

The Local Government LIABILITY BEAT



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THE FOURTEENTH AMENDMENT, THE ADA, AND INTERROGATIONS *Folkerts v. City of Waverly*

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On February 25, 2013, the Eighth Circuit Court of Appeals decided *Folkerts v. City of Waverly*¹, which is instructive regarding the application of the Fourteenth Amendment and the Americans with Disabilities Act (ADA) to police interrogations. The facts of *Folkerts*, taken directly from the case, are as follows:

Travis, now in his thirties, has an intellectual disability, diagnosed as mental retardation. A psychologist characterized his mental retardation as “severe,” with an IQ of 50, below the 0.1 percentile. The psychologist reported that his disability “would be obvious to anyone, including any police officer, who engaged in conversation with Travis.”

In May 2008, Travis lived alone in an apartment but had supervision most waking hours. On May 11, Travis’s neighbor reported that Travis had engaged in inappropriate conduct with her son. A patrol officer, who knew Travis had a disability, spoke with the complainants and called Schneider for advice. The officer then spoke with Travis, who was alone. At the officer’s request, Travis provided a phone number for his caseworker. The officer read Travis his Miranda rights and asked if he understood them; Travis said “yes.” After interviewing Travis, the officer left a voicemail with the caseworker and submitted an “Information Only” report to Schneider for follow-up.

The next day, Schneider went to Travis’s apartment; Travis was alone. Schneider said he read Travis his Miranda rights and more

fully explained them “[t]o accommodate for his limitations.” Schneider knew Travis had a mental disability but claims not to have known his “full limitations.” Schneider believed that Travis understood his rights. Schneider continued the interrogation at the police station, where he interrogated Travis in a conference room that Schneider believed was less intimidating than the station’s regular, smaller interview room. Schneider asked non-leading questions “because it seemed apparent that it would be easy to get him to say something that he did not do.” According to Schneider’s report, he asked about ten leading questions.

At Travis’s request, Schneider phoned Idella Folkerts. She spoke with Travis, who said he was “nervous.” She then spoke with Schneider. Schneider reported that Idella asked if I [Schneider] wanted her to come down and I said she could if she wanted and that it was up to her. She said that she thought [Travis] would be less nervous and it would be best if I spoke to him without her there. I said that he seemed pretty nervous and that if her being there would make him worse then I would rather she not be there.

When Idella told Schneider her presence might further upset Travis, she claims Schneider “said okay and hung up.” The Folkertses claim that Schneider never told Idella on the phone that Travis was in legal trouble or would be or was being interrogated. Schneider continued his interrogation.



Travis incriminated himself. Schneider drove Travis to the Folkertses's home and explained the situation to them. Schneider arranged alternative and friendlier booking procedures, and one parent accompanied Travis during booking.

Schneider consulted with the county attorney and filed a complaint charging Travis with lascivious conduct with a minor, a misdemeanor. An Iowa court found him incompetent to stand trial and dismissed the case.ⁱⁱ

The Folkertses sued the City of Waverly and the detective and alleged violations of Travis' Fourteenth Amendment substantive due process rights and violations of the ADA. The district court granted summary judgment for the city and the detective; the Folkertses appealed to the Eighth Circuit Court of Appeals.

The first issue on appeal was whether the detective violated Travis' Fourteenth Amendment due process rights during the interview and investigation. At the outset, the court noted that in order to defeat the detectives motion for qualified immunity, the plaintiffs must show (1) that there was in fact a constitutional violation, and (2) that the right was clearly established at the time of the violation such that a reasonable officer would have known his acts were unlawful.ⁱⁱⁱ

The court then examined the legal requirements for a plaintiff to prove a Fourteenth Amendment due process violation. The court first noted that mere negligence is not enough to establish a due process violation. Rather, the court stated that the officer's conduct must "shock the conscience." This occurs with "egregious" and "outrageous" conduct.^{iv} The court then stated:

Because a wide variety of official conduct may cause injury, a court must first determine the level of culpability the § 1983 plaintiff must prove to establish that the defendant's conduct may be conscience shocking. Mere negligence is never sufficient. Proof of intent to harm is usually required, but in some cases, proof of deliberate indifference, an intermediate level of culpability, will satisfy this substantive due process threshold. *Lewis*, 523 U.S. at 848-49. The deliberate indifference standard "is sensibly employed only when actual deliberation is practical." *Lewis*, 523 U.S. at 851. By contrast, the intent-to-harm standard most clearly applies in rapidly evolving, fluid, and dangerous situations which preclude the luxury of calm and reflective deliberation.^v

Further, when considering the "intent to cause harm" standard noted above, the court noted

that only "intent to cause harm unrelated to the legitimate object of the government action" will establish a violation.^{vi}

The court then applied the rules above to the facts of Travis' case. First, Travis alleged that the detectives conduct during the interview "shocked the conscience." However, the court noted that the detective made several modifications to his normal procedure. For example, he modified his questioning style, more fully explained the Miranda rights, interviewed Travis in a less intimidating room, and called Travis' mother (Idella) at his request during the interview. As such, the court held that the detectives conduct during the interview did not "shock the conscience."

Second, Travis alleged that the detectives investigation was inadequate and that "shocked the conscience." Regarding liability for an inadequate investigation, the court stated:

A negligent failure to investigate inconsistencies or other leads does not violate due process. *Akins*, 588 F.3d at 1184. A plaintiff must demonstrate an intentional or reckless failure to investigate. *Amrine v. Brooks*, 522 F.3d 823, 834 (8th Cir. 2008). Investigators shock the conscience when they (1) attempt to coerce or threaten the criminal defendant, (2) purposefully ignore evidence of the defendant's innocence, or (3) systematically pressure to implicate the defendant despite contrary evidence. *Akins*, 588 F.3d at 1184.^{vii}

In this case, the patrol officer interviewed the victim and the victim's mother and visited the scene of the alleged crime. The detective spoke with the patrol officer, reviewed his report, spoke to the victim's mother, and interviewed Travis. The fact that the detective did not interview the victim, Travis' caseworker and Travis' apartment manager does not amount to an "intentional or reckless failure to investigate" and therefore does not "shock the conscience."^{viii}

Third, Travis alleged that his arrest in this case was retaliation for a previous contact the detective had with his family that resulted in negative comments in the detective's annual performance appraisal several years before this incident. However, Travis presented no proof of this and the court dismissed this allegation as "mere speculation."^{ix}

Fourth, Travis alleged that the decision to charge him with the particular crime for which he was charged "shocked the conscience" because there was no evidence that he was in a "position of authority" over the victim. However, the detective testified that he believed Travis' superior size placed him in a sufficient "position of authority." The court noted that there was no case law interpreting this element of that crime at the time of the arrest and noted that the detective sought legal advice from the county attorney prior to making those charges. The court stated:



Although following an attorney's advice does not automatically cloak officers with qualified immunity, it can show the reasonableness of the action taken.^x

The second issue on appeal was whether city had a "culture of indifference" such that it showed "deliberate indifference" to Travis' rights. The court stated the applicable legal principal as follows:

In limited circumstances, a local government may be liable for its "decision not to train certain employees about their legal duty to avoid violating citizens' rights." *Connick v. Thompson*, 131 S. Ct. 1350, 1359, 179 L. Ed. 2d 417 (2011). The failure to train must rise to "deliberate indifference" to be actionable. *Id.* A pattern of similar constitutional violations by untrained employees is ordinarily necessary to show deliberate indifference. *Id.* at 1360. It may be, however, that "evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, could trigger municipal liability." *Bd. of Cnty. Comm'rs of Bryan Cnty, Okla. v. Brown*, 520 U.S. 397, 409, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997).^{xi}

However, in Travis' case, the court noted that he had not established any constitutional violation. As such, with no underlying constitutional violation, plaintiff cannot prevail on this claim for "failure to train."

The last issue before the court of appeals was whether the detective and/or city violated two provisions of the ADA during the case with Travis. First, Travis alleges a violation of § 504 of the Rehabilitation Act. To establish a violation of this section, Travis must prove that he is a qualified person with a disability and was denied, on the basis of the disability, the benefits of a program or activity of a public entity receiving federal funds. Second, Travis alleges a violation of Title II of the ADA. To establish a violation of Title II, Travis must show that he is a qualified person with a disability, and he was excluded from participation in or denied the public entities services by reason of his disability.

Travis argued that the defendants failed to accommodate Travis when they failed to provide communicative assistance, failed to professionally evaluate his level of functioning, interrogated him without his parents/guardians, failed to record the interrogation or have a witness present, failed to preserve the interrogation notes, and questioned Travis aggressively. Further, regarding the disparate treatment claim, Travis argued he was denied the benefit of the ability to communicate, a benefit afforded others without Travis's disability. For example, he cites to the city's provision of communicative assistance to others with disabilities, such as American Sign Language interpreters for the hearing-

impaired. Basically, Travis argued not that he was treated differently but rather that he was not treated differently. Because of the similarity of the two claims, the court said they would analyze the claims together.

The court noted that:

Title II and its regulations require that "qualified persons with disabilities receive effective communication that results in 'meaningful access' to a public entity's services." *Bahl*, 695 F.3d at 784, citing *Loye v. County of Dakota*, 625 F.3d 494, 496-97, 500 (8th Cir. 2010); see 28 C.F.R. § 35.160(a)(1). "Depending on the circumstances, this may require the use of auxiliary aids and services, such as interpreters for the hearing impaired." *Loye*, 625 F.3d at 496-97 (internal quotation marks omitted). Under the meaningful access standard, aids and services "are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons," but they nevertheless "must afford handicapped persons equal opportunity to . . . gain the same benefit." *Id.* at 499, quoting *Alexander v. Choate*, 469 U.S. 287, 305, 105 S. Ct. 712, 83 L. Ed. 2d 661 (1985).^{xii}

The court then applied the standards above to the facts of Travis' case. They noted that the police did make reasonable accommodations for Travis such as altering questioning style, more fully explaining his Miranda rights, using a less intimidating interview room, calling Travis' mother during the interview and giving her an opportunity to attend (she declined), driving Travis to his parents, explaining the situation to them, and arranging an alternative booking procedure. The court then held that, even if the officers did not use the "best practices" in this type of situation, the accommodations provided were still reasonable.

As such, the court affirmed summary judgment for the detective and the city.

Note: Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.

Citations

- i. No. 12-1083, 2013 U.S. App. LEXIS 3847 (8th Cir. Decided February 25, 2013)
- ii. *Id.* at 1-4
- iii. *Id.* at 5
- iv. *Id.* at 6 (see *County of Sacramento v. Lewis*, 523 U.S. 833 (1998))
- v. *Id.* at 6-7
- vi. *Id.* at 7
- vii. *Id.* at 8
- viii. *Id.* at 9
- ix. *Id.* at fn5
- x. *Id.* at 11 (internal citation omitted)
- xi. *Id.* at 12
- xii. *Id.* at 16



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THE FOURTEENTH AMENDMENT AND THE ADA

