Summaries of Selected Opinions

No. 17-4111. Acosta v. Foreclosure Connection, Inc. 8/15/2018. D.Utah. Judge Lucero. *Overtime Wages—Fair Labor Standards Act—Enterprise Engaged in Commerce—Prohibition on Retaliation.*

Foreclosure Connection, Inc. (FCI) buys real estate, renovates homes, and rents or resells properties. Based on a complaint filed by two FCI workers, the Department of Labor (DOL) investigated FCI for failing to pay overtime wages to its construction workers. When FCI received notice of the complaint, it held a meeting with its workers and instructed the group to refuse to cooperate with DOL's investigation. FCI had its workers sign "independent contractor agreements," but instructed them to leave the agreements undated, and told them to claim they could not remember when they signed. FCI fired the two employees who had instigated the investigation. FCI submitted the agreements to DOL, including an agreement for one of the fired workers that appeared to have a forged signature. DOL sued FCI and its manager, alleging that FCI had obstructed its investigation and retaliated against its employees. Following a bench trial, the district court issued a permanent injunction barring retaliation and obstruction, and awarded back pay and liquidated damages to the two employees who had complained.

On appeal, defendants argued that DOL failed to demonstrate that FCI was an enterprise engaged in commerce. Under the Fair Labor Standards Act (FLSA), employees are entitled to overtime pay if they work more than 40 hours per week and are employed in an enterprise engaged in commerce. After reviewing authorities from other circuits, the Tenth Circuit held that FLSA's prohibition on retaliation applies to any person regardless of whether that person is an enterprise engaged in commerce.

Defendants also contended that the district court clearly erred in finding a causal connection between the two terminated employees' protected activity and their termination. Here, the record contains direct evidence that the employees were fired because of their DOL complaints. Further, the district court could permissibly infer pretext because of the inconsistent reasons provided for the terminations.

The judgment was affirmed.

No. 17-1013. DISH Network L.L.C. v. Ray. 8/21/2018. D.Colo. Judge Seymour. *Arbitration—Employment Agreement—Class and Collective Claims—Arbitrator's Decision on Arbitrability—Manifest Disregard of Law—Arbitrator Did Not Exceed Powers.*

Ray was a sales associate for DISH Network L.L.C. (DISH). While he was employed, he signed an arbitration agreement (the Agreement) that DISH drafted. After DISH terminated his employment, Ray filed suit in federal court alleging that DISH had violated various laws pertaining to wages. DISH demanded arbitration, so Ray dismissed his lawsuit and filed with the American Arbitration Association asserting the same claims. In addition, he sought to pursue his claims as a class action and a collective action. The arbitrator determined that he had jurisdiction to determine whether the agreement allowed class arbitration and then concluded that the arbitration agreement permitted collective action covering Ray's wage claims. DISH filed a district court petition to vacate the arbitrator's ruling, which the district court denied.

On appeal, DISH first contended that the arbitrator had exceeded his powers in deciding the initial issue of jurisdiction over the arbitrability of the class and collective claims. Recognizing that the question of arbitrability is an issue for judicial determination unless the parties clearly provide otherwise, the Tenth Circuit determined that the broad language of the parties' agreement authorized the arbitrator to make this decision, and further, that the clear and unmistakable evidence demonstrated that the parties intended to delegate this question to the arbitrator.

DISH also argued that even if the arbitrator had the authority to determine whether the Agreement permitted classwide arbitration, the decision should be vacated because the arbitrator manifestly disregarded the law, or alternatively, impermissibly based his decision on public policy. Having held that the arbitrator had the authority to determine the arbitrability of the classwide arbitration issue, the Tenth Circuit's further review was limited to whether the arbitrator interpreted the Agreement. The Tenth Circuit thus summarized the arbitrator's interpretation of the Agreement to show that he interpreted the parties' contract. Here, the arbitrator clearly considered the Agreement, did not exceed his powers, and did not manifestly disregard Colorado law.

The order was affirmed.

No. 17-5118. United States v. Murphy. 8/24/2018. N.D.Okla. Judge O'Brien. *Sentence Enhancement—Maintaining Premises for Distribution of Controlled Substance.*

Defendant pleaded guilty to drug and firearms charges. The presentence investigation report (PSR) recommended a two-level enhancement to his advisory Guidelines offense level pursuant to USSG § 2D1.1(b)(12) because he had maintained a premises (his residence) for the purpose of manufacturing or distributing a controlled substance. Defendant

challenged the proposed enhancement, arguing that his drug-related activities represented a mere incidental use of the home. The district court rejected his argument and imposed the enhancement.

On appeal, defendant argued that the enhancement applies only when a defendant pervasively and persistently uses his or her home to further a drug business. He asserted the enhancement should not apply here because the evidence showed only that he sometimes used his home for drug-related activities. The Guideline commentary requires drug-related activity to be one of the defendant's primary or principal uses for the premises. Here, under the totality of the circumstances, defendant's use of his home for drug-related activity was frequent and substantial. Therefore, the enhancement was warranted.

The sentence was affirmed.

No. 17-7010. United States v. Dixon. 8/24/2018. E.D.Okla. Judge Holmes. *Jury Instructions—Duress Defense.*

Defendant was indicted for embezzlement and theft from an Indian tribal organization for voiding cash sales and pocketing sales proceeds at a convenience store owned by the Choctaw Nation. Defendant lived at home and was a caretaker for her disabled mother. Before trial, she filed a notice of defense of duress on the theory that she faced an imminent threat of sexual assault from her stepfather and that her post traumatic stress disorder (PTSD) caused her to believe that she could only escape that threat through theft. She also submitted a jury instruction on the duress defense and a written proffer of expert testimony in support of the defense. The court rejected the defense, and the jury convicted her.

On appeal, defendant argued that the district court erred in rejecting her duress defense and related jury instruction. She contended that her defense was viable because her actions were reasonable, given her history of sexual abuse and PTSD diagnosis. Defendant was entitled to a duress defense only if she produced sufficient evidence that would allow the jury to find in her favor by a preponderance on each element of the defense. Here, defendant did not satisfy the second element of the defense because she failed to show that she had no reasonable, legal alternative to violating the law, such as reporting the abuse to the police, leaving the home, or attempting to acquire a loan. Thus, there was a sufficient basis for the district court to reject her defense.

Defendant further argued that her actions should have been assessed considering her prior abuse and PTSD. Here, the plain text of defendant's proposed duress instruction, Pattern Instruction 1.36, included an objective test that clearly indicates a defendant's subjective beliefs or perspectives are not controlling; they must be objectively reasonable. Further, defendant failed to preserve the opportunity to argue for reversal under another duress-defense rubric. The district court did not err in finding defendant's duress defense legally insufficient under the analytical framework of the pattern jury instruction because she had reasonable, legal alternatives to violating the law.

The judgment was affirmed.

Nos. 16-7079, 16-7080, and 16-7081. Halley v. Huckaby. 8/27/2018. E.D.Okla. Chief Judge Tymkovich. *Qualified Immunity—Seizure and Interview of Minor—Interference with Familial Relationship—Fourth Amendment—Fourteenth Amendment.*

The Oklahoma Department of Human Services (DHS) received an anonymous call voicing a concern for the safety of 6-year-old J.H., alleging his father used drugs and had a prior arrest record for possessing drugs and a firearm. In response, two days later Police Chief Goerke picked J.H. up from school and transported him to a safe house, where DHS child welfare specialist Huckaby interviewed him. Deputy Calloway helped set up the video

recording equipment at the safe house, and he transported J.H. back to school after the interview.

The interview revealed no evidence of abuse, so DHS did not proceed further. But the interview process purportedly caused J.H. stress and trauma and interfered with his relationship with his father. J.H., represented by his grandfather, filed suit against Huckaby, Goerke, and Calloway (collectively, defendants) alleging, among other things, wrongful seizure in violation of the Fourth Amendment. J.H. also alleged that Huckaby and Calloway violated his Fourteenth Amendment rights through undue interference with J.H.'s substantive due process right of familial association. He claimed that the interview was unjustified and conducted with the intent of interfering with J.H.'s relationship with his father. J.H. claimed that defendants did this in retaliation for not having been able to convict J.H.'s father of domestic abuse allegations that his father's ex-wife had made. The district court granted qualified immunity on some claims and denied it on others.

On appeal, defendants contended that the district court erred in denying their motions for summary judgment; all three argued that they were entitled to qualified immunity on J.H.'s Fourth Amendment claims. A government official is entitled to qualified immunity from suit unless the plaintiff can show that the defendant violated a constitutional right that was clearly established at the time. The Fourth Amendment requires officials to have a reasonable suspicion of imminent abuse to seize a child. Here, defendants could not have had such a reasonable suspicion. In light of the evidence at summary judgment, a reasonable jury could find that Huckaby and Calloway violated the Fourth Amendment, so they are not entitled to qualified immunity on the unlawful-seizure claims. Further, the right was clearly established at the time. As to Goerke, the Tenth Circuit did not decide whether there was sufficient evidence for a jury to find that his actions violated the Fourth Amendment because even if his actions were unconstitutional, the violation would not have been clearly established. Therefore, Goerke is entitled to qualified immunity.

Huckaby and Calloway also argued that they are entitled to qualified immunity on the Fourteenth Amendment claims because J.H. failed to make the requisite showing of a clearly established interference with familial association. Here, J.H. failed to show that the law was clearly established that reasonable officials would have known that the short seizure would constitute an unwarranted interference with a family relationship. The Tenth Circuit did not decide whether the record demonstrates a constitutional violation because even if the officials violated J.H.'s substantive due process rights, the right was not clearly established at the time, so Huckaby and Calloway are entitled to qualified immunity on the Fourteenth Amendment claims.

The order denying qualified immunity to Huckaby and Calloway on the Fourth Amendment claims was affirmed. The order denying qualified immunity to Goerke on the Fourth Amendment claim was reversed. The order denying Huckaby and Calloway qualified immunity on the Fourteenth Amendment claims was reversed.

No. 17-2086. United States v. Sample. 8/27/2018. D.N.M. Judge Lucero. *Sentencing Guidelines—Downward Variance—Use of Probation to Permit Restitution.*

Defendant worked for several large brokerage firms and was recognized as a top investment advisor. He eventually began operating investment funds from which he diverted funds for his own personal expenses, providing investors with false account statements and other documents. In all, he misappropriated more than a million dollars. Defendant pleaded guilty to one count of frauds and swindles and two counts of wire fraud. The district court varied downwardly from the advisory Guideline range of 78 to 97 months' imprisonment and sentenced him to a five-year term of probation, reasoning that such sentence would allow him to remain employed and repay his victims. It imposed special probation conditions, including requiring defendant to maintain employment, allow the probation office to access his financial information, and pay restitution to his victims.

On appeal, the government argued that defendant's sentence is substantively unreasonable because the district court gave improper weight to defendant's income and consequent ability to pay restitution. The record clearly indicates that the district court imposed a lenient probation sentence because defendant's high income allowed him to make restitution payments to his victims. But the justice system has no sentencing discount for wealth, and examining the sentencing factors without considering defendant's earning capacity, it is not possible to conclude that defendant's sentence was reasonable.

The sentence was vacated and the case was remanded. 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.