RECENT DEVELOPMENTS

United States Supreme Court Invalidates an Arkansas Department of Correction Grooming Policy as a Violation of the Religious Land Use and Institutionalized Persons Act

Holt v. Hobbs,

___ U.S. ___, 135 S. Ct. 853 (2015).

The United States Supreme Court struck down an Arkansas Department of Correction (ADC) grooming policy under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). Arkansas inmate Gregory Holt, a practicing Muslim also known as Abdul Maalik Muhammad, wanted to grow a half-inch beard in conformance with his religious beliefs. ADC's grooming policy broadly prohibited inmates from growing beards absent a documented dermatological condition. ADC inmates were permitted only to wear facial hair in the form of "a neatly trimmed mustache that d[id] not extend beyond the corner of the mouth or over the lip." Failure to comply subjected an inmate to disciplinary action.

Holt believed his faith mandated that he not trim his beard at all, but he proposed a compromise that would have allowed him to grow a half-inch beard. Prison officials rejected this request and informed Holt that he would be subject to disciplinary action if he failed to comply. Holt then filed a pro se complaint in federal court, alleging that the grooming policy violated RLUIPA.

At an evidentiary hearing, two prison officials claimed that inmates could hide contraband in a beard of Holt's desired length. Further, they argued that it would be more difficult to identify a bearded inmate who escaped. The federal district court dismissed Holt's complaint. The Eighth Circuit Court of Appeals affirmed, holding that ADC had met its burden of demonstrating "that the grooming policy was the least restrictive means of furthering its compelling security interests."

After granting certiorari, the United States Supreme Court noted that Congress enacted RLUIPA to provide broad protection for religious liberty. First, the Court quoted the Act: "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." The Court observed that RLUIPA allows inmates to pursue religious accommodations in the same manner as provided in the Religious Freedom Restoration Act.

The Court concluded that the grooming policy substantially burdened Holt's religious liberties, stating that "RLUIPA's 'substantial burden' inquiry" requires an analysis of "whether the government has substantially burdened religious exercise," without considering whether the litigant could "engage in other forms of religious exercise." Under RLUIPA, the burden then shifts to the defendant to show that the policy at issue furthers a compelling governmental interest and represents the least restrictive means of furthering that interest.

ADC argued that the policy furthered a compelling interest in maintaining prison safety and security. The Court recognized that RLUIPA requires the government to show that the compelling interest is met through application of the challenged policy to the person whose exercise of religion is burdened. RLUIPA also does not provide unlimited deference to the government. Thus, ADC's argument that inmates could hide contraband in half-inch beards did not deserve the deference provided by the lower courts. The Court noted that prison officials already had to search for contraband in hair, clothing, and short beards permitted for medical reasons, so "it [was] hard to swallow the argument that denying petitioner a [half]-inch beard actually furthers the Department's interest in rooting out contraband." Furthermore, the Court determined that ADC's policy was not the least restrictive means of achieving its compelling interest in safety and security because ADC failed to prove that prison officials could not guard against contraband by simply searching the prisoners' beards.

ADC also argued that the grooming policy was necessary for identification purposes. While the Court acknowledged that prison guards have a compelling interest in being able to identify prisoners easily, it nonetheless held that the policy violated RLUIPA. As Holt argued, ADC could photograph a clean-shaven prisoner upon initial admission and use that photograph for future identification.

The Court ultimately concluded that ADC did not adequately demonstrate why its grooming policy was "substantially underinclusive" in at least two ways. First, ADC did not allow Holt to grow a half-inch beard, but the Department allowed other prisoners to grow quarter-inch beards for medical reasons and to grow the hair on their heads longer than a half-inch. Second, ADC failed to show why most states and the federal government allow inmates to grow half-inch beards but the same standard was not feasible at state prisons in Arkansas.

For these reasons, the Court reversed the Eighth Circuit's ruling and remanded the case. Justice Ginsburg, joined by Justice Sotomayor, concurred. Justice Sotomayor wrote separately to clarify that the holding did not reflect the Court's independent judgment as to alternative approaches. She pointed out that the Court's ruling turned on ADC's failure to demonstrate why the alternative, less restrictive policies were inadequate to achieve its compelling interest.

Eighth Circuit Court of Appeals Affirms Whistleblower Claim Under False Claims Act

Townsend v. Bayer Corp.,

774 F.3d 446 (8th Cir. 2014).

Mike Townsend, an Arkansas-based pharmaceutical sales representative for Bayer, sold a contraceptive device called Mirena. During the course of his work, Townsend discovered that Dr. Kelly Shrum had imported a non-FDA-approved version of Mirena and sold it to patients for the full price of the FDA-approved version. Townsend heard Dr. Shrum boast of the $50,000 profit he made by selling the cheaper version of Mirena, and he knew that Dr. Shrum had submitted Medicaid claims for the non-FDA-approved Mirena at the same rate as the FDA-approved version. Townsend approached Bayer about how to handle Dr. Shrum's overbilling practices. Supervisors either did not respond to Townsend's concerns or told him not to worry about the non-FDA-approved version of Mirena.

In April 2009, Townsend called the Arkansas Attorney General's Medicaid Fraud Hotline to report Dr. Shrum's scheme. Townsend did this despite knowing it might lead to his termination with Bayer. Using the information provided by Townsend, the government obtained a warrant and searched Dr. Shrum's clinic in June 2009. The search revealed the non-FDA-approved Mirena, and officers arrested Dr. Shrum. A jury convicted him of submitting false claims to the government after Townsend cooperated with investigators during the investigation.

Before the events in question transpired, Bayer had changed the way it reimbursed its employees for their expenses. As a result of the change, Townsend missed credit card payments for his work credit card, and the bank deactivated his account. After paying the bill in full in March 2010, the bank reactivated Townsend's credit card at the request of a program administrator at Bayer. In May 2010, Bayer fired Townsend, claiming the closed account prevented him from performing his job duties. Prior to the termination, no one asked Townsend about the outstanding balance or confiscated his card—the appropriate steps under the company's policies.

Townsend sued Bayer in March 2011, claiming the company terminated him for reporting Dr. Shrum to the government. The lawsuit alleged the termination violated the anti-retaliation provisions of the False Claims Act (FCA).[1] At a trial held in October 2012, Townsend offered evidence to support the following three contentions: (1) Bayer had an unwritten policy that employees should not report a physician's crimes to law enforcement; (2) Bayer did not terminate another employee with a similar credit card situation; and (3) Bayer consulted in-house counsel prior to the meeting during which Townsend was terminated.

A jury returned a verdict in favor of Townsend after concluding Bayer unlawfully fired Townsend for engaging in a protected activity. Townsend was awarded $1.21 million in damages, including $321,373 in back pay[2] and $568,000 for emotional distress. The trial court denied Bayer's post-trial motions and ordered the company to reinstate Townsend and pay his attorney's fees.

Bayer made several arguments on appeal. First, the company asserted the applicable statute of limitations barred Townsend's suit. Next, Bayer argued that Townsend offered insufficient evidence to establish the necessary causal connection between the termination and the fraud report. Third, Bayer contended that a retaliation claim under the FCA requires proof that the employer had been "working in concert with a fraudulent actor." The company also maintained that the district court's evidentiary rulings unfairly prejudiced the trial. Bayer then asserted that the court's failure to give a "privileged communication" jury instruction and its reinstatement order constituted an abuse of discretion. Next, the company claimed the evidence at trial did not support the back pay award. Finally, Bayer argued that the court erred when it denied Bayer's post-trial motions.

On the statute of limitations issue, the Eighth Circuit held that the 180-day limitations period applicable to whisteblowers employed by the government under Arkansas's Whistle-Blower Act[3] did not apply to private-sector whistleblowers. Because Townsend, as an employee of a private business, could not sue

1. *See* 31 U.S.C. § 3730(h) (2012).
2. The court doubled this figure to $642,746 pursuant to the FCA.
3. *See* ARK. CODE ANN. § 21-1-604 (Repl. 2004).

under the relevant Arkansas law, the 180-day limitations period did not apply, and Townsend filed suit within the statute of limitations imposed by other Arkansas laws.

The court also found that Townsend presented sufficient evidence to support his retaliation claim, primarily due to Bayer's "culture of silence." According to the court, the company's refusal to take action when Townsend reported the fraud, and testimony from other employees that they would not report fraud to outside authorities, supported Townsend's "culture of silence" contention. Bayer also argued that Townsend did not prove the specific supervisors who terminated him knew of his participation in the protected activity, but the court noted that at least two supervisors admitted they knew of his involvement in the investigation at the time of termination. Given these findings, the court found sufficient evidence existed for a reasonable jury to reach the conclusion that decision makers at Bayer knew Townsend had engaged in a protected activity.

Bayer next claimed that the FCA requires an employee to report his own employer's fraud, rather than a customer's fraud, before the employee's conduct receives protection. This issue required the court to interpret the statutory language of the FCA. The court recognized that the Act allows employees to bring retaliations suits but noted the law "does not restrict the class of persons who [can] violat[e] the substantive provisions of the FCA to employers." The court held that the law "broadly protects any lawful acts done by an employee to stop violations of the FCA, and broadly prohibits the demotion, suspension, threatening, harassment, or other discrimination in the terms and conditions of employment against an employee for engaging in such lawful acts."

The court also found that the district court did not abuse its discretion by allowing Townsend to present evidence showing Bayer did not terminate another employee due to similar credit card issues. Finally, the court ruled that the district court did not abuse its discretion when it refused to submit a jury instruction related to Bayer's attorney-client privilege regarding the conversation with counsel prior to the termination. On the issue of reinstatement, the court declined to decide whether the FCA mandated reinstatement, instead concluding reinstatement did not amount to an abuse of discretion.

The court upheld the jury's award of back pay to Townsend but found the $568,000 award for emotional distress excessive. The court concluded the evidence justified damages of $300,000, and Townsend could then choose between accepting a remittitur or a new trial on the issue of damages for his emotional distress.

Arkansas Supreme Court Upholds Class Certification in Case Brought Against Philip Morris Under the Arkansas Deceptive Trade Practices Act

Philip Morris Cos. v. Miner,

2015 Ark. 73, ___ S.W.3d ___.

The Arkansas Supreme Court recently upheld a class certification order in a case alleging that tobacco giant Philip Morris deceptively advertised Marlboro Lights as "safer" and containing less tar and nicotine than other cigarettes. Pulaski County Circuit Court Judge Timothy Fox certified the plaintiffs' class under the Arkansas Deceptive Trade Practices Act (ADTPA). Philip Morris appealed.

Wayne Miner and James Easley originally filed a class action complaint against Philip Morris Companies, Inc. and Philip Morris Inc., on behalf of themselves and others similarly situated. The complaint alleged that Philip Morris violated the ADTPA by falsely advertising that its Marlboro Light cigarettes had lower levels of tar and nicotine than other cigarettes. Judge Fox certified the following class:

> All persons who purchased Defendants' Marlboro Light [or Ultra Light] cigarettes in Arkansas for personal consumption from November 1, 1971, through June 22, 2010. Excluded from the Class are Defendants, any parents, subsidiary, affiliate, or controlled person of Defendants, as well as the officers, directors, agents, servants, or employees of Defendants, and the immediate family members of such persons.

Arkansas Rule of Civil Procedure 23 lists six requirements for certification of a class action complaint: (1) numerosity; (2) commonality; (3) typicality; (4) adequacy; (5) predominance; and (6) superiority.[4] On appeal, Philip Morris challenged the predominance and superiority prerequisites.

The court first discussed the commonality requirement because of its close relationship with predominance. Under Arkansas law, the commonality requirement is met "when a

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4. *See* ARK. R. CIV. P. 23.

single common issue is present among the class members." Predominance, on the other hand, is a more exacting requirement. In *Miner*, the Arkansas Supreme Court reaffirmed the use of a bifurcated approach to the predominance requirement that allows trial courts to split cases into two separate phases: "(1) certification for resolution of the preliminary, common issues; and (2) decertification for resolution of the individual issues."

Philip Morris claimed that each element of the plaintiffs' cause of action, including misrepresentation, causation, and damages, involved individual issues that were so vital as to destroy predominance. While the tobacco giant claimed the misrepresentation element required a consideration of each individual class member's smoking habits, the court found the company's description of Marlboro Lights went beyond whether a particular consumer actually inhaled less tar or nicotine. Thus, individual smoking behaviors were not dispositive on the facts of the case. On the issue of causation, the court determined that "individual purchasing motivations"—which Philip Morris argued defeated the causation element—were less important than the predominance question relative to the entire class. The court noted that when the causation and reliance elements require individualized determinations, the bifurcated approach allows circuit courts to decertify the class for that purpose. Finally, regarding the damages element, the court held that individualized damage inquiries will not destroy predominance where common questions concerning the defendant's alleged wrongdoing are applicable to all class members. For those reasons, the court found the plaintiffs' lawsuit satisfied the commonality and predominance prerequisites.

Philip Morris also argued that a class action was not the proper method for adjudicating the case. The court noted that superiority requirement depends upon the overall judicial efficiency and manageability of the class. Citing issues of cost effectiveness, the ability of Arkansas courts to handle a large volume of individual suits, and the feasibility of the defendant's need to defend a large number of individual suits, the circuit court found the superior method of adjudication was indeed a class action. The Arkansas Supreme Court agreed.

Lastly, Philip Morris contended that the class was not ascertainable. The court recognized that Rule 23 does not require circuit courts to specifically rule on whether a class is ascertainable. According to the court, the class definition—"All persons who purchased Defendants' Marlboro Light [or Ultra Light] cigarettes in Arkansas for personal consumption from November 1, 1971, through June 22, 2010"—sufficiently specified the class to make it readily "ascertainable." Further, the court noted that consumers could prove their membership in the class by affidavit or by testimony rather than by providing receipts of cigarette purchases. Because all of the prerequisites for class certification were satisfied, the court affirmed the class certification.

Arkansas Supreme Court Upholds Arkansas Death Penalty Protocol Passed in 2013

Hobbs v. McGehee,

2015 Ark. 116, ___ S.W.3d ___.

In April 2013, nine condemned prisoners confined in facilities operated by the Arkansas Department of Correction (ADC) filed a complaint in Pulaski County Circuit Court challenging the constitutionality of Act 139 of 2013,[5] the state's most recent iteration of the procedure for carrying out a sentence of death. The plaintiffs' complaint raised six arguments:

> (1) Applying Act 139 of 2013 retroactively to their sentences violate[d] the well-settled state-law principle that a sentence must be in accordance with the statutes in effect on the date of the crime; (2) To the extent that it may be applied to them and implemented by the ADC, Act 139 violate[d] the Ex Post Facto Clause of article 1, sections 9 and 10 of the United States Constitution because it create[d] a significant risk of increased punishment in the form of agony, degradation, serious injury, and/or lingering death as compared to Act 774 of 1983, which was in effect at the time of the Prisoners' crimes; (3) Act 139 violate[d] the separation-of-powers principles embodied in article IV of the Arkansas Constitution because it usurp[ed] legislative authority; (4) Act 139 violate[d] the Eighth Amendment to the United States Constitution because the ADC's new lethal-injection procedure entail[ed] a substantial risk of wanton and unnecessary infliction of agony, degradation, serious physical injury, and/or lingering death; (5) Act 139 violate[d] the Supremacy Clause of article IV, clause 2 of the United States Constitution and [was] preempted insofar as it purport[ed] to authorize the delivery, receipt, and use of Lorazepam and Phenobarbital; (6) Act 139 violate[d] the separation-of-powers principle embodied in article IV of the Arkansas Constitution because it unlawfully delegate[d] to the ADC standardless discretion with regard to the selection and training of the members of the execution team and with

5. *See* Act 139, 2013 Ark. Acts 554.

> regard to the method by which the drugs [were] to be injected.

The statute in effect at the time each plaintiff committed his offense(s) provided that the death penalty be carried out through "a continuous intravenous injection of a lethal quantity of an ultra-short acting barbiturate in combination with a chemical paralytic agent until the defendant's death." Because Phenobarbital is a slow-acting barbiturate, the prisoners claimed that the untested mixture of the drugs would take hours to produce its full effect, causing them to suffer greatly before death. During the litigation, ADC discontinued the use of Phenobarbital and Lorazepam from its lethal-injection procedure. The plaintiffs then amended their complaint, alleging: (1) anti-retroactivity principles mandated that they could not be executed pursuant to Act 139; and (2) Act 139 violated the Arkansas Constitution's separation-of-powers doctrine.

ADC asserted that Act 139 permissibly constrained its discretion "by requiring its Director to select a 'barbiturate.'" ADC conceded that Act 139 did not provide any guidance as to how the injection should be made and was not in effect when the prisoners were convicted and sentenced. ADC also stated that it intended to follow Act 139 to carry out death sentences and moved to dismiss the complaint. Both parties filed motions for summary judgment in September 2013. In February 2014, Pulaski County Circuit Court Judge Wendell Griffen granted the plaintiffs' motion, ruling Act 139 violated the Arkansas Constitution's separation-of-powers doctrine. Judge Griffen enjoined ADC from proceeding with executions until the Arkansas General Assembly revised the law. Both sides appealed.

On direct appeal, ADC contended that Act 139 did not violate the separation-of-powers doctrine because the statute properly delegated authority to ADC to choose a "barbiturate" to be used in lethal injections. The plaintiffs argued that the lower court's ruling should be upheld because "the drugs within the class of drugs designated by Act 139 varied greatly in their effectiveness, side effects, and the time they take to act."

The Arkansas Supreme Court recognized that the General Assembly may vest a state agency with discretionary power as long as the delegation includes "reasonable guidelines." Under

Arkansas law, a delegation statute may not give "absolute, unregulated, and undefined discretion" to an administrative agency. In 2012, the Arkansas Supreme Court struck down a 2009 law, the "Methods of Execution Act,"[6] on separation-of-powers grounds.[7] In the present case, ADC pointed to several characteristics of Act 139 that demonstrated the law's compliance with the separation-of-powers doctrine. The plaintiffs argued that Act 139 could subject them to a drawn-out death, possibly of an hour or more. Moreover, the plaintiffs noted that Act 139 failed to specify that "death should occur swiftly," a feature commonly found in the death penalty laws of other states.

The Arkansas Supreme Court conceded that Act 139 allowed more than one drug to be used but held that the General Assembly provided sufficient guidance to ADC by determining the procedure to be used (intravenous injection), by establishing the type or class of drug to be used (a barbiturate), and by specifying the amount ("an amount sufficient to cause death"). Further, Act 139 required ADC to administer benzodiazepine—a powerful sedative—prior to the administration of a barbiturate. The Act also required all equipment to be sterilized and stated the that General Assembly sought to provide "a means of carrying out the sentence of death while also complying with the constitutional prohibition on cruel and unusual punishment." The court ultimately distinguished Act 139 from its 2009 counterpart, holding that the law did not violate the separation-of-powers doctrine. The court also rejected the plaintiffs' argument that a statute cannot give an agency the power to make decisions about training and qualification of personnel.

Regarding the issue of retroactivity, the court found that Act 139 did not change the criminal liability or sentences for capital murder in Arkansas. The court noted that Act 139 was not "retroactive" because it would only apply to executions that occurred after its enactment. The court went on to hold that Act 139 was not prohibited by the "rules against retroactive application of sentencing statutes" because it was not a sentencing statute, nor would it apply retroactively.

6. *See* Act 1296, 2009 Ark. Acts 6213.
7. *See* Hobbs v. Jones, 2012 Ark. 293, 412 S.W.3d 844.

Justice Wynne, joined by Chief Justice Hannah and Justice Danielson, concurred in part and dissented in part. Justice Wynne agreed with the majority that Act 139 did not violate retroactivity rules. However, he disagreed with the majority's analysis on the separation-of-powers issue, stating that he found the same problems with Act 139 that the court used to strike down the law's predecessor in *Jones*.

Pulaski County Circuit Court Judge Herbert Wright Invalidated Arkansas's "Failure to Vacate" Statute

State v. Smith,

No. CR 2014-2707, 2015 WL 991180 (Ark. Cir. Ct. Jan. 20, 2015).

In August 2014, Artoria Smith was convicted of a misdemeanor violation of Arkansas's "failure to vacate" law.[8] At some prior point, Smith had orally agreed to lease property from Primo Novero. Believing Smith had breached the oral contract, Novero notified Smith in July 2014 that she had ten days to move out. Smith refused. A Little Rock District Court Judge convicted Smith for violating the statute, and she appealed to Pulaski County Circuit Court. Smith then filed a motion to dismiss, alleging that the statute violated equal protection and due process guarantees of both the United States and Arkansas Constitutions. She also argued that the statute "unconstitutionally chill[ed] her right to a trial, that it violate[d] the state and federal prohibition on debtor's prisons, and that it constitute[d] cruel and unusual punishment."

Under the statute, a failure to vacate within ten days of notice from the landlord constitutes a Class B misdemeanor. If a defendant pleads guilty or nolo contendere, he or she must pay $25 for each day he or she remains on the property. A not-guilty plea is only allowed if the defendant deposits the disputed rent into the "registry of the court" and if the defendant also pays rent as it comes due. Arkansas is the only state with this type of law.

The court first analyzed *Duhon v. State*,[9] the most recent Arkansas Supreme Court decision addressing the statute. *Duhon* upheld the failure to vacate statute on procedural due process grounds under *Mathews v. Eldridge*,[10] a case decided by the United States Supreme Court in 1976. However, the Arkansas General Assembly amended the statute in 2001 to require a defendant who enters a not-guilty plea to deposit funds with the

8. *See* ARK. CODE ANN. § 18-16-101 (Repl. 2003).
9. 299 Ark. 503, 774 S.W.2d 830 (1989).
10. 424 U.S. 319 (1976).

court prior to adjudication. Pulaski County Circuit Court Judge Herbert Wright found that the amended statute affected a different property interest than the one involved in *Duhon*—a defendant's interest in the rent money controlled by the court.

Importantly, the amended statute required a defendant to surrender the funds before any decision was made as to his or her guilt or innocence. Further, Arkansas landlords can pursue a civil cause of action to remove noncompliant tenants.[11] Ultimately, Judge Wright ruled that the failure to vacate statute violated Smith's due process rights under the Fourteenth Amendment to the United States Constitution. Judge Wright also invalidated the statute as an impermissible infringement on a defendant's right to trial under the Sixth Amendment because the law required a defendant to turn over the disputed rent as a condition of pleading not guilty.

Smith also raised an equal protection argument, and the State expressed reservations about the constitutionality of the statute as applied because it could subject a defendant to different levels of punishment based on his or her ability to deposit funds with the court. Although Judge Wright noted that he was not convinced that there was a "constitutionally suspect" difference between those who could afford to turn over the funds and those who could not, he did observe that any governmental infringement upon the fundamental right to a jury trial must survive strict scrutiny. Under this standard, Judge Wright recognized that the criminal statute did not expressly allow courts to issue an order to vacate alongside a conviction, so the landlord typically had to sue for a writ of possession in order to regain control of the premises. Noting that this could motivate a tenant to vacate rather than face prosecution, Judge Wright concluded that the process failed to protect the rights of landlords to "acquire and possess and protect property" in a manner narrowly tailored to achieve the state's objective. Thus, the statute violated equal protection guarantees.

Judge Wright also found that the statute allowed for imprisonment without a finding of fraud in the traditional sense, making the law a violation of the state's constitutional ban on debtor's prisons. Further, he held that the statute violated the Eighth Amendment to the United States Constitution as a form

11. *See* ARK. CODE ANN. § 18-60-304 (Supp. 2013) (relevant statute).

of cruel and unusual punishment. Judge Wright made two observations on this point: (1) Arkansas is the only state that criminalizes the failure to pay rent; and (2) the federal government seemingly opposes the law because landlords whose tenants receive subsidies from the federal government cannot use the law against their tenants. Ultimately, Judge Wright found the failure to vacate statute unconstitutional, both facially and as applied, and granted Smith's motion to dismiss.

BRITTA PALMER STAMPS