

Summaries of Selected Opinions

No. 18-1327. Steven R.F. v. Harrison School District. No. 2. 5/28/2019. D.Colo. Judge Briscoe. *Individuals with Disabilities Education Act—Free Appropriate Public Education—Mootness Doctrine—Capable of Repetition Yet Evading Review.*

Plaintiff is a disabled student entitled to a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA). Harrison School District No. 2 (the District) proposed to move plaintiff to another school. Plaintiff's mother disagreed with the proposal and filed a state complaint challenging plaintiff's proposed new placement. The state compliance officer (SCO) ruled that the District's decision to move plaintiff was not based on his individual needs and imposed various requirements before the District could change plaintiff's placement. Plaintiff remained at the same school for the 2014–15 and 2015–16 school years, but the District again tried to move him for the 2016–17 school year. Mother filed another complaint and the SCO ruled in her favor.

The District challenged the ruling, and an administrative law judge determined that plaintiff was not deprived of FAPE or educational benefits and his mother was not deprived of her right to participate in the decision-making process. Mother appealed to the district court, which found that the District had denied plaintiff a FAPE.

On appeal, the District asked the Tenth Circuit to reverse the district court's ruling that it violated the IDEA. This case concerned plaintiff's 2016–17 school year, which already passed. Thus, the Tenth Circuit decided the case was moot because there was no actual, ongoing controversy. The District argued for application of the exception to the mootness doctrine for cases capable of repetition yet evading review. This exception applies where (1)

the challenged action was too short in duration to be fully litigated, and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again. Here, the first prong was satisfied by the one-year duration of a school year. As to the second prong, although the District argued that mother would challenge plaintiff's placement for the next school year, this does not satisfy the mootness exception because the procedural challenges at issue were fact-specific to the 2016–17 school year, and nothing suggests that these same alleged procedural failures will be at issue in subsequent challenges mother may bring.

The appeal was dismissed as moot.

No. 17-9558. Big Horn Coal Co. v. Sadler. 6/4/2019. Dep't of Labor Benefits Review Board. Judge Ebel. *Total Disability Diagnosis—Black Lung Benefits Act—Statute of Limitations—Tolling—Regulation—Extraordinary Circumstances—Exhaustion.*

Sadler worked as a coal miner for Big Horn Coal Co. (Big Horn). He filed three claims for benefits under the Black Lung Benefits Act (BLBA), 30 USC §§ 901 to 944, which provides that a claimant must file for benefits within three years of a medical determination of total disability due to black lung disease. 20 C.F.R. 725.308(c) interprets the BLBA's statute of limitations, 30 USC § 932(f), and provides that the limitations period may be tolled for extraordinary circumstances. Sadler filed his third claim, which is at issue in this appeal, five years after his total disability diagnosis. An administrative law judge (ALJ) found that extraordinary circumstances existed and awarded Sadler benefits. The Department of Labor Benefits Review Board (the Board) affirmed the ALJ's order.

On petition for review of the Board's judgment, Big Horn argued that 20 C.F.R. 725.308(c) is invalid. The Tenth Circuit analyzed the regulation under the two-part agency-deference analysis in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). The first part of the analysis determines whether Congress has directly spoken to the question at issue. Here, 30 USC § 932(f) does not directly address the precise question at issue—equitable tolling. Thus, the Tenth Circuit moved to the second step to determine whether the regulation was a reasonable interpretation of the statute. The statute of limitations in the BLBA is nonjurisdictional, so it is subject to the presumption that equitable tolling is permissible. Therefore, the regulation was validly promulgated and entitled to deference.

The Tenth Circuit did not address Big Horn's claim that this case did not present any extraordinary circumstances because the employer failed to exhaust those arguments before the agency.

The decision was affirmed.

No. 18-1008. Patterson v. PowderMonarch, LLC. 6/10/2019. D.Colo. Judge McKay. *Skiing Injury—Release of Liability—Contract Modification—Same Transaction—“Free to Walk Away”—Clear and Unambiguous Language.*

Patterson made an online payment for a nonrefundable ski lift ticket to use at Monarch Mountain resort, which is owned and operated by defendant PowderMonarch, LLC. Either she or her husband (collectively, plaintiffs) picked up the ticket two days later at the resort. The lift ticket included a seven-paragraph warning and a release of liability.

Patterson was injured at the resort when she unloaded from a ski lift. Plaintiffs sued, claiming negligence and loss of consortium. The district court entered summary judgment in defendant's favor, concluding that plaintiffs' claims were barred by the exculpatory agreement included in the ski lift ticket and preempted by Colorado's premises liability statute.

On appeal, plaintiffs argued that the district court erred in granting summary judgment because the addition of the release of liability two days after Patterson paid for the ticket

constituted a contract modification for which there was no additional consideration. The lapse of two days was not a sufficient amount of time to be characterized as a contract modification. Further, when she made the payment, Patterson was aware that the transaction was not complete because she knew the ticket had to be picked up at the resort. Her receipt of the ticket is better viewed as part of the same transaction, rather than as a subsequent contract modification. Thus, no additional consideration was required for the lift ticket's exculpatory language to be enforceable.

Plaintiffs also argued that the exculpatory agreement was invalid under Colorado law because it was not fairly entered into or expressed in clear and unambiguous language. Plaintiffs argued that the ticket was nonrefundable, and Patterson had incurred travel costs to get to the resort, so she was not "free to walk away." The

Tenth Circuit considered the four factors in *Jones v. Dressel*, 623 P.2d 370, 376 (Colo. 1981), to determine whether the agreement was valid. It was undisputed that two factors were satisfied, the existence of a duty to the public and the nature of the service performed. As to the third factor, whether the contract was fairly entered into, the Tenth Circuit noted that "free to walk away" does not mean free from all costs, but means free from compulsion or coercion. The exculpatory agreement here was fairly entered into because of its recreational nature and the lack of incompetency, compulsion, or other evidence that plaintiff was placed "at the mercy of the other party's negligence." As to the fourth factor, whether the parties' intent was expressed in clear and unambiguous language, the key phrases on the ticket were capitalized and bolded to attract the reader's attention and the agreement was not confusing or indecipherable.

The agreement was clear and unambiguously applies to the claims at issue here. Accordingly, the lift ticket agreement was enforceable.

The judgment was affirmed.

No. 18-1263. United States v. Cabral. 6/10/2019. D.Colo. Judge McHugh. *Supervised Release Conditions—Ripeness for Review—Delegation of Judicial Power to Probation Officer.*

Defendant pleaded guilty to being a felon in possession of a firearm and ammunition. He was sentenced to a prison term followed by a term of supervised release. One of his supervised release conditions allowed a probation officer to require defendant to notify third parties if the probation officer determined that defendant posed a risk to them. The district court declined to define all the specific risks that might trigger the condition and indicated that some of them might be unforeseen.

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On appeal, defendant argued that the risk-notification condition was unconstitutionally vague. The vagueness challenge was unfit for judicial review because it was not possible to assess how the condition would be applied in the future, so it was not prudentially ripe. Further, defendant would not be unduly harmed unless and until the probation officer ordered him to notify someone.

Defendant also argued that the risk-notification condition improperly delegates judicial power to a probation officer. This issue was ripe for review because it involved an already-realized delegation of judicial power to a probation officer, so further factual development was not required. Here, the district court delegated broad decision-making authority to the probation officer that could implicate a variety of liberty interests. Therefore, it was an improper delegation of judicial power.

The sentence was vacated and the case was remanded for resentencing.

No. 18-4088. United States v. Bishop. 6/10/2019. D.Utah. Judge Briscoe. *Right to Present Defense—Expert Testimony.*

Defendant manufactured a device, a TCGTR, that could be installed in an AR-15 semiautomatic rifle to increase its firing speed. As part of its investigation of defendant, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) ordered multiple TCGTRs from defendant, followed defendant’s instructions for bending and installing a TCGTR, and tested the effect on an AR-15. Based on its testing, the ATF concluded that the TCGTR was a machinegun.

Defendant was indicted for unlawfully manufacturing, possessing, and transferring machineguns. He proceeded pro se at trial with the assistance of standby counsel. The

government presented evidence that the device was a machinegun because, when bent per the instructions on defendant’s website and installed in an AR-15, it caused the gun to fire multiple bullets with each pull of the trigger. At trial an ATF agent testified that defendant’s device overrode a rifle part known as a disconnecter that ordinarily prevents a second shot without an additional trigger pull. During his case, defendant sought to present an animation to the jury to show how the device contacted the “trigger group assembly” without disabling the disconnecter. The district court barred this testimony because it concerned technical and specialized knowledge but had not been previously disclosed to the government as the federal rules required. A jury convicted defendant of unlawfully manufacturing machineguns and unlawfully possessing or transferring machineguns.

On appeal, defendant argued that limiting his testimony denied him his constitutional right to present a defense. The barred testimony required specialized knowledge about how an AR-15 rifle works and how its components may be manipulated. Because this knowledge is not readily accessible to ordinary persons, it was expert testimony, and defendant was required to disclose it to the government. Further, defendant was not unfairly prejudiced because he was permitted to present other testimony concerning his intent. Therefore, the district court did not err in limiting defendant’s testimony.

Defendant also argued that the district court erred in instructing the jury on the elements of the crime of unlawfully manufacturing machineguns because it failed to instruct the jury on the requisite mens rea. Defendant is not entitled to relief because any error in the jury instructions was not clear or obvious.

Defendant further contended that the district court erred in allowing hearsay testimony elicited by the government from four people who purchased a TCGTR from defendant. The testimony was about the ATF agents’ prior statements. These statements were inadmissible hearsay, but this testimony was harmless because it was cumulative of properly admitted testimony.

Defendant further argued that the district court erred in allowing the government’s expert

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to testify that the TCGTR met the statutory definition of a machinegun. The witness adequately explained the factual basis for his opinion that the TCGTR was a machinegun, so the district court did not err in allowing his testimony.

The convictions were affirmed.

No. 18-6130. United States v. Arias-Quijada. 6/17/2019. W.D.Okla. Judge Murphy. *Illegal Reentry into United States—Duress Defense.*

Defendant was removed from the United States by order of an immigration judge in 2005 and in 2014. He had not received permission to reenter the United States. In 2017, he was taken into custody by immigration officers in Oklahoma City. Defendant sought a pretrial ruling on the admissibility of evidence to substantiate his claim that he illegally reentered the United States only because of duress. He proffered facts and supporting documents detailing his interactions with the Mara Salvatrucha (MS-13) gang and the 18th Street (Barrio 18) gang in El Salvador during his adolescent years, alleging that both gangs attempted to recruit him, the Barrio 18 gang tortured him when he was 15 years old, and a serious assault was perpetrated on him by MS-13 gang members after he was removed to El Salvador in 2014. The district court denied defendant's motion to assert a duress defense, reasoning that he failed to show he made a bona fide effort to surrender to authorities as soon as the duress lost its coercive force. Defendant entered a conditional guilty plea to illegal reentry into the United States, reserving the right to appeal the district court's denial of his motion to assert a duress defense.

The Tenth Circuit explained that to assert a duress defense, a defendant must establish (1) an immediate threat of death or serious bodily injury; (2) a well-grounded fear that this threat will be carried out; and (3) lack of a reasonable opportunity to escape the threatened harm. To make this showing concerning the continuing offense of illegal reentry, a defendant must also proffer evidence that he made a bona fide effort to surrender to authorities as soon as the alleged duress lost its coercive force. If the alleged duress loses its coercive force at any time before a defendant surrenders or is

apprehended, he is not entitled to present the duress defense to the jury.

Here, it was undisputed that the criminal activity in which defendant engaged continued throughout the three-year period he resided in the United States illegally, and he failed to make a bona fide effort to surrender. Rather, defendant attempted to excuse his behavior by arguing that the alleged duress continued during the entire time of his undetected presence in the United States because he feared that if he surrendered to authorities he would be immediately returned to El Salvador. He asserted that the fact of his indictment for illegal reentry is evidence from which a jury could conclude that he would have been denied asylum if he had surrendered voluntarily. However, defendant's indictment is no indication of whether a formal application for asylum would have been denied. Therefore, he did not identify any evidence from which a jury

could determine he acted reasonably by failing to surrender to law enforcement either when he illegally reentered or during the three years between his reentry and arrest. The district court did not abuse its discretion when it refused to allow defendant to present the defense.

The order was affirmed. 

These summaries of selected Tenth Circuit opinions are written by licensed attorneys Katherine Campbell and Frank Gibbard. They are provided as a service by the CBA and are not the official language of the court. The CBA cannot guarantee the accuracy or completeness of the summaries. The full opinions are available on the CBA website and on the Tenth Circuit Court of Appeals website.

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