SPRING 2015

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Traffic Stops and Dog Sniffs – A Tail of Caution

IN *RODRIGUEZ V. UNITED STATES*, the Supreme Court of the United States addressed the question of whether an officer's continued detention of a driver, even after completion of the traffic stop, to conduct a canine sniff violates the Fourth Amendment when the officer lacks reasonable suspicion of criminal activity or some other legal justification to support the additional investigation. The six member majority found that the dog sniff was unconstitutional because it was an investigation unrelated to the reason for the stop and prolonged the original seizure.

The facts of the case are simple: just after midnight on March 27, 2012 a police officer, Struble, pulled over Dennys Rodriguez after his vehicle veered onto the shoulder and then jerked back onto the road. Rodriguez was travelling with a passenger. Struble inquired about the veering and gathered Rodriguez's license, registration and proof of insurance. After running a record check on Rodriguez, Struble returned to Rodriguez's vehicle and questioned the passenger and gathered his license. Struble again returned to his police vehicle, ran a records check on the passenger, and called for back-up. Struble wrote Rodriguez a warning and returned to Rodriguez's vehicle to deliver the warning. He also asked for permission to walk his dog around the vehicle. Rodriguez declined. At that point Struble ordered Rodriguez out of the vehicle to wait for the second officer. After the second officer arrived, Struble led his dog around Rodriguez's vehicle and the dog alerted Struble to the presence of methamphetamine. All told, 7-8 minutes elapsed between when Struble issued the warning and when the dog indicated the presence of drugs.

The Fourth Amendment protects against unreasonable searches and seizures. A traffic stop such as the one described is a seizure because the driver is not free to leave at any moment. To be lawful, a seizure must be "reasonable." Here, there is no question that the seizure was initially lawful: Struble witnessed Rodriguez veer off the road and that provided justification for the stop. The issue in this case—and many similar cases—is twofold: (1) how long can a seizure last before it becomes unlawful and (2) can the police officer conduct unrelated investigations.

HOW LONG CAN A LAWFUL SEIZURE LAST?

Previous Supreme Court decisions have determined that a seizure for a traffic violation justifies a police investigation into that violation and the stop may last "no longer than is necessary to effectuate that purpose." (Emphasis added). In this case, the violation at issue was investigation and citing the driver for traffic violations. Therefore, to answer the first question, the traffic stop is lawful only as long as it takes the officer to complete the tasks tied to

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MANAGING PARTNER'S MUSINGS

from Paul's desk…

It is Spring-time in Oregon … the trees outside our offices in River Place are now fully in bloom with that shade of green that looks so bad on a house but is astounding on trees. Spring-time … and time to get out our BEH newsletter and give you some thoughts on municipal law and goings on around our offices.

As many of you know, Pam and I have Irish Setters around our home (and sometimes here at the office). One of them is Danny-Boy; like me, he is an "old dog." And old dogs like us aren't always the best at learning new things.

But, in this area of the law, even old dogs like me learn new stuff which amazes me. I have been practicing local government law in Oregon for nigh on 35 years but almost every week I still learn of some "new" idea or item or principle I

Pregnant Employees Require Accommodation

EMPLOYERS SHOULD think twice about not providing accommodations for their pregnant employees after a recent United States Supreme Court ruling in *Young v. United Parcel Service, Inc*. The Court held that the ultimate test is to determine whether the nature of an employer's policy and the way in which it burdens pregnant women shows that the employer has engaged in intentional discrimination. Key to that analysis is whether an employer is accommodating other employees, but not pregnant women.

A part-time United Parcel Service ("UPS") employee, Young, filed suit against the United Parcel Service, Inc. after it failed to accommodate her need for light duty while she was pregnant, claiming disparate treatment under the Pregnancy Discrimination Act of 1978 ("Act"). After suffering several miscarriages, Young's doctor ordered her not to lift more than 20 lbs. during the first 20 weeks of pregnancy and no more than 10 lbs. thereafter. UPS requires all of its drivers to pick up parcels up to 70 lbs. (150 lbs. with assistance). As a result of her doctor's orders, Young was not allowed to work and stayed home without pay during much of her pregnancy and consequently lost her employee medical coverage.

UPS provided accommodations to other employees as follows: 1) drivers who became disabled on the job; 2) those who lost their Department of Transportation ("DOT") certifications; and 3) those who suffered from a disability covered under the Americans with Disabilities Act of 1990 ("ADA"). UPS indicated that Young did not fall into any of these categories and therefore was not eligible for light duty/desk jobs.

The Court's decision interprets the Act which applies Title VII of the Civil Rights Act's prohibition against sex discrimination to discrimination based on pregnancy. Specifically, the Court found that the Act requires courts to consider the extent to which an employer's policy treats pregnant workers less favorably than it treats nonpregnant workers, similar in their ability or inability to work.

To prevail in a disparate treatment suit under the Act, the Supreme Court noted that the plaintiff could establish a prima facie case by showing: she belongs to a protected class, she sought accommodations, the employer did not accommodate her, and the employer did accommodate others "similar in their ability or inability to work." Here, Young presented enough evidence to survive a motion for summary judgment because there was a genuine dispute as to whether UPS provided more favorable treatment to at least some employees whose situation could not reasonably be distinguished from Young's. For example, several employees were granted lifting restriction accommodations after suffering a foot injury and arm injury respectively and still others were given "inside" jobs when they lost their DOT certifications, one after receiving a DUI and another because of high blood pressure. Young also introduced evidence that UPS had three separate policies (on-the-job, ADA, and DOT) that significantly burdened pregnant women. The Court asked "why when [UPS] accommodated so many, could it not accommodate pregnant women as well."

While the Court declined to rely on recent pregnancy discrimination related guidance ("Guidance") issued by the Equal Employment Opportunity Commission ("EEOC") in 2014, the Guidance is still helpful in determining how potential EEOC complaints will be analyzed and has added significance given the changes to the ADA that occurred after Young's suit. Specifically, the definition of disability was expanded to include physical impairments that substantially limit an individual's ability to lift, stand or bend—impairments that tend to affect pregnant women.

Employers would do well to revisit their reasonable accommodation guidelines to ensure they are not unintentionally discriminating against pregnant workers and to ensure that employees who are similar in their ability or inability to work are treated the same.

Heather Martin

New Land Conservation and Development Commission Rules Effective for Population Forecasting

IN LATE MARCH of this year, the Oregon Land Conservation and Development Commission's ("LCDC") new rules regarding population forecasts went into effect. LCDC drafted the new rules in response to HB 2253, which the Legislature passed and the governor signed into law in 2013. The new rules significantly change the population forecasting process.

Population forecasts provide the foundation for long range land use planning. Previously, counties adopted coordinated population forecasts for both urban and rural areas within their jurisdiction. In the Portland metro area, Metro adopted forecasts for the Metro urban growth boundary ("UGB").

Prior to HB 2253, population forecasting had become a laborious and controversial exercise. The process was expensive, time consuming and, in some cases, litigious. In addition, many counties did not update their forecasts as the law required. This put cities in such counties in jeopardy of not being able to accommodate growth, as a current forecast is necessary for cities to estimate land needs and determine whether state law warrants a UGB expansion.

HB 2253 repealed the previous statutory scheme governing population forecasting. Instead of requiring counties to adopt forecasts, the new law requires the Population Research Center at Portland State University ("PRC") to prepare and issue population forecasts for all cities (including their UGBs) and counties, except Metro, on a four-year schedule. Once the PRC issues a new forecast, affected local governments must use it as the basis for land use planning. These forecasts are not appealable to LUBA, although a party may request the PRC to review a draft forecast before it is finalized. In such cases, the PRC will consider the request and ultimately issue a final forecast that is not subject to appeal.

The new LCDC rules, at OAR Chapter 660, division 32, replace those that governed the pre-HB 2253 forecasting process. The rules now require local governments outside of Metro to use the PRC's final forecast when undertaking any plan amendments that must rely upon an updated forecast (e.g. urbanization studies, amendments to a UGB, establishing urban reserves, adopting a TSP, etc.). They also depend upon and cross-reference rules that the PRC itself has adopted regarding the process. The PRC's rules are found at OAR Chapter 577, division 50.

The new law requires forecasts on a four-year schedule. Once the PRC issues a new forecast, affected local governments must use it as the basis for land use planning.

The new law, including LCDC's new rules, should make the population forecasting process much smoother for jurisdictions outside of Metro. Any cities or counties seeking to undertake long range planning projects requiring the use of a population forecast are urged to review the new rules. In addition, all Oregon local governments outside of Metro should closely follow the PRC's process as it begins to finalize the first round of population forecasts under the new law. It is critical that affected local governments are aware of and participate in the PRC's process to ensure the PRC is considering all the facts a local government believes are relevant to the PRC's decision.

David Doughman

should have known about but didn't. For example, a few weeks ago I learned of a provision in the federal Clean Water Act that requires all federal agencies owning property to comply with local requirements and pay local fees relating to stormwater management. This requirement is in statute and has been around for a number of years; I flat out never knew about it and before that "revelation," I was of the mindset I had learned early in my career: if it is the federal government, there isn't a whole lot local government can do except say "Go ahead, make your day."

It is this constant learning—even for us old dogs—that makes the practice of municipal law challenging, exhilarating, rewarding and fun all at the same time.

The articles in this edition of the BEH Newsletter hopefully will introduce some new ideas and revelations to you, our reader.

Let us know about any interesting projects happening in or planned for your community! We'd love to feature you in our next Client Corner segment.

BEH provides this newsletter and its content solely for informational purposes. It is not intended to be and should not be construed as legal advice or as a solicitation for work or business. If you have any questions about the newsletter or its content, please contact an attorney in our office.

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HAPPY BIRTHDAY, HAPPY VALLEY

CLIENT CORNER

THE CITY OF HAPPY VALLEY is celebrating becoming a quinquagenarian this year! That's right, the City is the Big 5-0.

In 1965, a community of approximately 300 citizens decided via special election to incorporate as Clackamas County's eleventh municipality. The vote passed by a wide margin, resulting in the unique history of growth, development and vision which is the basis for today's thriving community. In 2015, in spite of nearing 20,000 residents, the City of Happy Valley still maintains its small-town feel thanks to a community that is dedicated to family, service and safety.

The City is marking its Golden Jubilee with 50 Days of Celebration over the course of the year, including the presentation of commemorative gifts to residents, staging historical displays throughout the City, 4th of July Family Festival, a summer concert series, Harvest Fest, and many other community programs. We are proud to have been a part of the City's journey over the last 11 years!

HAVE A SUBMISSION? Please contact Kristen Ketchel-Bain at 503.226.7191.

Traffic Stops and Dog Sniffs – continued from page 1

the traffic infraction that led to the seizure and enforcing the traffic code.

In other words, if one is pulled over for a traffic infraction and it hypothetically takes 20 minutes to investigate and issue a traffic ticket, the stop is justified for 20 minutes.

CAN AN OFFICER CONDUCT UNRELATED INVESTIGATIONS?

According to the majority opinion, the fact that the officer conducted an unrelated investigation in itself did not make the stop unreasonable. The issue lies with the fact that the dog sniff prolonged the stop. Unrelated investigation can occur, but cannot prolong. Therefore, in this case, Struble could have legally conducted the dog sniff while he was waiting for results of the records checks. The problem was that Struble waited until after he issued the traffic warning to conduct the test.

The Court held that the unrelated dog sniff investigation ran afoul of the Fourth Amendment, not because it was conducted, but because it prolonged the traffic stop by 7-8 minutes.

DISSENT

As the Alito dissent points out, this decision presents an interesting conundrum for police officers regarding the sequences of events during traffic stops. In this case, Struble clearly waited until after he issued the warning and his back-up arrived to conduct the dog sniff. Struble was concerned that he was outnumbered at the scene and, as the dissent highlights, "[w]hen occupants of a vehicle who know that their vehicle contains large amounts of drugs see that a drug-sniffing dog has alerted to the presence of drugs, they will almost certainly realize that the police will then proceed to search the vehicle, discover the drugs and make arrests." In such situations, there is a heightened risk that the occupants will attempt to flee or attack the officer.

Under the majority opinion, an officer has to decide whether to risk his or her own safety or that of the suspects fleeing in order to conduct the unrelated dog sniff test during the time allotted for a traffic violation investigation. Or forgo the dog sniff test in general.

Ashley Whittaker