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Recent Developments

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RECENT DEVELOPMENTS

BUSINESS LEADERS IN CHRIST v. UNIVERSITY OF IOWA[1]

In a free speech and free exercise case involving the Business Leaders in Christ at the University of Iowa, the Eighth Circuit Court of Appeals reversed the Southern District of Iowa by holding that University officials should not be granted qualified immunity based on the student organization's free speech claim.

Business Leaders in Christ ("BLIC"), a Christian student organization in the business college at the University of Iowa, was delisted as a registered student organization ("RSO") after University officials were not satisfied that BLIC's revised constitution adhered to the University's Human Rights Policy—a requirement for registration. That policy prohibits discrimination based on, among other common forms of discrimination, sexual orientation.

Student leaders of BLIC originally denied Marcus Miller, a student member of BLIC, participation in leadership because he disclosed he was gay and unwilling to forgo romantic same-sex relationships. The leadership explained that Miller fundamentally disagreed with the organization's beliefs and interpretation of the Bible regarding same-sex relationships. Miller complained to University officials, an investigation was performed, and the University ultimately revoked BLIC's registration as an RSO because it would not revise its policy of denying openly gay persons from participating in leadership.

BLIC sued the University and individual University officials for violating its free speech and free exercise rights. The United States District Court for the Southern District of Iowa found that the University violated BLIC's free speech rights by deliberately exempting other organizations from compliance with its Human Rights Policy. For example, it agreed to register organizations

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[1] Bus. Leaders in Christ v. Univ. of Iowa, 991 F.3d 969 (8th Cir. 2021).

like the Hawkapellas, an all-female a cappella group; the House of Lorde, a group for black queer individuals or the support thereof; and the Chinese Students and Scholars Association, a group limited to Chinese students. The Court held it was viewpoint discrimination to prevent the religious organization from expressing its views on protected characteristics while other groups were permitted to espouse other views and restrict membership to certain persons. The Court also found a violation of BLIC's free exercise rights for similar reasons.

The issue on appeal was *not* whether any violations occurred. Rather, the issue was whether the District Court's decision to grant qualified immunity to the University officials (from civil suit) on both the free speech and free exercise claims was correct. The Eighth Circuit panel, Chief Judge Lavenski Smith writing, explained that "qualified immunity attaches when an official's conduct does not violate *clearly established* statutory or constitutional rights of which a reasonable person would have known."[2]

The Court went on to examine applicable free speech case law from the United States Supreme Court, the Eighth Circuit, and other federal Circuit Courts of Appeals (persuasive authority) to determine whether the law was so "clearly established" that the University officials *should have been aware* that their actions implicated BLIC's free speech rights. The Court held that it *was* clearly established and therefore held that the District Court should *not* have granted qualified immunity to the University officials based on BLIC's free speech claim.

The Court agreed with the District Court, however, that the free exercise case law was less clearly established. Therefore, qualified immunity on the free exercise claim was appropriate. Judge Jonathan Kobes, writing separately, would have denied qualified immunity on the free exercise claim as well, because he believed the law was clearly established such that the University officials should have known they were also violating BLIC's free exercise rights.

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[2] *Id*. at 979 (quoting Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018)).

McCARTY v. ARKANSAS STATE PLANT BOARD[3]

The Arkansas Supreme Court struck down portions of the statute governing the appointment process for members of the Arkansas State Plant Board ("ASPB") as an unconstitutional delegation of legislative power to private entities.

Appellants, Arkansas farmers, had challenged the ASPB's 2018 rule prohibiting the use of dicamba-based herbicides on crops from April 16 to October 31 each year.[4] Among their arguments, the farmers argued that the rule should be void because nine of the 18 members of the Board had been unconstitutionally appointed.[5]

Arkansas Code Annotated Section 2-16-206(a) provided for the appointment of one voting member from each of the following private agricultural entities: the Arkansas State Horticultural Society, the Arkansas Green Industry Association, the Arkansas Seed Growers Association, the Arkansas Pest Management Association, the Arkansas Seed Dealers' Association, the Arkansas Oil Marketers Association, the Arkansas Crop Protection Association, Inc., the Arkansas Agricultural Aviation Association, and the Arkansas Forestry Association.[6] Seven voting members are appointed by the Governor under the statute, and two non-voting members are appointed by the University of Arkansas.

In a 6-1 decision, the Arkansas Supreme Court reversed the Pulaski County Circuit Court and declared the portions of the statute giving private entities power to appoint members to the ASPB unconstitutional. Citing separation of powers concerns, Justice Barbara Webb wrote the opinion and explained that the Arkansas legislature cannot delegate away its power to make laws to private persons or non-government entities. The Court also cited decisions from other state supreme courts holding that private entities may not appoint members to a governmental board without offending their own constitutions and the doctrine against delegation of legislative power.

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[3] McCarty v. Ark. State Plant Bd., 2021 Ark. 105, 2021 WL 1807312.

[4] *See* Ark. State Plant Bd. v. McCarty, 2019 Ark. 214, 1-5, 576 S.W.3d 473, 474-76.

[5] *See id*. at 7-8, 576 S.W.3d at 477.

[6] ARK. CODE ANN. § 2-16-206(a)(5)-(13).

The Court reversed and remanded to the Circuit Court with instructions to remove the unconstitutionally appointed members.

BURLEY v. BRADLEY[7]

In an interesting property case, the Arkansas Court of Appeals considered "Possum Ridge Road" and a dispute between two quarreling neighbors, Bradley and Burley. The Court affirmed the lower court's determination that the neighbors' mutual road was a "private" road and that the gate and speed bumps connected to the road could remain. The Court reversed, however, on the issue of which neighbor was responsible for the road's regular maintenance.

In Union County, Arkansas, lies Possum Ridge Road, a long-established road presently serving landowners Bradley and Burley. In 2003, Bradley approached Burley about constructing a gate across the road to deter trespassers and thieves. Burley agreed, and the county judge allowed construction of the gate where the road met County Road 302.

Several years later, Burley hosted a church event at his home and requested that Bradley leave the gate open so that his guests could easily come and go. Burley alleged that Bradley detained at least one of his guests at the gate. Burley later withdrew his consent to the gate and contacted the county judge and sheriff about removing the gate. The parties then sued each other over the status of the road, the gate, and speed bumps that had been constructed.

The Union County Circuit Court held two separate bench trials, one on the status of the road and the other on the gate and speed bumps. Deferring to the Circuit Court under the clearly erroneous standard of review, the Court first affirmed the Circuit Court's finding of a private road.

The Court determined that the evidence showing occasional Union County maintenance of the road as a "courtesy," along with an unofficial county document suggesting that that the road was "maintained" as opposed to "private," was not enough to make the road a county road. Rather, the Court credited the

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[7] Burley v. Bradley, 2021 Ark. App. 105, 619 S.W.3d 49.

testimony of three former county judges who testified that the road has never been a county road. Furthermore, the Court held that any prescriptive easement the public at large may have previously enjoyed in the road for access to the Ouachita River was "abandoned" after installation of the gate in 2003.

The Court also agreed with the Circuit Court that the gate was a reasonable security measure for the private road, benefitting both Bradley and Burley. It was not unduly burdensome to Burley or his guests. As an appurtenant easement on Bradley's land (the servient estate), the road may be modified with reasonable safety and security measures by Bradley. Therefore, the gate and speed bumps could remain, with restrictions.

The Court disagreed with the Circuit Court, however, that Bradley, as the servient owner, was solely responsible for routine maintenance and repairs of the road. Citing prior case law, the Court held that the owner of the dominant estate, here Burley, has the right and responsibility of maintaining his enjoyment of the easement without unduly burdening the servient estate.

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