

# Summaries of Selected Opinions

**No. 17-5079. Grice v. CVR Energy, Inc.** 4/23/2019. N.D.Okla. Chief Judge Tymkovich. *Diversity Jurisdiction—Dispensable Party—Unfair Prejudice—Summary Judgment.*

Benjamin Grice was severely burned in an explosion at the refinery where he worked. He and his wife (the Grices) filed tort claims against the employer's two parent corporations, CVR Energy, Inc. and CVR Refining, LP, alleging they assumed responsibility for workplace safety by entering into a services agreement for the benefit of Benjamin's employer. The district court granted summary judgment to defendants, holding that the agreement did not make them responsible for Benjamin's safety.

The Tenth Circuit first determined jurisdiction. After the appeal was filed, it was discovered that CVR Refining had unitholders in Kansas, which was the Grices' state of residence. This rendered the district court without jurisdiction, but the Tenth Circuit was able to cure the jurisdictional defect by dismissing CVR Refining under Fed. R. Civ. P. 19 because no party would be unfairly prejudiced by its dismissal, given that the Grices could refile their claims against it in state court.

On the merits, the Grices challenged the summary judgment determination that CVR Energy owed no duty to Benjamin. Here, the services agreement was one of oversight and administrative services. While CVR Energy gave advice and monitored the progress of safety issues, it did not assume a duty to provide workplace safety for its subsidiaries' employees.

The judgment was affirmed.

**Nos. 18-3070 & 18-3071. United States v. Cookson.** 4/26/2019. D.Kan. Judge McHugh. *Sentencing—Evidence of Rehabilitation—Substantive Reasonableness of Sentence.*

The FBI seized Playpen, a website that facilitated the distribution of child pornography, and proceeded to use the site to find Playpen's users. However, finding users was a challenge because Playpen was accessible only through a program that allowed users to browse the Internet anonymously. To bypass the steps Playpen took to keep its users anonymous, the FBI loaded Playpen's contents onto a government server in Virginia. The FBI then obtained a warrant from a magistrate judge in Virginia to authorize law enforcement officers to deploy a network investigative technique (NIT) that would cause a user's computer to transmit identifying information, including the user's IP address, to the FBI.

The FBI operated Playpen with the NIT for about two weeks. During this operation, agents obtained defendant's IP address, and through a subpoena to a telephone company in Kansas, they obtained his physical address. Agents searched defendant's premises and found child pornography on defendant's various devices.

The government charged defendant with two counts of possessing child pornography. Defendant moved to suppress all evidence derived from the operation of the NIT on his computer. The district court denied the suppression motion. Defendant pleaded guilty to possessing child pornography. At his sentencing hearing, the district court determined his criminal history and total offense level correlated to a Guidelines range of 97–121 months. The district court announced its intention to sentence defendant to 72 months' imprisonment, but after entertaining argument from both parties and inviting defendant's allocution, the district court imposed a sentence of five years' probation.

On appeal, the government challenged defendant's sentence. The Tenth Circuit

determined the sentence was substantively unreasonable because the district court failed to adequately justify its dramatic downward variance with reference to the statutory sentencing factors, other than defendant's presentence rehabilitation. Further, the district court erroneously relied upon the harm defendant would face if incarcerated pending his appeal, notwithstanding that the plea agreement allowed him to remain on bond while his appeal was pending.

Defendant cross-appealed, arguing that the district court erred in denying his motion to suppress. He argued that the magistrate judge in Virginia lacked authority to issue a warrant to search property outside his district. Here, the good-faith exception to the exclusionary rule applied to the government's search using the NIT. Therefore, the district court did not err.

The denial of defendant's motion to suppress was affirmed, the sentence was vacated, and the case was remanded for resentencing.

**No. 17-2180. United States v. Loera.** 5/13/2019. D.N.M. Judge Ebel. *Fourth Amendment—Search of Computer Pursuant to Warrant—Evidence of Other Crimes.*

While executing a warrant to search defendant's home for evidence of computer fraud, FBI agents discovered child pornography on four CDs. The agents completed the on-site search, then seized and removed several electronic devices and CDs that appeared to contain evidence of computer fraud, plus the CDs containing child pornography. One of the agents later opened the CDs with child pornography so he could describe some of the images in an affidavit seeking a second warrant to search all of the seized devices for child pornography (the second search). After the second warrant

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was granted, the agents executed it and found more child pornography.

Defendant was prosecuted for possessing child pornography. He filed a motion to suppress the evidence seized pursuant to each search, arguing that the searches violated the Fourth Amendment. The district court denied the motion. Defendant filed a motion for reconsideration, which the district court also denied. Defendant pleaded guilty to receipt of child pornography, reserving the right to appeal the denial of his motion to suppress.

On appeal, defendant argued that all the evidence of child pornography should have been suppressed because each of the searches was unlawful. As to the first search, defendant argued that the FBI agents obtained the initial warrant to search his residence for evidence of computer fraud as a pretext to search instead for evidence of child pornography. Based on the record facts, including agents' testimony, the agents conducted the first search solely to look for evidence of computer fraud, and there were no pretextual motivations for obtaining the first warrant. In addition, the first search was reasonable because it was directed solely at uncovering items described in the first warrant, both before and after the officers discovered the child pornography evidence.

However, the second search of the CDs was unreasonable because it was directed toward discovering evidence of child pornography rather than computer fraud. It was unlawful because it exceeded the scope of the first warrant and none of the exceptions to the warrant requirement applied.

As to the second warrant, defendant argued that it was not supported by probable cause and no exceptions to the warrant requirement applied. Because the second search was unlawful, the child pornography evidence uncovered during that search had to be excised from the search warrant application. Absent this tainted information, the second warrant lacked probable cause. Further, the "good faith" exception did not apply because the warrant affidavit was based on tainted evidence from a prior unlawful search. Notwithstanding these conclusions, the FBI agents would have inevitably discovered the 330 child pornography images on defendant's

CDs and the 730 child pornography images on his laptop through lawful means, so the "inevitable discovery doctrine" applied and supported the denial of the motion to suppress.

The denials of defendant's motion to suppress and motion for reconsideration were affirmed.

**No. 17-1456. Hamer v. City of Trinidad.** 5/15/2019. D.Colo. Judge Carson. *Statute of Limitations—Americans with Disabilities Act—Rehabilitation Act—Continuing and Repeated Violation Doctrines.*

Plaintiff is a qualified individual with a disability as defined under the Title II of the Americans with Disabilities Act (ADA) and § 504 of the Rehabilitation Act (RA). Confined to a wheelchair, he primarily used the City of Trinidad's (the City) public sidewalks to move about. Based on plaintiff's complaints to various governmental agencies that many of the City's sidewalks did not comply with the ADA and RA, the City actively began repairing and raising funds to further repair noncompliant sidewalks. Even so, plaintiff sued the City for violating the ADA and RA based on the noncompliant sidewalks, seeking injunctive relief and monetary damages. Plaintiff argued that both the continuing violation doctrine and the repeated violations doctrine could make his claims timely. The district court granted summary judgment to the City, holding that Colorado's general two-year statute of limitations applied, and the statute began to run when plaintiff first discovered the existence and cause of his injury. Because plaintiff had complained to the city council more than two years before filing suit, the suit was untimely.

On appeal, plaintiff argued that the repeated violations doctrine applied to make his claims timely. The Tenth Circuit discussed the continuing violation doctrine, which combines otherwise discrete occurrences into a single timely claim if at least one act occurred before the limitations period expired, and the repeated violations doctrine, which divides a single action into separate claims, at least one of which accrued within the limitations period and allows recovery for only that part of the injury suffered within the limitations period. As a matter of first

impression in the circuit, the Tenth Circuit held that the repeated violations doctrine applies to Title II ADA and § 504 RA claims. A public entity repeatedly violates those laws each day that it fails to remedy a noncompliant service, program, or activity. Consequently, a qualified individual with a disability is excluded from, and subjected to discrimination under, those services, programs, and activities each day. Thus, the statute of limitations bars recovery only for the injuries that plaintiff incurred outside the limitations period immediately preceding the day of suit. Therefore, plaintiff's claims were not all barred by the statute of limitations, and the district court erred.

The judgment was reversed and the case was remanded.

**No. 17-9003. Peterson v. Commissioner.** 5/15/2019. U.S. Tax Court. Judge Hartz. *Tax—Related Trust—Subchapter S Corporation—Employee Stock Ownership Plan.*

Peterson and other taxpayers (collectively, Taxpayers) were majority shareholders in a Subchapter S corporation (the Corporation), whose income, deductions, and losses were passed through to its shareholders. Taxpayers owned most of the Corporation's stock, and the Corporation's employee stock ownership plan (ESOP) owned the rest. The ESOP was qualified under ERISA, so it was exempt from income taxes.

The Corporation was an accrual-basis taxpayer, but the ESOP-participant employees were cash-basis taxpayers. The Corporation deducted expenses for ESOP participants in 2009, the year the expenses accrued, even though it did not pay the expenses until 2010. The Internal Revenue Service audited Taxpayers and decided that Corporation employees who participated in the ESOP were related to the Corporation. It therefore disallowed deductions taken for the 2009 tax year based on expenses accrued in that year but not paid to the related employees until 2010. The Tax Court upheld the determination.

On appeal, Taxpayers contended that the Tax Court misinterpreted the Internal Revenue Code (IRC), and even if its interpretation was correct, it miscalculated the deficiency amounts (the Commissioner agreed that a recalculation

tion is necessary). A corporation can deduct ordinary and necessary business expenses in the year when all events occurred. But under IRC § 267(a)(2), if a taxpayer and a person to whom the taxpayer is to make a payment are related, the amount of the payment cannot be deducted until it is paid or is includable in the recipient's gross income. Taxpayers made various arguments that an ESOP trust was not a trust within the meaning of IRC § 267, so the Corporation and the Corporation's ESOP were not related. Here, the ESOP was a trust within the meaning of IRC § 267, so the Corporation and the Corporation ESOP were related.

The Tax Court's decision was affirmed, except that the matter was remanded for recalculation of the correct deficiency amounts.

**No. 18-1259. United States v. Mendez.** 5/17/2019. D.Colo. Judge Seymour. *Guideline*

*Sentencing—Crime of Violence—Categorical Approach.*

Defendant pleaded guilty to being a felon in possession of a firearm. In sentencing him, the district court treated his prior Colorado conviction for attempted robbery as a "crime of violence," resulting in an enhanced base offense level under the Sentencing Guidelines.

On appeal, defendant challenged the designation of the prior offense and his resulting enhanced sentence. The Tenth Circuit applied a categorical approach to determine whether the prior conviction was a crime of violence. While the Guidelines specify that a crime of violence includes "attempting" to commit such a crime, they do not define "attempt." The Tenth Circuit compared the Colorado statutory definition of "attempt" to a generic definition derived from the Model Penal Code and determined that the definitions were sufficiently similar to satisfy

the categorical approach, and thus concluded that attempted robbery is a crime of violence.

The sentence was affirmed. **CL**

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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