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The City's Appellate Practice: Recent Cases

This year, as in years past, the Law Department's Appeals Division has handled many cases involving important questions of public policy in the United States and New York state appellate courts. This column will address the division's activities in the U.S. Court of Appeals for the Second Circuit and U.S. Supreme Court, focusing on several cases involving civil rights, employment practices, and the defense of measures adopted to protect the health and safety of the public.

Marriage Equality

New York City has long been in the forefront of seeking to recognize and protect the rights of same sex couples. Long before the legalization of same sex marriage by the New York State Legislature, in a number of Mayoral Executive Orders and local laws issued and enacted beginning in the Koch administration and extended and expanded under succeeding administrations, the city established a program of domestic partner registration. The New York City Law Department was instrumental in these efforts.

The U.S. Supreme Court will soon decide two landmark cases that could determine the legal rights of same-sex couples on a national level. Attorneys of the Appeals Division have participated in one of these cases, Windsor v. United States of America, No. 12-63, which concerns the constitutionality of the federal Defense of Marriage Act (DOMA), 1 U.S.C. §7. The other, Hollingsworth v. Perry, No. 12-144, is a challenge to California's Proposition Eight, which defines marriage as the union of a man and a woman.

For purposes of federal law, section 3 of DOMA defines "marriage" as a legal union between one man and one woman as husband and wife, and defines "spouse" as a person of the opposite sex who is a husband or a wife. As a result, DOMA denies to legally married same-sex couples significant federal benefits that are available to legally married opposite-sex couples.

As a result of DOMA, Edith Windsor, a resident of New York City, was required to pay $363,053 in federal taxes on the estate of her late same-sex spouse—taxes Windsor would not have had to pay if federal law recognized her marriage. Windsor sued the federal government, arguing that section 3 of DOMA violates the Equal Protection Clause of the U.S. Constitution by discriminating against legally married same-sex couples. After Judge Barbara Jones of the Southern District granted summary judgment for Windsor, the Law Department, on behalf of Mayor Michael Bloomberg, City Council Speaker Christine Quinn and the New York City Council, filed an amicus brief in her support in the Second Circuit.

Beyond adopting Windsor's arguments, the city's brief described how DOMA undermines the city's non-discrimination laws and forces the city to discriminate between legally married city employees based on whether their marriages are same-sex or opposite-sex. Over the past quarter century, the city has adopted policies and laws prohibiting discrimination based on sexual orientation, and has extended to same-sex couples, to the maximum extent allowed by law, the same rights and benefits afforded to opposite-sex couples. Because of DOMA, however, thousands of legally married same-sex couples in New York City are disadvantaged with respect to federal income taxes, federal employee and retiree benefits and Social Security benefits. DOMA presents the last obstacle to affording legal equality to all of the city's married residents and employees.

Applying "intermediate scrutiny," the Second Circuit, in an opinion by Judge Dennis Jacobs (joined in by Judge Christopher Droney, with a partial dissent by Judge Chester Straub), upheld the District Court's determination, concluding that section 3 of DOMA violates the Equal Protection Clause because DOMA's definitions of "marriage" and "spouse" are not "substantially related to an important government interest." Windsor v. United States, 699 F.3d 169 (2d Cir. 2012), aff'ing 833 F.Supp.2d 394 (S.D.N.Y. 2012). Subsequently, when both sides urged the U.S. Supreme Court to grant certiorari, so that the constitutional question at issue could be finally determined, the city filed another amicus brief in support of the plaintiff. After the federal government's petition for certiorari was granted, the city joined an amicus brief on the merits filed on behalf of a group of public and private employers. The U.S. Supreme Court heard oral argument on March 27, 2013. A decision is expected this week.

Employment

Another recent decision of the Second Circuit partially vindicated the city's position in a long-standing and hotly

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contested challenge alleging racial bias in the personnel policy of the New York City Fire Department (FDNY). In 2007, the U.S. Department of Justice commenced an employment discrimination action against the city under Title VII of the Civil Rights Act, 42 U.S.C. §2000e et seq., alleging that two written FDNY examinations used to evaluate firefighter applicants between 1999 and 2002 had a disparate impact on African-American and Hispanic applicants. The Vulcan Society, an organization of African-American firefighters, intervened in the action, asserting a claim of intentional discrimination.

Judge Nicholas Garaufis of the U.S. District Court for the Eastern District of New York granted the Justice Department's and the Vulcan Society's motions for summary judgment on the disparate impact claim. The two challenged exams (and the rank-ordering of results) disproportionately impacted black and Hispanic applicants, the District Court ruled, and the city did not demonstrate that the exams were "job-related" and "consistent with business necessity." United States v. City of New York, 637 F.Supp.2d 77 (E.D.N.Y. 2009).

Subsequently, Garaufis also granted summary judgment on the claim that the FDNY had intentionally discriminated against minority applicants, despite the city's presentation of contrary evidence, including descriptions of its aggressive efforts to promote diverse FDNY hiring and its reliance on the federal Uniform Guidelines on Employee Selection Procedures in designing the challenged exams. United States v. City of New York, 683 F.Supp.2d 225 (E.D.N.Y. 2010), vacated, 2013 U.S. App. LEXIS 9671 (2d Cir. 2013).

After a remedial hearing, Garaufis ordered broad injunctive relief, including the appointment of a Court Monitor to restructure and oversee the FDNY's hiring practices and Equal Employment Opportunity office for at least 10 years. Prior notice to and approval of the monitor was required before the FDNY could take any steps in its hiring process. United States v. City of New York, 2011 U.S. Dist. LEXIS 115074, vacated in part, 2013 U.S. App. LEXIS 9671 (2d Cit. 2013).

The city appealed the District Court's injunctive order and finding of intentional discrimination to the Second Circuit. On May 14, 2013, in an opinion by Judge Jon Newman (concurred in by Judge Ralph Winter with a partial dissent from Judge Rosemary Pooler), the court reversed the grant of summary judgment on the intentional discrimination claim, remanded the case for trial of that claim, and significantly pared back the injunctive order. United States v. City of New York, 2013 U.S. App. LEXIS 9671 (2d Cir. 2013). In reversing the finding of intentional discrimination, the court noted that "questions of subjective intent can rarely be decided by summary judgment," and concluded that the District Court had erroneously rejected the city's offer of evidence showing that it did not act with discriminatory intent. In particular, the court faulted the District Court for dismissing the city's offer of evidence as "incredible," a finding which cannot be made on a motion for summary judgment, but only at the conclusion of a trial.

While noting that "Judge Garaufis is an entirely fair-minded jurist who could impartially adjudicate the remaining issues in this case," the court ordered assignment of the trial of the intentional discrimination claim to a different judge. The court also modified the injunction by, among other things, reducing its duration from 10 years to five, removing constraints on the city's ability to seek relief from the injunction's prospective requirements, and eliminating the city's obligation to hire private consultants to assist in recruitment and EEO strategies.

Preemption Challenges

On occasion, parties challenge city laws, rules, and programs on the ground that federal law preempts or supersedes local law. Over the last few years, the Second Circuit has invalidated several important city initiatives on federal preemption grounds. This was the fate, for instance, of a City Board of Health resolution requiring tobacco retailers to display signs bearing graphic images showing adverse health effects of smoking (23-34 94th St. Grocery v. New York City Bd. of Health, 685 F.3d 174 (2d Cir. 2012); the city's attempt to levy real estate taxes on portions of foreign missions to the United Nations used as staff housing (City of New York v. Permanent Mission of India, 618 F.3d 172 (2d Cir. 2010); and a rule of the Taxi and Limousine Commission encouraging the use of fuel-efficient hybrid vehicles as taxicabs (Metropolitan Taxicab Board of Trade v. City of New York, 615 F.3d 152 (2d Cir. 2010). However, attorneys of the Appeals Division have recently prevailed in two particularly important federal preemption cases, one involving regulation of an indispensable segment of the construction industry, the other involving an important public health initiative of the Bloomberg administration.

Steel Institute v. City of New York. The New York City Building Code (Title 28, Chapter 7 of the Administrative Code of the City of New York) provides "reasonable minimum requirements and standards…for the regulation of building construction in the city of New York in the interest of public safety, health, [and] welfare." Admin. Code §28-101.2. "[B]ecause New York City is the most densely populated major city in the United States, construction worksites necessarily abut, or even spill over into adjoining lots and public streets." Steel Inst. v. City of New York, 832 F.Supp.2d 310, 314 (S.D.N.Y. 2011). For that reason, construction cranes—some of which extend to 1,800 feet, and move loads

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as heavy as 825 tons—"pose a unique risk to public safety in New York City." Id.

The city comprehensively regulates the design, construction, and operation of cranes, derricks, and other hoisting equipment. Section 3319 of the Building Code sets forth the city's requirements regarding the "construction, installation, inspection, maintenance and use of cranes and derricks." As the city agency responsible for enforcing the city's crane laws, the New York City Department of Buildings promulgates "Reference Standards," a set of definitions and regulations regarding power-operated cranes and derricks.

After two crane collapses, one of which, in midtown Manhattan, killed seven people and heavily damaged surrounding buildings, the Buildings Department promulgated a revised Reference Standard RS 19-2 in 2008. Among other things, RS 19-2 authorizes the Buildings Department to issue a stop work order when it finds that any hoisting machine, including a crane, is "dangerous or unsafe."

Apparently in reaction to the 2008 Reference Standard, the Steel Institute of New York, a trade association representing the interests of businesses that own or operate cranes in New York City, commenced litigation in July 2009, challenging most of the city's regulations governing the operation of cranes, derricks and hoisting devices. Plaintiff argued that crane regulations contained in the federal Occupational Safety and Health Act, 29 U.S.C. §651 et seq. (OSHA) preempt the city's regulations, which, according to plaintiff, regulate worker health and safety, the exclusive subject matter of OSHA, in a "direct, clear and substantial way." As support for this argument, plaintiff relied on Gade v. National Solid Waste Management Assn., 505 U.S. 88 (1992), in which a plurality of the U.S. Supreme Court held that OSHA regulations preempt Illinois statutes regulating the licensing and training of employees who work with hazardous waste.

Rejecting plaintiff's arguments, the Second Circuit, in an opinion by Judge Dennis Jacobs, affirmed an order of Judge Colleen McKenna of the Southern District which granted the city's motion for summary judgment. Steel Institute of New York v. City of New York, 2013 U.S. App. LEXIS 9236 (2d Cir. May 7, 2013), aff'ing 832 F.Supp.2d 310 (S.D.N.Y. 2011). The court held that the city's crane regulations fall within a preemption exception—recognized by the Supreme Court in Gade—for laws of general applicability, even though the city's regulations may substantially affect worker health and safety.

The court reasoned that, unlike OSHA standards, which address workplace safety, the city's crane regulations address public safety, and are primarily intended to protect not crane workers, but rather the city as a whole, where the use of cranes inevitably affects streets and lots adjoining construction sites. Laws of general applicability advancing public safety, the court concluded, do not run afoul of OSHA, even if they achieve their purpose in part by regulating the conduct of—and thereby protecting—workers. Emphasizing the importance of the city's "general prohibitions on conduct that endangers the populace," the court expressed doubt that a "crowded city" like New York could function "without such regulations."

U.S. Smokeless Tobacco Mfg. Company v. City of New York. In another recent federal preemption challenge, attorneys of the Appeals Division successfully defended Local Law 69 of 2009, which prohibits the sale of smokeless-flavored tobacco products in New York City "except in a tobacco bar." See Admin. Code §17-713 et seq. The local law defines flavored tobacco products as those that impart a "characterizing flavor." Admin. Code §17-713(e). Characterizing flavors—e.g., fruit, chocolate, and honey—are distinguishable tastes or aromas, other than tobacco itself, imparted before or during consumption of the tobacco product. Admin. Code §17-713(b). Mayor Bloomberg and the City Council view these flavored products as posing particular risks to young New Yorkers, who may be more likely to start using them (and then become addicted to them), even as their use of traditional tobacco products declines. The local law is enforced by the city's Department of Health and Mental Hygiene (which has issued implementing regulations) and Department of Consumer Affairs.

Following enactment of the local law, manufacturers and distributors of smokeless tobacco sued the city, arguing that Congress had preempted state and local restrictions on the sale of smokeless-flavored tobacco products. As support for their argument, the plaintiffs cited 21 U.S.C. §387-p(a)(2)(A), the preemption provision of the Federal Smoking Prevention and Tobacco Control Act (FSPTCA), which preempts state or local laws with respect to "tobacco product standards." The FSPTCA also contains a "preservation" clause, however, which explicitly reserves to states and local governments the power to adopt laws, even laws more stringent than federal laws and FDA rules, regarding the sale, distribution or use of tobacco products. 21 U.S.C. §387-p(a)(1).

When Judge Colleen McMahon of the Southern District upheld the local law, plaintiffs appealed to the Second Circuit, which, in an opinion by Judge Gerard Lynch, affirmed the District Court's determination. U.S. Smokeless Tobacco Mfg. v. City of New York, 708 F.3d 428 (2d Cir. 2013), aff'ing 703 F.Supp.2d 329 (S.D.N.Y. 2010). The court held that Congress, in enacting the FSPTCA preservation clause, had expressly reserved to states and localities the right to restrict the sale of tobacco products within their jurisdictions. The court further concluded that the FSPTCA preemption provision—which relates to "tobacco product standards"—was inapplicable,

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since the local law does not regulate tobacco manufacturers and the production of flavored tobacco products. Thus, in the court's view, the city's restriction of flavored tobacco products are sales restrictions, a zone preserved for state and local action, rather than standards of production, reserved to federal control.

The court also noted that the local law furthers a key intent of Congress in enacting the FSPTCA: to prevent the harm smokeless tobacco products cause young people. Given the importance of legislative intent to any preemption analysis, the court viewed the local law's advancement of a congressional purpose as additional support for its statutory analysis.

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