

CAMP "CLEAN UP" MAKES HOMELESS STATUS CRIMINAL

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An otherwise legitimate public health and safety ordinance or policy may be unconstitutional when it is applied in a selective and discriminatory fashion to effectively punish individuals based on their lack of social status, rather than actual misdeeds. The case of *Anderson v. City of Portland*, Civ. No. 08-1447-AA (Dist. Or. 7/30/2009) presented such a situation wherein several homeless individuals alleged that they were targeted for selective enforcement under a City ordinance and policy to prohibit "camping" in public parks and places. In their civil rights class action lawsuit, these homeless plaintiffs alleged the City had violated their "rights to be free from cruel and unusual punishment under the Eighth Amendment" because the City's "enforcement of no-camping and temporary structure ordinances essentially criminalizes the status of being homeless."

Accordingly, the homeless plaintiffs in this case petitioned the federal district court to declare the ordinance and policy unconstitutional and issue an injunction prohibiting the its enforcement against homeless individuals. In response, the City claimed plaintiffs had failed to state a claim under the Eighth Amendment and filed a motion to dismiss plaintiffs' lawsuit.

FACTS OF THE CASE

Under the challenged ordinance, the Portland City Code (PCC) made it unlawful "for any person to camp in or upon any public property or public right of way" unless otherwise authorized by the PCC or the mayor in "emergency circumstances." PCC § 14A.50.020(B). "To camp" was defined as "to set up, or to remain in or at a campsite, for the purpose of establishing or maintaining a temporary place to live." § 14A.50.020 (A) (1). "Campsite" was defined as "any place where any bedding, sleeping bag, or other sleeping matter, or any stove or fire is placed, established, or maintained, whether or not such place incorporates the use of any tent, lean-to, shack, or any other structure ." § 14A.50.020 (A) (2). A violation of § 14A.50.020 was punishable by a fine not to exceed \$100 and a term of imprisonment not to exceed 30 days. § 14A.50.020(C).

It was also unlawful "to erect, install, place, leave, or set up any type of permanent or temporary fixture or structure of any material(s) in or upon non-park public property or public right-of-way without a permit or other authorization from the City." PCC § 14A.50.050(A). Any such fixture or structure was deemed a "public nuisance," and "[i]n addition to other remedies provided by law," may be "summarily" abated by the police. § 14A.50.050(B).

In addition, an Executive Order issued by the Chief of Police addressed the "clean-up" of "established campsites" by police officers. A "camp clean-up" was "any organized, prearranged operation by or on behalf of the Bureau to remove illegal campers, camps or camp structures from an established campsite."

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"Established campsites" were "locations where a camp structure such as a hut, lean-to or tent is set up for the purpose of maintaining a temporary place to live and exists on public property." Under the Executive Order, officers were required to post a 24-hour notice prior to clean-up of the campsite and to notify JOIN - a local agency that provides services to homeless persons - of the pending clean-up. Campsites located on private property or public rights of way or those constituting "public health hazards" did not require 24 hours notice prior to clean-up.

Plaintiffs Marlin Anderson, Mary Bailey, Matthew Chase, and Jack Golden were involuntarily homeless individuals residing in Portland, Oregon.

Anderson had physical and mental disabilities that preclude full-time employment. Anderson occasionally found temporary work and resided in a van with his five dogs. Anderson had been warned by police officers not to camp in Delta Park in northeast Portland.

Bailey also had disabilities that prevented full-time employment, including seizures that affected her memory. Bailey and her partner, plaintiff Matthew Chase, usually slept outside in southeast Portland near the Hawthorne Bridge. Bailey and Chase were frequently told by police officers that they could not lie down and to "move along." Although her medical problems required Bailey to rest, police officers told Bailey that she could not lie down to sleep. Shelter beds for women were extremely limited in Portland, and Bailey needed the help and protection of Chase when she suffered seizures.

Golden was also disabled and received disability benefits. Golden could not find affordable housing and typically slept outside in southeast Portland near the Hawthorne Bridge. While sleeping outside, Golden had been told by police officers to "move along."

On the afternoon of August 30, 2007, Anderson was napping on top of his sleeping bag in Delta Park in north Portland, just south of the dog park at Hayden Meadows Drive. Officer Hurley made contact with Anderson and cited him for unlawful camping under PCC § 14A.50.020. Anderson pled not guilty and was scheduled for trial on October 15, 2007. On October 11, 2007, after being notified that Anderson would be represented by counsel, the District Attorney dismissed the citation.

On May 7, 2008, Chase and Golden were in a temporary campsite under the Hawthorne Bridge. Portland police officers posted a no-camping notice on each of their tents, with handwritten notes stating: "1 p.m., time to be moved or this stuff will be taken away." Chase and Golden understood this to mean that they had 24 hours from 1:00 p.m. on May 7, 2008 to move their tents and belongings. Instead, just before 9:00 p.m. on May 7, 2008, Officer Filitano arrived and ordered them to remove their belongings immediately. The officer cited both men for "erecting a structure on public property" in violation of PCC § 14A.50.050.

In September 2008, Bailey and Chase were living in the parking lot of a private building in southeast Portland with the permission of the building manager. The manager told Bailey and Chase that police officers had threatened to "shut down" the building if Bailey and Chase did not move their belongings. On or about October 1, 2008, Bailey and Chase moved their personal property to the nearby street, taking care not to obstruct public rights-of-way. The next day, they

found most of their belongings gone and the rest scattered about. A "notice of illegal camping" was found with their belongings, with no date or time given for the clean-up and seizure of their property.

Bailey and Chase went to the address listed on the notice to retrieve their property and found only a few pieces of clothing that were wet and moldy. Missing were two bicycles, two bicycle trailers, clothing, boots, tools, personal items, and family photographs and mementos, including the ashes of Bailey's deceased father. Bailey and Chase allege that, if given adequate notice of the sweep, they would have contacted a local service agency to help move their property.

CRUEL AND UNUSUAL PUNISHMENT?

On December 12, 2008, plaintiffs filed suit. Plaintiffs alleged that the City's enforcement of the anti-camping and temporary structure ordinances essentially criminalized the status of homelessness in violation of the Eighth Amendment because it punished them for sleeping in a public place even though they had no lawful place to sleep.

In response, the City argued the Eighth Amendment did not apply because "erecting a temporary structure is considered a nuisance rather than a crime and is punishable through abatement [i.e., removal] of the structure instead of fines and/or imprisonment." The federal district court, however, noted that abatement was available "in addition to other remedies provided by law," which included "a fine of not more than \$500 and a term of imprisonment not exceeding six months." § 14A.20.060. As a result, the court concluded that "the temporary structure ordinance is not outside the scope of the criminal process and accompanying Eighth Amendment restrictions."

The City had also contended that "plaintiffs lack standing to bring an Eighth Amendment challenge, because they have not been convicted of violating the ordinances." In so doing, the City argued "the Eighth Amendment was designed to protect those convicted of crimes and absent convictions under the anti-camping or temporary structure ordinances, plaintiffs have not suffered injury in fact and therefore lack standing to raise a Eighth Amendment challenge." The federal district court rejected this argument.

While the Eighth Amendment "limits the kinds of punishment that can be imposed on those convicted of crimes," prohibiting "punishment grossly disproportionate to the severity of the crime," the court noted that the Eighth Amendment also "imposes substantive limits on what can be made criminal and punished as such." Specifically, the court found the Eighth Amendment "limits what can be made criminal, implicating conduct that is subject to criminal prosecution." Moreover, to establish standing to bring suit, the court found plaintiffs "need only establish a reasonable expectation that their conduct will recur and trigger the alleged harm."

Applying these principles to the facts of this particular case, the federal district court found plaintiffs had established standing due to their inability "to avoid engaging in the illegal conduct in the future" based upon their being homeless.

Here, plaintiffs allege past injuries and threatened future injuries resulting from the City's enforcement of the anti-camping and temporary structure ordinances through the threat of criminal sanctions and the loss of personal property. Further, plaintiffs claim that they may be excluded from public parks in Portland for up to 180 days for violating the anti-camping ordinances. Plaintiffs allege that they are likely to violate the ordinances in the future by sleeping in public places, because they have no other place to sleep.

As a result, the federal district court held "plaintiffs have standing to assert an Eighth Amendment claim."

STATUS VS CONDUCT

The City had also argued that "plaintiffs fail to state a meritorious Eighth Amendment claim because the challenged ordinances target the conduct of camping and erecting temporary structures rather than the status of being homeless." Plaintiffs, however, contended that "the City's enforcement of the ordinances extends beyond the limits of what can be made criminal under the Eighth Amendment."

In the opinion of the federal district court, "homeless persons should not be subject to criminal prosecution for merely sleeping in public at any time of day." On the other hand, consistent with the Eighth Amendment, the court found the City could reasonably impose "a criminal sanction for public behavior which may create substantial health and safety hazards which offends the moral and esthetic sensibilities of a large segment of the community."

Accordingly, the court found the "critical factor" in resolving this case was "whether and to what degree the City's enforcement of the anti-camping and temporary structure ordinances criminalizes conduct that society has an interest in preventing." Further, the court would consider whether the ordinance targeted conduct, i.e. homelessness, which was involuntary and effectively criminalized one's status, as opposed to actual conduct.

Assuming "homeless people have nowhere else to sleep," plaintiffs had argued that "punishing them for sleeping in a public place essentially renders sleeping, and their status of homelessness, a crime." In so doing, plaintiffs contended that "Portland has far more homeless people than available shelter space, and that many homeless people cannot access shelters based on physical disabilities, mental illness, or other factors." Further, plaintiffs claimed the City was "enforcing the anti-camping ordinance to prohibit sleeping or lying on public property at any time if 'bedding material' is present."

Plaintiffs allege that officers cited Anderson for napping on top of his sleeping bag in a City park during the day. Plaintiffs further allege that police officers have told Bailey, Chase, and Goldman to "move along" when lying down or sleeping on public property.

As a result, the plaintiffs alleged that the City was effectively 'punishing them for sleeping in a public place essentially render[ed] sleeping, and their status of homelessness, a crime.' The federal district court agreed.

In the opinion of the federal district court, plaintiffs had adequately stated a claim under the Eighth Amendment, in that they alleged "the City's enforcement of the anti-camping and temporary structure ordinances criminalizes them for being homeless and engaging in the involuntary and innocent conduct of sleeping on public property." As a result, the federal district court denied the City's motion to dismiss plaintiffs' Eighth Amendment claim.

SELECTIVE ENFORCEMENT?

The federal district court also considered plaintiffs' claim that "the City's enforcement is strategically deployed to target and harass homeless persons" in violation of the Equal Protection Clause. As cited by the court, the Equal Protection Clause "directs that all persons similarly circumstanced shall be treated alike." Moreover, the federal district court noted that "a plaintiff makes out a selective-enforcement claim if she shows that the state based its enforcement decision on an arbitrary classification that gives rise to an inference that the state intended to accomplish some forbidden aim against that group through selective application of the laws."

Where a plaintiff alleges selective enforcement of criminal laws in violation of the Equal Protection Clause, the plaintiff must demonstrate that enforcement had a discriminatory effect and the police were motivated by a discriminatory purpose. Further, plaintiffs seeking to enjoin alleged selective enforcement must demonstrate the police misconduct is part of a policy, plan, or a pervasive pattern.

Applying these principles to the facts of the case, the federal district court found plaintiffs "allegations of selective enforcement of the anti-camping and temporary structure ordinances against the homeless based on improper motives" had "sufficiently state an equal protection claim."

Here, plaintiffs allege that police officers cited Anderson for napping on a sleeping bag in a public park, repeatedly tell Bailey, Chase, and Golden to "move along" while lying down or sleeping outside, and seize personal property while conducting camp clean-ups without adequate notice.

As a result, the federal district court also denied the City's motion to dismiss plaintiffs' equal protection claims. Plaintiffs would, therefore, have an opportunity to proceed to trial to develop the facts as to precisely "when, where and how the City enforces the anti-camping and temporary structure ordinances." Based upon such facts developed at trial, the court would then determine whether the City had indeed violated the Eighth Amendment and/or the Equal Protection Clause. If so, the court could then issue an injunction prohibiting the City from enforcing an unconstitutional ordinance against homeless individuals residing in Portland.

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