NINTH CIRCUIT COURT OF APPEALS

Kaplan v. County of Los Angeles,

__F.2d__, 90 D.A.R. 801,
No. 87-6646 (9th Cir., Jan. 23, 1990).

Cost Recovery System for Statements by Candidates in Voter Pamphlets Upheld

The Ninth Circuit Court of Appeals has upheld the constitutionality of California Election Code section 10012. The section allows a local government to defray the cost of publishing voter's pamphlets by charging the candidates listed in the voter's pamphlet who choose to insert a limited recitation of personal background and qualifications a pro rata share of the printing costs of the pamphlet.

The statute permits "[t]he local agency [to] estimate the total cost of printing, handling, translating, and mailing the candidate's statement to pay in advance to the local agency his or her estimated pro rata share as a condition of having his or her statement included in the voter's pamphlet." The statute further provides that the amount paid by the candidate will be adjusted if necessary after the actual publication costs are known. Under the statute, the local agency neither profits from these payments nor uses them to finance the costs of the election itself.

Leon S. Kaplan, then sitting as a judge of the Los Angeles Municipal Court, decided to run in a 1986 nonpartisan election for an open seat on the Los Angeles Superior Court. The County Registrar estimated that Judge Kaplan's pro rata printing costs amounted to $52,000 for the June 3, 1986 primary election and subsequently estimated the cost to be $27,500 for the November 4, 1986 general election. Kaplan tendered only approximately $24,000 for what he personally estimated was his share of the printing costs for the June 3 primary election.

When the County Registrar rejected this amount as inadequate and refused to print Kaplan's statement, Judge Kaplan then resubmitted his statement along with a check for $52,000. However, Kaplan subsequently withdrew his statement from publication and received a full refund; on the same day, he filed this action in the district court seeking an injunction against enforcement of the County's requirement for advance payment of the publication costs and a declaratory judgment that it violated the First and Fourteenth Amendments. His requests for declaratory and injunctive relief were denied by the district court and by the Ninth Circuit Court of Appeals. Judge Kaplan won in the primary election despite the absence of his statement in the voter's pamphlet. For the general election, he paid the advance cost of $27,500 and had his statement published. He then amended his complaint to add a request for refund of the $27,500.

Judgment was entered against Kaplan in the district court, after which Kaplan presented two issues on appeal: (i) whether the cost recovery system impermissibly infringes his First Amendment rights; and (ii) whether the system violates equal protection by distinguishing between candidates on the basis of financial resources.

In its First Amendment analysis, the court described the public forum doctrine and the "now familiar...three categories of access according to the type of public property involved": the traditional public forum, the "nonpublic" public forum, and the limited or designated public forum. Although the Ninth Circuit agreed with Judge Kaplan's classification of the voter's pamphlet as falling within the limited or designated public forum, it disagreed with him as to the appropriate level of scrutiny. Kaplan invoked strict scrutiny, and argued that the government must demonstrate that section 10012 serves a compelling state interest in a narrowly drawn fashion. Finding that the restriction imposed by section 10012 is content-neutral, the court applied the lesser level of scrutiny under *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983): the restriction must be shown to serve a significant state interest in a narrowly tailored fashion, and leave open ample alternative channels of communication.

Under this lesser level of scrutiny, the court upheld the validity of the section. "The state's interest in publishing voter's pamphlets in a way that does not burden local agency budgets is a substantial interest. The statute is narrowly drawn in that the local agencies can recover actual costs alone, and cannot profit from the publication charges nor finance election costs with them. The statute exempts the indigent from cost liability and leaves open a variety of alternative means for a candidate to transmit his statement to voters."

Consistent with this analysis, the Ninth Circuit also rejected appellant's equal protection argument. The County's prepayment requirement is not an absolute prerequisite to participation in an election; failure to meet it does not disqualify one from having his or her name placed on the ballot. "The County has provided one method for candidates to express their qualifications to the electorate, if they choose to do so and share the cost. If not, they can utilize other means of reaching the electorate in their election campaigns."

UNITED STATES DISTRICT COURTS

California State Employees' Ass'n (CSEA), et al. v. State of California, et al.,

___F.Supp.___, 89 D.A.R. 12371,
No. C-84-7275-MHP (N.D. Cal.,
Oct. 3, 1989).

Gender Discrimination Claim Dismissed

Plaintiffs alleged "disparate treatment" violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. sections 2000e- 2000e-17, claiming that certain female-dominated state job classifications were paid less than other similar job classifications within the California state government when evaluated on a "comparable worth" theory. The U.S. District Court for the Nothern District of California held that the plaintiffs failed to meet their burden of proving discriminatory intent, as outlined in *American Fed'n of State, County and Mun. Employees v. Washington*, 770 F.2d 1401 (9th Cir. 1985) (AFSCME), and ordered the parties to submit additional briefing on the status of the pending disparate impact claims in light of the present ruling and the U.S. Supreme Court's decision in *Wards Cove Packing Co. v. Antonio*, ___U.S.___, 109 S.Ct. 2005 (1989).

The district court relied on AFSCME in requiring plaintiffs to establish that, before 1938, defendants intentionally set lower salary levels for female-dominated job classifications and that such discrimination was intentionally maintained after, or carried over into, the 1938 state restructuring of the state compensation schedule. The district court summarily rejected plaintiffs' showing of numerous primary memos and other state documents as evidence of discriminatory intent, largely on two bases.

At times, the court found little probative value between incriminatory admissions by given state officials and the practical effect or impact of those admissions on the state's decisionmaking policy regarding the setting of salaries and wages. The court found that other evidence proffered by the plaintiffs revealed motivations other than sex discrimination, such as the state's desire to match the prevailing rate dictated by the private sector, which, under the preponderance of the evidence, caused the plaintiffs to fail in meeting their burden of proof. However, the district court did not examine whether the state's policy in adhering to wage-setting practices prevailing in the marketplace reflected historical and intentional sex discrimination.

The district court was also highly critical of plaintiff's statistical evidence, which purported to show that certain job positions, when held by groups of women, suffered in pay when compared to the salaries of the men holding similar job titles. The court found the evidence flawed primarily because the empirical method of paralleling job titles without first comparing or evaluating the substantive requirements of the individuals employed to fill those titles was itself suspect.

In short, the court found that in this class action suit under Title VII, plaintiffs failed to bear the burden of showing by a preponderance of the evidence that sex discrimination was defendant's standard operating procedure maintained through systematic intentional discrimination.

CALIFORNIA COURTS OF APPEAL

Farron v. City and County of San Francisco,

___Cal. App. 3d___, 89 D.A.R. 15282, No. A044579 (Dec. 20, 1989).

Public Meetings Not Required for Mayor's Advisory Committee

The First District Court of Appeal recently affirmed a superior court's judgment which found that the mayor's San Francisco Housing Demolition Task Force, consisting of two members of the city's Board of Supervisors, is not subject to the Brown Act and therefore may operate in secret sessions closed to the public.

The Brown Act requires that all meetings of a "legislative body" of a local agency be open to the public. Further, the Act defines "legislative body" to include any "body on which officers of a local agency serve in their official capacity as members and which is supported in whole or in part by funds provided by such agency...."

Relying largely on a prior opinion of the Attorney General, the court found that the two city supervisors sitting on the Task Force were not serving in their official capacities because there was no evidence to suggest that these individuals were appointed to the Task Force to represent the board's interest. More importantly, according to the court, there was no evidence that the board of supervisors required its members to serve on the Task Force or exercised any control over the members' actions on the Task Force.

In light of this characterization of the facts, the court found that the Task Force is not subject to the open meeting requirements of the Brown Act. Because the matter was concluded dispositively in this manner, the court did not find it necessary to address the City's argument that the mayor is exempt from the provisions of the Brown Act.

Kennedy Wholesale, Inc. v. Board of Equalization,

___Cal. App. 3d___, 89 D.A.R. 15246, No. C006406 (Dec. 14, 1989).

Tobacco Tax Initiative Does Not Infringe State Legislature's Appropriations Power

The Third District Court of Appeal has ruled that Proposition 99 does not violate Proposition 13, the single subject rule applicable to initiatives, or the equal protection clause of either the United States or the California Constitution; and does not infringe on the legislature's constitutional appropriations power.

On November 8, 1988, the California voters approved Proposition 99, the Tobacco Tax and Health Protection Act of 1988 ("Act" or "Initiative"). Effective January 1, 1989, the Act increased the state tax on cigarettes and tobacco products and imposed additional taxes on distributors of cigarettes and tobacco products. The stated purpose of the initiative is to reduce smoking and other tobacco use among children; to support medical research into tobacco-related cancer, heart, and lung diseases; to treat people suffering from tobacco-related diseases; and to support treatment of patients suffering from tobacco-related illness who cannot afford to pay for services. The Act created the Cigarette and Tobacco Products Surtax Fund in the State Treasury into which all revenues generated by its terms are to be deposited; all monies in the fund may be appropriated by the legislature only for specified purposes.

Plaintiff Kennedy, a distributor of cigarettes and tobacco products, initially alleged that Proposition 99 violates section 3 of Article XIII A of the California Constitution, commonly known as "Proposition 13," which provides that no statewide tax may be increased or added except by a two-thirds vote of both houses of the state legislature. In rejecting this argument, the court stated that, by its express terms, section 3 of Article XIII A limits its scope to action by the legislature. Therefore, Proposition 13, which imposes a supermajority requirement on the legislature when adjusting state taxes, does not repeal the people's right to enact statewide tax adjustments by statutory initiative pursuant to Article II, sections 8 and 10, and Article IV, section 1. The court held that the imposition of supermajority requirements by the people on the legislature does not destroy the coextensive nature of their powers to enact particular types of legislation.

Kennedy then asserted that Proposition 99 violates the "single subject" rule (Article II, section 8(d) of the California Constitution), which provides that an initiative measure embracing more than one subject may not be submitted to the electors or have any effect. Kennedy claimed that this rule was violated because some of the legislature's appropriations from the Initiative's surtax funds are for environmental and medical purposes which are neither functionally related nor reasonably germane to each other or to the provisions of the Initiative concerning tobacco related problems. Kennedy further asserted that the Act violates the single subject rule because it contains more than one item or appropriation.

The court rejected this argument, stating that numerous provisions having one general object, if fairly indicated in the title, may be united in one act. In support of its conclusion, the court referred to similar holdings in challenges to Proposition 13, the Political

Reform Act of 1974, the Victims' Bill of Rights, and, most recently, Proposi-tion 103. Although each of these acts involved multiple complex features, they all satisfied the "single subject" rule because their provisions were found to be either functionally related to one another or reasonably germane to one another or the objects of the enactment. The court stated that because Proposi-tion 99 has as its broad goal the reduction of disease, environmental damage, and economic costs to the state which result from tobacco use, all of its provisions are reasonably germane to its purposes.

The court also rejected as "frivolous" Kennedy's argument that the Act is unconstitutional because it contains more than one item of appropriation, as prohibited by Article IV, section 12(d) of the California Constitution. Article IV deals solely with the legislative department; thus, the provision is inapplicable to the appropriation of surtax funds generated by statutory initiative.

Kennedy next argued that Proposition 99 violates the equal protection clauses of the United States and California Constitutions by imposing a financial burden on tobacco distributors and consumers for programs designed to benefit the public at large. Kennedy claimed that the question is not whether tobacco distributors may be taxed but whether they may be taxed when the proceeds are linked to the funding of particular programs.

In rejecting this argument, the court stated that so long as a system of taxation is supported by a rational basis and is not palpably arbitrary, it will be upheld despite the absence of a precise, scientific uniformity of taxation. Further, the court found a rational relationship between the imposition of a tax on cigarette distributors and the Initiative's broad goals to fund educational, health, and environmental programs related to tobacco use.

Kennedy's final argument asserted that the Act violates Article IV, section 12 of the state constitution by imposing a legal limit on how the legislature may appropriate the proceeds of the tax. The court found that because the Act's appropriation of surtax funds for specified purposes is a continuous appropriation, it does not run afoul of Article IV, section 12. Further, the rules imposed by the Act are capable of change. The Act provides an express grant of power to the legislature to amend the provisions of the Act by a four-fifths vote of the membership of both houses. As a result, the legislature is able to amend the Act if it so desires.

Annamarie E. Ibrahim, et al. v. Ford Motor Company,

___Cal. App. 3d___, 89 D.A.R. 12668, No. A040454 (Oct. 13, 1989)

"Lemon Law" Allows Refund to Buyer Without Manufacturer's Repair Effort

In May 1984, plaintiff Ibrahim bought a new Mercury Cougar from the Larry Albedi Motors dealership. Plaintiff received a document entitled "Ford Warranty Information," which embodied Ford's express warranty that the "selling Dealer will repair, replace, or adjust parts, except tires, on 1984 Ford Motor Company Cars...found to be defective in factory materials or workmanship made or supplied by Ford" which develop during the following twelve months or 12,000 miles, "whichever occurs earlier." During the first five months of ownership, plaintiff returned the vehicle to the Albedi dealership for repairs no less than eight times. During this time, the vehicle was out of service for approximately 55 days. One of plaintiff's complaints about her vehicle—the tendency of the vehicle's engine to surge or die unexpectedly—was never resolved to her satisfaction, despite the best efforts of the dealer to correct the problem.

Following an unsuccessful attempt by plaintiff to have Ford refund the purchase price of the vehicle, she brought suit against Ford, alleging breach of express and implied warranties of fitness and merchantability under the Song-Beverly Consumer Warranty Act (California's "Lemon Law", Civil Code section 1790 *et seq.*), the Uniform Commercial Code, and the Magnuson-Moss Consumer Warranty Act. After the trial court returned a verdict for Ford, plaintiff appealed the judgment.

In reversing the trial court's decision, the First District Court of Appeal noted that Civil Code section 1793.2(d) establishes a substantive rule of general application that a manufacturer is obligated to replace or to reimburse the buyer if "the manufacturer or its representative in this state [are] unable to service or repair the goods to conform to the applicable express warranties after a reasonable number of attempts." Further, section 1793.2(e) establishes a pair of standards establishing reasonableness within the particular area of new motor vehicles—the vehicle is out of service for more than 30 calendar days, or the same problem has been the subject of at least four attempts at repair by "the manufacturer or its agents."

The appellate court found that conflicting jury instructions at the trial court level served to create a misimpression as to which party had the burden of proof on certain issues. Specifically, the jury was told that plaintiff had the burden of proving that she "delivered the motor vehicle to defendant, Ford Motor Company, for repair," that "defendant thereafter failed to repair the defect after a reasonable number of attempts," and that "such failure was not caused by conditions beyond the control of defendant." Conversely, the jury was told that Ford had the burden of establishing that "Ford did not have a reasonable number of repair attempts."

The appellate court held that these instructions told the jury that the previous eight repair efforts of the Albedi dealership were not to be considered for the purpose of deciding plaintiff's entitlement to reimbursement of the purchase price from Ford, pursuant to section 1793.2, subdivisions (d) and (e). Further, the court held that the legislative history of these provisions demonstrates beyond any question that such a differentiation between manufacturer and local representative is unwarranted.

Plaintiff's evidence sufficed to activate the presumption of subdivision (e), which the legislature explicitly declared to be "a rebuttable presumption affecting the burden of proof." The effect of such a presumption, according to Evidence Code section 606, "is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact." The presumption established by subdivision (e) operates against Ford, and Ford therefore was obliged to carry the burden of proof. The court held that error occurred when the jury was instructed otherwise.

According to the court, the crucial issue before the jury was whether the problem afflicting plaintiff's Cougar persisted after a reasonable number of attempts to correct it, triggering the replacement or refund provision of the Lemon Law. The key to resolving this question was whether Ford passed or failed the test of reasonableness.

However, this issue was muddled by the number of instructional errors provided to the jury. The court found a reasonable probability that the erroneous instructions were a factor in the jury's decision to return the verdict in favor of Ford. Because of the cumulative impact of the errors, the appellate court reversed the decision and granted Plaintiff relief.

CALIFORNIA ATTORNEY GENERAL OPINION

No. 89-404 (Oct. 12, 1989).

Education Fund Is Not Required To Get Certain Unredeemed Lotto Prizes

Following a request by the California State Lottery Commission (CSL), the Attorney General concluded that unredeemed "3 of 6" Lotto prizes of California residents are not required to be transferred to the California State Lottery Education Fund.

In the November 6, 1984, general election, California voters adopted an initiative measure which created the California State Lottery Act of 1984 ("the Act"; Government Code sections 8880 et seq.). The Act fixes limits on the kinds of games which may be established for the state lottery and regulates the disposition of the proceeds of all games. The Act also creates the CSL to govern the operation of the state lottery with the authority to promulgate rules and regulations specifying the types of games to be conducted.

One of the games authorized by CSL is known as "California Lotto (6/49)." CSL regulations provide that if a person has a Lotto ticket which has "3 of 6" winning numbers, the holder is entitled to a prize of $5, redeemable from any Lotto retailer. The retailer is credited with the $5 prizes so paid out by a deduction from the money paid for Lotto tickets due the state lottery from the retailer. Many holders of winning "3 of 6" tickets fail to collect their prizes within the statutory 180-day period for redemption; the CSL estimates the amount of unredeemed "3 of 6" $5 prizes to be approximately $5 million per year.

Section 8880.4 of the Government Code provides for the allocation of lottery revenues. This section also states that "all unclaimed prize money shall revert to the benefit of public education as provided for in section 8880.32(e)." Section 8880.32(e) provides that "[i]f a valid claim is not made for a prize directly payable by the Lottery Commission within the period applicable for that prize, the unclaimed prize money shall revert to the benefit of the public purpose described in this chapter." Further, CSL regulation 7.b states that "a prize of $5 or less must be claimed only from an authorized CSL retailer, unless the claimant resides outside California." The Attorney General determined that CSL had sufficient statutory authority to promulgate such a rule, as Government Code section 8880.32(a) permits CSL to authorize lottery game retailers to pay winners of up to $600 after performing validation procedures appropriate to the lottery game involved.

Based on the preceding, the Attorney General found that the "3 of 6" $5 Lotto prizes of California residents are not "directly payable" by CSL within the meaning of section 8880.32(e). Accordingly, the requirement of that section that unclaimed prize money shall revert to public education does not apply to such prizes.

However, the Attorney General noted that SB 906 (Chapter 917, Statute of 1989) will amend section 8880.32(e) to provide that "[i]f a valid claim is not made for a prize directly payable by the Lottery Commission or for any Lotto prize within the period applicable for that prize the unclaimed prize money shall revert to the benefit of the public purpose described in this chapter." This statute went into effect January 1, 1990.

The Attorney General concluded by noting that until Chapter 917 became effective, CSL could lawfully transfer funds allocated for the payment of "3 of 6" Lotto prizes which are unredeemed to pay other prizes or lottery expenses or to the California State Lottery Education Fund provided all other provisions of the Act were satisfied.