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Recent Developments

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RECENT DEVELOPMENTS

Eighth Circuit Holds ADA Compensatory Damages Claims Survive Death

Guenther v. Griffin Constr. Co., Inc., 846 F.3d 979 (8th Cir. 2017).

This past January, the United States Court of Appeals for the Eighth Circuit reversed the United States District Court for the Western District of Arkansas and held a claim for compensatory damages under the Americans with Disabilities Act (ADA) survives the death of an aggrieved party. The case arose after Griffin Construction terminated employee Semmie John Guenther, Jr. in 2013. When he was originally diagnosed with prostate cancer in 2012, the company granted his request for three weeks of leave from work to receive treatment. However, in 2013, when he learned that the cancer had spread and he requested an additional three weeks of leave to undergo radiation therapy, Griffin Construction fired him and immediately cancelled his insurance policies.

While Guenther timely filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), he died before the agency completed its administrative process and issued a right-to-sue letter. The special administrator of Guenther's estate filed suit under Title I of the ADA and a section of the Arkansas Civil Rights Act (ACRA).[1] Griffin Construction argued the claims did not survive death in their motion to dismiss, and the District Court agreed. Noting the "difficult question of state law," the District Court found that the federal common law provided for application of Arkansas's tort survival statute.[2] Judge Timothy Brooks entered judgment on

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1. ARK. CODE ANN. § 16-62-101(a)(1) (West 2016).
2. Guenther v. Griffin Constr. Co., Inc., 161 F. Supp. 3d 665, 667 (W.D. Ark. 2016), *rev'd*, 846 F.3d 979 (8th Cir. 2017).

the pleadings for Griffin Construction, concluding Guenther's ADA claim abated at death.

Writing for the Eighth Circuit, Chief Judge William Jay Riley reversed the District Court. Judge Riley first addressed how Congress could have instructed the judiciary whether federal claims survive a complainant's death. Not only is there no general federal survival statute for federal-question cases, there is nothing on claim abatement within the text of the ADA. Even though 42 U.S.C. § 1988(a) instructs courts to fill gaps with state law when state law is not inconsistent with federal law, the Eighth Circuit agreed with Judge Brooks that the statute does not apply to the ADA. Relying on a Tenth Circuit case, the court decided that federal common law should govern the issue of ADA claim survival since Congress has not expressed a contrary intent.[3] Rather, Congress's intent in passing the ADA was to provide a comprehensive national mandate with "clear, strong, consistent, [and] enforceable standards" for addressing disability-based discrimination.[4]

In considering the ADA's intent, the opinion makes two points. First, state law should not be incorporated where it would "frustrate" a federal program's intent. The abatement of ADA claims would pose "a special threat to enforcement" because the very health issue that led an employee to file their claim could lead to or cause the individual's death before the administrative process runs its course (as was seen in Guenther's case). Second, unlike state law, a uniform federal rule would ensure consistent and evenhanded application of the ADA.

Griffin Construction argued that applying state statutes of limitation was similar to applying state survivorship laws, and the tort survival language contained in ACRA should control. The Eighth Circuit flatly rejected this notion, faulting the "analogy to comparing apples to oranges." In concluding that federal common law does not incorporate state law to determine survivorship of an ADA claim, the Eighth Circuit gave Guenther's administrator and future plaintiffs' estates the green

3. Smith v. Dep't of Human Servs., 876 F.2d 832, 834 (10th Cir. 1989).

4. 42 U.S.C. § 12101(a)(2), (b)(1)-(2) (2009).

light to bring ADA claims in the place of the decedent. However, the court did not provide any view as to "whether a claim for punitive damages would survive," and cautioned that it was not answering the question "whether a claim under any other federal scheme warrants a uniform rule of survivorship."

Federal Judge Permanently Enjoins State Authorities from Enforcing Anti-Begging Law

Rodgers v. Bryant, No. 4:16-cv-775-BRW (E.D. Ark. Nov. 22, 2016) (order granting preliminary injunction).

In late November, United States District Judge Billy Joe Wilson granted a preliminary injunction prohibiting the state from enforcing a section of its loitering statute. Under Arkansas Code Annotated § 5-71-213(a)(3), a person commits a class C misdemeanor if he or she "[l]ingers or remains in a public place or on the premises of another for the purpose of begging."[5] In enjoining the law, Judge Wilson concluded that the anti-begging section "infringe[d] on the freedom of speech guaranteed under the First Amendment to the Federal Constitution."

The American Civil Liberties Union (ACLU) of Arkansas filed the case on behalf of two plaintiffs: one disabled veteran in Garland County and one homeless male in Benton County. Both plaintiffs were previously cited for violating § 5-71-213(a)(3). Plaintiff Michael Andrews Rodgers was arrested once and cited four times while holding up a sign that identified him as a veteran. After getting convicted in Garland County District Court, the Garland County Circuit Court found the law unconstitutional and dismissed the charges. However, with the law in effect in other parts of the state, Rodgers believed the law continued to have a direct and chilling effect on his right to freedom of speech. The other plaintiff, Glynn Dilbeck, was arrested for holding up a sign asking for money alongside a roadway exit in Northwest Arkansas. While his charge was voluntarily dismissed by the prosecuting attorney, he too alleged that his fear of further criminal action had a chilling effect on his First Amendment right. Their complaint, filed against the Director of the Arkansas State Police, maintained that the anti-

5. ARK. CODE ANN. § 5-71-213 (West 2016).

begging section of the loitering statute was both unconstitutionally vague and overbroad.[6]

The District Court found the plaintiffs had standing to bring their First Amendment claims, noting that begging is constitutionally-protected. The plaintiffs' experiences, wrote Judge Wilson, underscored the real threat of being charged for begging. The District Court's order then addressed the Defendant's concerns that federal courts should abstain and defer to the authority of state courts to interpret state law when a narrow construction by state courts may avoid constitutional concerns. While the Arkansas Supreme Court has not had the opportunity to consider § 5-71-213(a)(3), Judge Wilson declined to abstain noting he could "imagine no interpretation shy of metaphysical contortions that would save the anti-begging law from constitutional concerns."

As to the vagueness challenge, the District Court agreed with Defendant that persons of ordinary intelligence understand what is meant by the term "begging." Citing *The New American Heritage Dictionary*, the District Court relied on the term to mean asking for money or soliciting alms. However, the District Court agreed with the Plaintiffs that § 5-71-213(a)(3) was not narrowly tailored to meet constitutional muster. Noting that the section broadly applied to "begging in all places, at all times, by all people," Judge Wilson determined that the anti-begging section violated the First Amendment. While his court order left untouched the other subsections of § 5-71-213, the injunction will prevent future arrests or citations from being issued by the Arkansas State Police.

6. Complaint at 1, Rodgers v. Bryant, No. 4:16-cv-775-BRW (E.D. Ark. Oct. 21, 2016).

Arkansas Supreme Court Overturns Birth Certificate Ruling for Same-Sex Couples

Smith v. Pavan, 2016 Ark. 437, 505 S.W.3d 169.

In a narrow decision, the Arkansas Supreme Court threw out Pulaski Circuit Court Judge Tim Fox's ruling that temporarily allowed married same-sex couples to get the names of both spouses on their children's birth certificates without a court order. The case was brought by three couples whose children were conceived through artificial insemination by anonymous donors. The six plaintiffs filed their suit in circuit court seeking (1) a declaration that the refusal to issue birth certificates with the names of both spouses was unconstitutional; (2) a finding that certain statutory provisions were unconstitutional; (3) an order enjoining the Arkansas Department of Health (ADH) from refusing to list the names; and (4) an order requiring ADH to issue corrected birth certificates naming both spouses. The central question of the children's rights relating to their birth certificates was not argued by the parties or addressed by the circuit court. The majority opinion, authored by Justice Josephine Hart, focused instead on interpreting two portions of the Arkansas Code relating to the registration of children's births.[7]

The majority held that the circuit court erred in concluding that the case was controlled by *res judicata*. Nathaniel Smith, the Director of the ADH, was a party in a previous case that granted injunctive relief to same-sex couples.[8] However, the court noted the absence of the words "birth certificates" from the previous order and held that the "language in the [] orders would not have placed Smith on notice that he needed to appeal those orders to this court and raise on appeal arguments related to the overbreadth of the injunctive relief granted and to the issuance of birth certificates."

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7. ARK. CODE ANN. §§ 20-18-401(e)-(f), 20-18, 406(a)(2) (West 2016).

8. Smith v. Wright, No. 60CV-13-2662 (Pulaski Co. Cir. Ct. May 9, 2014); Smith v. Wright, No. 60CV-13-2662 (Pulaski Co. Cir. Ct. May 15, 2015).

The majority then turned to the circuit court's reliance on the Supreme Court's 2015 decision in *Obergefell v. Hodges,*[9] declaring the decision inapplicable to same-sex birth certificates. Arkansas Code Annotated § 20-18-406(a)(2), which establishes when the State Registrar of Vital Records can issue new birth certificates, uses the language "person to be legitimated." The circuit court interpreted this phrase in light of *Obergefell* to cover minor children of *any* married couple. The majority disagreed, reasoning the statute relies on the biological relationship of the parents to the child. It noted that *Obergefell* did not address the question presented, rather it mentioned birth certificates only once. Pointing to the second statute, which the circuit court also found unconstitutional, the majority referenced the dictionary meanings of "husband" and "father." When viewed in context of these definitions, "the statute centers on the relationship of the biological mother and the biological father to the child, not on the marital relationship of husband and wife."

In addressing the couples' facial challenge to the two statutes, the majority cited the state's "important governmental objective" in listing biological parents on birth certificates, concluding it "does not violate equal protection to acknowledge these basic biological truths." The majority faulted the circuit court for conflating marriage, parental rights and vital records. Relying heavily on an affidavit from the Registrar of Vital Records, Melinda Allen, the majority placed a strong emphasis on this government interest in documenting the nexus between biological parents.

Former Chief Justice Howard Brill and Justice Rhonda Wood both concurred in part and dissented in part. Beginning with lyrics from Bob Dylan's classic, "The Times They Are a-Changin'," Justice Brill's opinion highlighted the unique powers held by each branch of government, and it concluded that all three branches must protect the constitutional rights of its citizens. Justice Brill also detailed the implications of Judge Fox's ruling through three different scenarios. In the first scenario, two married couples are unable to naturally conceive a

9. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

baby. The wife in the heterosexual couple gives birth through artificial insemination, as does one of the women in the homosexual couple. However, only the heterosexual couple is entitled to a birth certificate because the statute includes the word "husband." In the second scenario, both couples use artificial insemination to have a baby, but neither couple is married. As both are barred from using section 9-10-201(a), they must instead rely on a different statute that allows for a new birth certificate when there is evidence proving "that the person has been legitimated."[10] Justice Brill agreed with the majority that Judge Fox erred in giving a court-ordered definition to that phrase, while acknowledging that future direction from the legislative or executive bodies is necessary to "effect appropriate and required changes." His dissent questioned the majority's reliance on Melinda Allen's affidavit, noting that the ADH practice described in the affidavit run contrary to the language of existing Arkansas statutes—further underscoring the need for legislative or executive attention.

In the third scenario, both couples are married and seek to adopt. Under *Obergefell*, the statute is gender-neutral and both married couples are able to obtain a birth certificate. These scenarios, Justice Brill concluded, provide a snapshot of the "variations that may be presented by the changes in society and the changes in reproductive methods." In referencing the musical legend and recent Nobel laureate Bob Dylan one last time, he reminded the other branches of government to "heed the call."

Writing in dissent, Justice Wood discussed how the court could utilize the prudential-mootness doctrine to withhold relief and instead conduct a full evidentiary hearing. Characterizing the case as "fluctuating and underdeveloped," she highlighted the need for the legislature to review and rewrite the two statutes in light of *Obergefell*. A remand would allow the legislature "to either amend the statute to apply neutrally to same-sex marriages or base the benefit on something other than marital status." The federal doctrine, she argued, is essential when key

10. ARK. CODE ANN. § 20-18-406(a)(2) (West 2016).

circumstances in the course of litigation forestall meaningful relief. Both parties, she pointed out, acknowledge that material facts have changed.

Justice Paul Danielson dissented in full, contending that listing a parent's name on a birth certificate is "a benefit associated with marriage." In *Obergefell,* the Supreme Court listed "birth and death certificates" as those benefits "linked" to marital status. The majority here, Danielson writes, errs in favoring biological relationships over marital ones.

As of publication, two of the three couples have filed a petition for a writ of certiorari with the United States Supreme Court.[11]

11. Pavan v. Smith, 2016 Ark. 437, *petition for cert. filed*, (U.S. Feb 13, 2017) (No. 16-992).