that a notice of appeal from an interlocutory order does not produce a complete divestiture of the district court's jurisdiction over the case; rather, it only divests the district court of jurisdiction over those aspects of the case on appeal, and the district court may still proceed with matters not involved in the appeal. The Court noted that although the factual basis of the Title IX claims and the § 1983 claim overlap, the claims are legally distinct. Thus, to the extent that Dusek is subject to discovery requests on claims for which she does not or cannot assert qualified immunity, such discovery requests do not implicate her right to qualified immunity.

Dearmore v. City of Garland, **519 F.3d 517 (5th Cir. 2008)**

A property owner challenged the constitutionality of a City ordinance relating to the maintenance of rental properties, alleging the minimum housing standards and inspection procedures violated the Fourth, Fifth and Fourteenth Amendments. Dearmore also sought injunctive relief to prevent enforcement of the ordinance. After amending his complaint, Dearmore obtained a preliminary injunction enjoining the City from enforcing certain provisions of the ordinance, but the trial court dismissed other claims. Subsequently, the City advised Dearmore that it intended to amend the ordinance in accord with the Court's order, which it then did. Dearmore's remaining claims were dismissed as moot with prejudice.

At issue in this appeal was the Court's award of attorney's fees to Dearmore as a "prevailing party." An issue of first impression in the Fifth Circuit, the Court held that to qualify as a prevailing party under § 1988(b), a plaintiff (1) must win a preliminary injunction, (2) based upon an unambiguous indication of probably success on the merits as opposed to a mere balancing of equities, (3) that causes the defendant to moot the action, which prevents the plaintiff from obtaining final relief on the merits. Here, Dearmore met the newly announced test and the award of his fees in favor was affirmed.