

RECENT DEVELOPMENTS

Judicial Ethics—Arkansas Supreme Court Finds Immediate Removal from Office Without Pay Was Appropriate Sanction for Judicial Misconduct

Judicial Discipline and Disability Commission v. Maggio,

2014 Ark. 366, ___ S.W.3d ___.

The Arkansas Supreme Court recently held that immediate removal of a judge from office without pay was the appropriate sanction for misconduct rather than removal in the form of suspension with pay until the end of the judge's current term. This ruling stemmed from the Arkansas Judicial Discipline and Disability Commission's (the "Commission") decision to file a report of uncontested sanction pursuant to Arkansas Judicial Discipline and Disability Commission Rule 12(D). The report concerned Judge Michael Maggio, a judge in Arkansas's Twentieth Judicial District. Judge Maggio, a circuit judge since January 2001, heard criminal, civil, probate, and domestic-relations cases during his time on the bench.

The case before the Arkansas Supreme Court began when David Sachar, the Commission's executive director, filed a complaint with the Commission. In the complaint, Sachar alleged Judge Maggio posted inappropriate comments on an online message board known as "Tiger Droppings" using the name "geauxjudge." Sachar also claimed Maggio posted information on the website involving sealed judicial proceedings. Judge Maggio admitted to authoring the posts.

Judge Maggio, after consulting counsel, agreed that suspension and removal were appropriate sanctions for his actions. This concession allowed the case to be resolved without a formal disciplinary hearing. The investigation panel unanimously approved those sanctions, and Commission

members unanimously approved the recommendations of suspension and removal.

The Arkansas Supreme Court was forced to decide the issue of whether or not to accept the Commission's proposed findings and recommended sanctions. Under Arkansas Judicial Discipline and Disability Commission Rule 12(E), the Arkansas Supreme Court may accept, reject, or modify the findings and recommendations of the Commission. The Arkansas Supreme Court reviews such matters *de novo* and will not reverse the Commission's findings unless they are clearly erroneous.

The Arkansas Supreme Court accepted the Commission's findings and approved the recommendation that Judge Maggio be removed from office. However, the court rejected the Commission's recommendation to suspend Judge Maggio with pay. Judge Maggio was officially relieved of his duties by Chief Justice Hannah on March 24, 2014 pursuant to amendment 80, sections 4 and 13 of the Arkansas Constitution. Other judges have performed Judge Maggio's duties since March 24, 2014, but Judge Maggio continued to receive compensation from the State of Arkansas. The Arkansas Supreme Court determined that suspension with pay was an inappropriate punishment and concluded that immediate removal was the just and proper sanction for the judge's conduct. The Court thus ordered Judge Maggio be removed from office, effective on the date of the opinion. The Court also proscribed Maggio from holding any judicial office in the State of Arkansas in the future.

*Federal Civil Procedure—United States Court of Appeals
for the Eighth Circuit Holds Collective Bargaining
Agreement Could Not Be Reopened Pursuant to Federal
Rule of Civil Procedure 23(e) Stipulated Dismissal Is a
Judgment for the Purposes of Federal Rule of Civil
Procedure 60(b)*

White v. National Football League,

756 F.3d 585 (8th Cir. 2014).

In 1993, a class of plaintiffs led by football star Reggie White signed an extensive collective bargaining agreement, known as the Stipulation and Settlement Agreement (“SSA”), to settle an antitrust lawsuit with the National Football League (NFL). The SSA governed labor relations between the NFL and its players until 2010, when the NFL declined to extend the agreement. The NFL Players’ Association (NFLPA) and several law firms authorized to represent NFL players sued the NFL as a result. The NFLPA alleged that the NFL violated the SSA in 2010 by instituting a secret cap on player salaries, but the lawsuit was settled by signing a Stipulation of Dismissal.

The SSA expired on March 11, 2011 with no agreement in place to replace it. NFL owners agreed to “lock out” the players until a new labor agreement was reached. A flurry of litigation by players ensued. The “lock out” ended with the signing of a new collective bargaining agreement in August 2011. The NFL and the NFLPA signed the Stipulation of Dismissal under Federal Rule of Civil Procedure 41(a)(1)(A)(ii) to settle the lawsuit over the alleged secret salary cap. The NFLPA agreed to dismiss with prejudice “all claims, known and unknown, whether pending or not, regarding the SSA including but not limited to claims asserting . . . collusion with respect to the 2010 League Year.” Several owners made public comments about alleged collusion in 2010, and the NFLPA interpreted these comments as admissions of collusion.

On May 23, 2012, The NFLPA petitioned the federal district court to reopen and enforce the SSA so it could pursue the collusion claim. The NFLPA sought to set aside the Stipulation of Dismissal based on two grounds. First, the

NFLPA claimed that because the district court never approved the Stipulation of Dismissal as required by Federal Rule of Civil Procedure 23(e), the Stipulation of Dismissal was invalid. Second, the NFLPA claimed the NFL procured the Stipulation of Dismissal by fraud, misrepresentation, or misconduct and should have been set aside pursuant to Federal Rule of Civil Procedure 60(b).

In determining whether the Stipulation of Dismissal was approved as required by Federal Rule of Civil Procedure 23(e), the court found the parties treated the SSA as a normal contract rather than a class settlement. Neither the parties nor the court ever invoked Rule 23 while litigating numerous complaints filed on behalf of players for alleged SSA violations. Rule 23 was not invoked until after the parties had agreed to extend the SSA, but the court found that even then, the parties did not actually follow Rule 23. The court also determined that nearly all of the players in the *White* class had retired from the NFL by 2010. The court found it was unlikely that the affected members of the class could constitute a class by themselves under the criteria for class certification in Federal Rules of Civil Procedure 23(a) and 23(b). Therefore, the court concluded that the alleged imposition of a salary cap in 2020 did not give rise to a claim “of a certified class.”

The court then addressed whether the NFLPA could seek relief under Rule 60(b), which allows the court to set aside a “final judgment, order or proceeding” obtained by “fraud[,] . . . misrepresentation, or misconduct.” The district court concluded that the Stipulation of Dismissal was not a “final judgment, order or proceeding.” The Eighth Circuit recognized two previous unpublished opinions¹ in which the appeals court held that dismissal under Rule 41(a)(1)(A) is not a “judgment, order or proceeding” and a party cannot seek to set aside a dismissal under Rule 60(b) after stipulating to such a dismissal. The court next noted that six other Circuit Courts of Appeal had considered the same issue and reached the opposite conclusion.²

1. See *Ajiwoju v. Cottrell*, 245 Fed. App'x 563, 565 (8th Cir. 2007) (per curiam) (unpublished); *Scher v. Ashcroft*, 960 F.2d 1053 (8th Cir. 2009) (per curiam) (unpublished).

2. See *Yesh Music v. Lakewood Church*, 727 F.3d 356, 362-63 (5th Cir. 2013); *Nelson v. Napolitano*, 657 F.3d 586, 589 (7th Cir. 2011); *In re Hunter*, 66 F.3d 1002, 1004-05 (9th Cir. 1995); *Smith v. Phillips*, 881 F.2d 902, 904 (10th Cir. 1989); *Hinsdale v.*

The Eighth Circuit ultimately agreed with its sister circuits that considered a stipulated dismissal as a “judgment” under Rule 60(b) for two primary reasons. First, the court determined that an accepted offer of judgment is identical to a stipulated dismissal under Rule 41(a)(1)(A)(ii) in nearly all relevant portions. Second, the court reasoned that the policy underlying Rule 60(b) bears a similar relationship to court-ordered termination of litigation and a stipulated dismissal. Accordingly, the court concluded that the NFLPA could seek Rule 60(b) relief from the Stipulation of Dismissal.

*Constitutional Law—Arkansas Supreme Court Affirms
Trial Court Invalidation of Act 595 of 2013 as an
Unconstitutional Burden on the Right to Vote*

Martin v. Kohls,

2014 Ark. 427, ___ S.W.3d ___ (2014).

In May 2014, an Arkansas state trial court declared Act 595 of 2013 unconstitutional, invalidating voter-identification requirements imposed by the Act. The court also enjoined the various parties representing the State of Arkansas, including Secretary of State Mark Martin, from enforcing Act 595's proof-of-identity requirements. The Plaintiffs in the case were four registered voters in Pulaski County.

Act 595, which required Arkansas voters to provide “proof of identity” when voting at the polls, passed both houses of the Arkansas General Assembly on March 19, 2013. Governor Mike Beebe vetoed the legislation because he believed it was “an expensive solution in search of a problem” and “an unnecessary measure that would negatively impact one of our most precious rights as citizens.” The legislature overrode Governor Beebe's veto by a simple majority vote on April 1, 2013.

On April 16, 2014, Plaintiffs filed a complaint seeking injunctive and declaratory relief under portions of the Arkansas Declaratory Judgment Act.³ The complaint challenged provisions of Act 595 that allegedly placed additional burdens on citizens before they could exercise the right to vote. The Plaintiffs claimed these additional requirements constituted a new and unconstitutional qualification on the right to vote under article 3, section 1 of the Arkansas Constitution. The Plaintiffs also alleged the requirement impermissibly impaired the right to vote under article 3, section 2. On April 23, the Plaintiffs filed a motion for preliminary injunction, asking the court to enjoin the Defendants from enforcing the Act's proof-of-identity requirements during an upcoming primary election. Following a May 2, 2014 hearing, the circuit court agreed with the Plaintiffs

3. See ARK. CODE ANN. §§ 16-111-102 to -104 (Repl. 2006).

on their constitutional claims and granted preliminary injunctive relief pursuant to Arkansas Rule of Civil Procedure 65. Accordingly, Arkansas voters were not required to provide identification prior to voting during the May 2014 election. Defendants appealed to the Arkansas Supreme Court in advance of the November 2014 general election.

On appeal, the State advanced several arguments: (1) the Plaintiffs lacked standing to bring a facial challenge to the constitutionality of Act 595; (2) sovereign immunity prevented the circuit court from having proper jurisdiction to enter a preliminary injunction; (3) the circuit court's grant of the preliminary injunction amounted to an abuse of discretion; (4) the circuit court's order violated Arkansas Rule of Civil Procedure 65; and (5) Plaintiffs failed to join necessary parties in the litigation. Because the Plaintiffs were registered voters, the Arkansas Supreme Court ruled the Plaintiffs possessed the required standing because they were among the class of people affected by the legislation. The court also declared all necessary parties had been properly joined in the lawsuit.

With respect to the facial challenge, the State asserted that checking a state-issued, photo-identification card was an appropriate means of "identifying eligible voters at the polls" and not a new qualification on the right to vote. Instead of characterizing the requirement as a new qualification, the State argued the Act's proof-of-identification provisions merely imposed a permissible procedural requirement. The Plaintiffs disagreed, noting that the Arkansas Constitution "fiercely protects against the Arkansas General Assembly's interference with Article 3 of the Arkansas Constitution."

The Arkansas Supreme Court first turned to article 3, section 1 of the Arkansas Constitution, which governs voting requirements. The Arkansas Constitution described four requirements an individual must satisfy in order to vote in the state: (1) the voter must hold United States citizenship; (2) the voter must be a resident of the State of Arkansas; (3) the voter must have reached eighteen years of age; and (4) the voter must be properly registered to vote in the election prior to voting. The court concluded that those four qualifications "simply do not include any proof-of-identity requirement." Rejecting the State's argument, the court declined to interpret the Act's proof-of-identity requirement as a constitutionally permissible means

of determining whether an Arkansas voter was lawfully registered to vote prior to casting his or her ballot. The court reasoned that, under the State's interpretation of the law, every registered voter would need to requalify themselves in each election under those circumstances. Because the court found Act 595 unconstitutional on its face, it declined to address the State's other arguments.

Justice Courtney Goodson concurred. She stated, "if the General Assembly possesses the power to enact Act 595 at all, that power necessarily emanates from amendment 51," which requires a two-thirds majority vote in both houses of the legislature. Because the Arkansas General Assembly did not pass Act 595 as an amendment to amendment 51, Justice Goodson considered the legislation "null and void."

Bankruptcy—United States Court of Appeals for the Eighth Circuit Rules Bankruptcy Courts May “Strip Off” Valueless Liens in Chapter 13 Proceedings

In re Schmidt,

765 F.3d 877 (8th Cir. 2014).

In June 2012, Minnesota residents Jamey and Keeley Schmidt filed for bankruptcy protection under Chapter 13 of the Bankruptcy Code. Chapter 13 allows individuals with regular income to adjust their debts through flexible repayment plans funded primarily through the debtors' future income. Bankruptcy courts generally possess the authority to approve a debtor's Chapter 13 plan that modifies the rights of creditors. A plan may modify the rights of creditors holding both unsecured and secured claims, “other than a claim secured only by a security interest in real property that is the debtor's principal residence.” In the Schmidt's case, the Minnesota Finance Housing Agency (MHFA) held a third mortgage secured only by the debtors' principal residence. However, since the value of the home was insufficient to satisfy the debts of first and second mortgages encumbering the residence, the holder of the third mortgage effectively held a worthless property interest.

The Eighth Circuit Court of Appeals was presented with the question of whether a debtor may engage in “lien stripping.” Lien stripping is a process in which a debtor attempts to keep his or her home following bankruptcy. The debtor first asks the court to reclassify the creditor's claim from secured to unsecured. The debtor then seeks modification of the terms of the mortgage obligation for the duration of the Chapter 13 plan. Upon discharge from the bankruptcy proceedings, the debtors then avoid the recharacterized mortgage in its entirety.

At the time of filing, the Schmidt's home had appraised value of \$140,000 and was encumbered by three mortgages in the following amounts: (1) a \$154,578.20 first mortgage; (2) a \$39,451.99 second mortgage; and (3) \$26,469.31 third mortgage held by MHFA. The Schmidt's filed a motion asking the court to declare that their home did not have the equity to support MHFA's claim, reclassify MHFA's interest from secured to

unsecured, and allow the couple to avoid the third mortgage upon completion of the Chapter 13 plan. The bankruptcy court granted the motion. A federal district affirmed, concluding MHFA held only an unsecured claim because no equity existed to support its lien.

The Eighth Circuit noted that each United States Circuit Court of Appeals presented with the issue of “whether a bankruptcy court may strip off a valueless lien in a Chapter 13 proceeding” had answered affirmatively.⁴ The Eighth Circuit ruled similarly, holding that the division imposed by Section 1322(b)(2) of Title 11 of the United States Code distinguishes between a lienholder whose security interest in the property has some value and a lienholder whose security interest is worthless. A creditor’s rights in a mortgage lien are protected by Section 1322(b)(2) only where the debtor’s residence retains enough value for the lien to be at least partially secured under Section 506(a) of Title 11, after accounting for other encumbrances that have priority over the lien. The court concluded by noting that “[r]equiring a creditor to have a ‘secured claim’ under [Section] 506(a)(1) before it can avail itself of [Section] 1322(b)(2)’s antimodification provision ‘better serves the policy imperatives of the Bankruptcy Code by encouraging debtors to first consult Chapter 13 before seeking either to reorganize pursuant to the more expensive and cumbersome Chapter 11 or liquidate pursuant to Chapter 7.’”

4. See *In re Davis*, 716 F.3d 331, 334-39 (4th Cir. 2013); *In re Zimmer*, 313 F.3d 1220, 1222-27 (9th Cir. 2002); *In re Lane*, 280 F.3d 663, 665-69 (6th Cir. 2002); *In re Pond*, 252 F.3d 122, 124-27 (2d Cir. 2001); *In re Tanner*, 217 F.3d 1357, 1358-60 (11th Cir. 2000); *In re Bartee*, 212 F.3d 277, 284-95 (5th Cir. 2000); *In re McDonald*, 205 F.3d 606, 609-15 (3d Cir. 2000).

Environmental Law—United States Court of Appeals for the Eighth Circuit Upholds Decision by Environmental Protection Agency to Consider Downstream Effects on Water Quality When Approving State Changes to Water-Quality Standards

El Dorado Chemical Co. v. U.S. Environmental Protection Agency,

763 F.3d 950 (8th Cir. 2014).

The Eighth Circuit Court of Appeals recently examined the Environmental Protection Agency's (EPA) decision to deny the El Dorado Chemical Corporation's (EDCC) proposed changes to Arkansas's water quality criteria. The Clean Water Act (CWA)⁵ authorizes each state to establish water quality standards for bodies of water within its boundaries. State water-quality standards designate how water is to be used and establish criteria necessary to protect such uses. To determine the uses and accompanying criteria, a state must consider the water-quality standards of downstream waters and ensure that state water-quality standards allow the downstream water quality standards to meet rules promulgated by the EPA. A state must also submit proposed standards and revisions to the EPA for approval.

Prior to initiating litigation, EDCC operated a chemical manufacturing facility in El Dorado, Arkansas. It discharged wastewater into an unnamed tributary referred to as UTB, which flowed into another unnamed tributary referred to as UTA. The wastewater ultimately found its way into Flat Creek and later Haynes Creek, both of which had been designated as gulf coastal fisheries.

EDCC renewed its permit under the National Pollutant Discharge Elimination System (NPDES) in June 2004. The limits on the dissolved materials EDCC could discharge were more stringent under the June 2004 permit than under its previous permit. EDCC had until June 1, 2007 to comply with

5. See Clean Water Act, 33 U.S.C. § 1251–1387 (2012)

the new limits, but the company filed a petition on August 31, 2006 seeking a modification of the state's water-quality standards. In its petition, EDCC sought to remove the "domestic water supply" uses of UTA, UTB, and portions of both Flat Creek and Haynes Creek. EDCC also sought to increase the maximum permissible concentrations of chloride, sulfate, and total dissolved solids for all four bodies of water. The State of Arkansas approved both changes on June 22, 2007 before submitting them to the EPA for approval. The EPA then approved change in designated use for all four bodies of water.

However, the EPA did not approve the revised water-quality criteria and informed The State of Arkansas that it did not provide adequate supporting evidence. After the state supplemented its documentation, the EPA again rejected the changes and declared additional information was necessary in order to make a determination. As a result, EDCC conducted another study and submitted additional documentation. The EPA again rejected the changes over concerns that the proposed changes to UTA and UTB would negatively affect downstream aquatic life in Flat Creek and Haynes Creek. The EPA also claimed it needed more information from EDCC on the downstream effects.

EDCC petitioned the State of Arkansas to re-open its case and make changes to the limits. The state rescinded the previously approved changes to the sulfate, chloride, and total dissolved solids for Flat Creek and Haynes Creek and then re-adopted the proposed criteria for UTA and UTB. The EPA disapproved, and EDCC filed a complaint in federal district court seeking judicial review of the EPA's decision. The court granted summary judgment in favor of the EPA. EDCC appealed.

The Eighth Circuit first noted that EDCC failed to demonstrate that the lower court applied the incorrect standard of review when it upheld the EPA's decision because agency decisions are reversed if they are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The court then discussed the EPA's authority to scrutinize a state's water-quality standards, holding that the EPA must determine whether a state water-quality standard is consistent with the requirements of the CWA. In turn, EDCC argued that the EPA usurped the State of

Arkansas's role in setting water quality standards by considering the downstream effects in Flat Creek and Haynes Creek.

The Eighth Circuit declined to rule the EPA's interpretation of its own regulations was clearly erroneous. Because federal regulations did not restrict the EPA from considering in-stream effects when examining water-quality standards, the Eighth Circuit held that the EPA may consider downstream effects. Further, the court found that the language of the CWA supported the EPA's position. The CWA's broad purpose is to restore and maintain the integrity of bodies of water nationwide. Accordingly, the EPA's consideration of downstream effect furthered that purpose.

The State of Arkansas was ultimately responsible for providing evidence that proposed state water-quality criteria meet the requirements of the CWA. EDCC argued that the proposed changes were relatively modest, but the Eighth Circuit found this argument insufficient to conclude that the EPA's decision lacked a "rational basis." Finally, the court examined the studies submitted by EDCC with its proposed changes. The court considered the company's failure to respond when asked by the EPA for additional information, and it ruled in the EPA's favor on the issue of evidentiary support and methodology. Ultimately, the court found the EPA did not act in an arbitrary or a capricious manner when it rejected Arkansas's proposed water-quality standards.

BRITTA PALMER STAMPS