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Mental Health Law Update
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I. Supreme Court Cases of 2008 - 2009

a. Decided Cases

Wyeth v. Levine, No. 06-1249, 555 U.S. ___, 129 S.Ct. 1187 (March 4, 2009)(FDA does not preempt state tort claim for failure to warn; drug manufacturer bears responsibility for crafting a label with adequate warnings and is not prevented by FDA law from updating warnings when new information becomes available)

Forest Grove School District v. T.A., 557 U.S. ____ , 129 S.Ct. 2484 (June 22, 2009)(if school district denies disabled child FAPE, e.g., by finding child ineligible for special education services, and private placement is appropriate, district can be forced to reimburse parents even if child never received special education services from school)

Safford Unified School District No. 1 v. Redding, 557 U.S. ___, 129 S.Ct. 2633 (June 25, 2009)(holding 8-1 that school's strip search of 13 year old girl to search for ibuprofen violated her Fourth Amendment rights)

Ashcroft v. Iqbal, 556 U.S. ___, 129 S.Ct. 1937 (May 18, 2009)(increasing the pleading burden on plaintiffs to survive a motion to dismiss, requiring "sufficient factual matter…to state a claim to relief that is plausible on its face" i.e. "factual content that allows the court to draw the reasonable inference that defendant is liable…" Where a plaintiff pleads facts that are "merely consistent" with a defendant's liability, the complaint will be deemed insufficient)

Ricci v. DeStefano, 557 U.S. ___ , 129 S.Ct. 2658 (June 29, 2009) (questioning but not deciding—this time—whether disparate impact discrimination analysis violates the Equal Protection clause; as Justice Scalia writes in concurrence that the case "merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act consistent with the Constitution's guarantee of equal protection?")

B. Pending

Perdue v. Kenny A. , *cert. granted* 129 S.Ct. 1907 (April 6, 2009)(can attorney's fees awarded under federal statute ever be enhanced for quality of work or results achieved?)

US v Comstock Sex offender – civil commit – Sex sentence

II. Mental Health Law

a. Right to Refuse Treatment and other medication-related cases

In re Seroquel Litigation, 601 F.Supp.2d 1313 (M.D.Fla. 2009)(in a case involving whether defendant had knowingly misled US regulators about the dangers of Seroquel, precluding plaintiffs from offering evidence that Japanese regulatory authorities required defendant to add diabetes contraindication to its labeling, Dutch regulatory authorities required it to add warnings about hyperglycemia and diabetes, and French regulatory authorities wouldn't let it market Seroquel at all, because allowing evidence would unfairly prejudice defendants, confuse the jury, and waste time; however, court did permit evidence on the information that foreign regulators conveyed to defendant regarding adverse effects of its product)

Brandt v. Monte, 2009 WL 235417, 2009 U.S.Dist.LEXIS 6974 (D.N.J. Jan. 29, 2009)(holding that plaintiff is entitled to post-deprivation independent intra-administrative hearing after emergency medication, that emergency medication cannot be given if less intrusive alternatives exist (e.g."momentarily isolating a patient while he calms down") and that patients can only be emergency-medicated in "an imminent or reasonably impending emergency." Further holding that the fact that plaintiff was court-ordered to take medications does not constitute Rooker-Feldman bar because "[a]n order from a state commitment court that a patient must take prescribed medication does not relieve the administering medical authorities of their constitutional obligations."

Facts: plaintiff has confrontation with treatment team, psychiatrist fills out "emergency" medication form, and plaintiff is "emergency" medicated nine hours later, and again 21 hours later. Log shows no aggressive behavior by plaintiff during this time. Plaintiff sues for violation of substantive and procedural due process rights in both emergency and non-emergency forced medication (in essence, challenging system set up under *Rennie v. Klein*)

Important holdings and dicta: Court calls "untenable" the argument that forced medication is governed by the professional judgment standard alone. Court also holds "**If medicating a patient would substantially depart from accepted professional standards (for example, if isolating the patient momentarily while he calms down rather than medicating him would avert the danger more effectively) then his due process right to refuse medication has been violated.**" The court also notes in a footnote that "The Court offers this only by way of example, and does not intend to draw and conclusions here about the particular standards of the medical profession."

"Importantly here, Plaintiff does not allege a mere rights violation; . .. essentially Plaintiff alleges that it was the standard practice for these medical authorities to fabricate emergencies so as to do an end-run around the law's consent requirement."

Note: The plaintiff Brandt has been a relatively successful pro se plaintiff for some years, see *Brandt v. Ganey,* 2008 WL 5416393 (D.N.J. Dec. 22, 2008)(surviving motion to dismiss on claim of seclusion without evaluation and transfer to more restrictive ward as retaliation), and *Brandt v. Davy,* 2006 U.S.Dist.LEXIS 8835 (D.N.J. March 2, 2006). In this case, however, Mr. Brandt was represented by Blank, Rome, a law firm.

b. Instititional Admission, Closure and Conditions

Ricci v. Patrick, 544 F.3d 8 (1st Cir. 2008), cert den. 129 S.Ct. 1907 (2009)(district court lacked jurisdiction to modify consent decree to effectively keep institution for people with mental retardation open when there was no evidence that

O'Haire v. Napa State Hospital, 2009 U.S.Dist.LEXIS 74099 (N.D.Ca. Aug. 7, 2009)(finding that plaintiff stated a claim under the rational basis standard of the Equal Protection clause when he claimed that defendants permitted, even encouraged, sexual relations between heterosexual couples and families but not homosexual couples and families, but dismissing claim that plaintiff was discriminated against because hospital applied for and received permission to pay patient workers at the hospital less than California minimum wage because their mental illness made them unreliable workers)

J.D. v. Nagin, 255 F.R.D. 406 (E.D.La. 2009)(certifying class of children held in 50 year old Youth Study Center damaged during Hurricane Katrina and scheduled for demolition with vermin, overuse of isolation for children with mental illness and generally unconstitutional conditions)

c. Civil Commitment

Doe v. Graham, 2009 Me. 88, 2009 MeLEXIS 91 (Aug. 13, 2009)(holding that, even taking as true that a doctor told a patient proposed for involuntary commitment that she "could make things difficult" for the patient, disregarded patient's advance directive to not discuss her situation with her husband, and who discussed patient with patient's husband and his alleged mistress, and that security guards threatened patient with restraints and a diaper, held her keys above her head and called her "stupid" and told her she had no control over what they did, the doctor and security guards were protected by immunity, and that none of these actions "exceeded the scope" of their authority, but rather "represent discretionary actions taken in furtherance of reaching the statutorily mandated diagnosis necessary to determine if involuntary commitment was warranted" Note: doctor committed patient, who was discharged within two hours of arrival at the psychiatric facility)

Bigley v. Alaska Psychiatric Institute, 208 P.3d 168 (Alaska 2009)(finding a state constitutional due process right to notice and access to records prior to a hearing on involuntary medication, the notice to consist of a "plain, concise and definite statement of the facts underlying the petition, the nature of and reasons for the proposed treatment, patient's symptoms, diagnosis, method of administration, likely dosage, possible side effects, risks and benefits of treatment, risks and benefits of alternative treatment and non-treatment." Also finding that 72 hours notice gives attorney sufficient time to prepare, although court may in its discretion grant an extension.)

d. ECT and Aversive treatment

Bernstein v. Department of Human Services, 2009 WL 1796308 (Ill.App. June 19, 2009)(plaintiff sought injunction forcing agency operating residential facility where her son lived to "treat" him with contingent electroshock, arguing that otherwise her son would be physically or chemically restrained. Court upheld dismissal of the complaint, finding that there is no constitutional right to optimal or controversial treatments, that plaintiff's son was a voluntary patient not protected by substantive due process rights)

e. Restraint and Seclusion

H.H. ex. rel. H.F. v. Moffett, 2009 WL 1931203 (4th Cir. July 7, 2009)(mother of child restrained in wheelchair for hours at a time sues two teachers and school; Court of Appeals affirms district court rejection of defendants' contention they were entitled to qualified immunity as a matter of law, citing Youngberg v. Romeo, and finding that restraints used with malice amount to a brutal and inhumane abuse of official power literally shocking to the conscience.)

f. Tasers, Pepper Spray and Excessive Force

State of Conn. v. Ovechka, __ A2d __ , 292 Conn. 533 (Conn. 2009)(finding pepper spray to be a "dangerous instrumentality" for purposes of the criminal law).

Cyrus v. Town of Mukwonago, 2009 U.S.Dist. LEXIS 34859 (E.D. Wisc. April 24, 2009)(excluding expert testimony on police use of excessive force and on cause of death of man tasered to death by police because expert's opinion on excessive force was not based on specific facts in the records and because pathologist could not isolate which of eight interrelated factors caused death; finding that a police expert could not testify on what constituted "excessive force" because that was question for the jury and the fact that a law enforcement officer was testifying that a fellow law enforcement officer used excessive force would cause "unfair prejudice")

Heckenswiler v. McLaughlin, 2008 U.S.Dist.LEXIS 76771(E.D. Pa Sept. 30, 2008)(when attempt to execute mental health warrant turned into standoff where power was cut,

flashbang devices were used, and person killed himself in the house in which he was barricaded, no unreasonable seizure claim because warrant was authorized, but excessive force claim survived and court finds state-created danger standard and "shocks the conscience" standards met by allegations)(note: many defendants dismissed because plaintiffs' lawyers failed to identify readily identifiable defendants, 2008 U.S.Dist.LEXIS 100741 (E.D.Pa. Dec. 11, 2008)

III. Americans with Disabilities Act

a. Olmstead

Disability Advocates v. Paterson, 589 F.Supp.2d 289 (E.D.N.Y. 2009)(holding that P&A had standing to bring claim under *Olmstead* on behalf of its constituents, denying defendant's motion for summary judgment and interpreting the integration mandate to require "the most integrated setting appropriate to their needs;" rejecting defendant's argument that unlocked adult homes met integration mandate because they provided opportunity to interact with non-disabled people and holding that "most integrated setting" was one that permitted such interaction to "the fullest extent possible."

Jenkins v. New York City Department of Homeless Services, 2009 U.S.Dist.LEXIS58682 (S.D.N.Y. July 7, 2009)(plaintiff placed in psychiatric facility rather than homeless shelter because he had schizophrenia sued to be placed in more integrated setting of homeless shelter; court granted defendant's motion for summary judgment because 1) it was required under Olmstead to defer to reasonable medical judgments of public health officials, and therefore he was not "qualified" for homeless shelter (despite being homeless); 2) it was not ADA's mission to move institutionalized patients into inappropriate settings such a homeless shelters; and 3) he had declined defendant's offer to be reevaluated so that he declined "reasonable accommodations")

Ball v. Rodgers, 2009 U.S.Dist.LEXIS 4533 (D.Az April 24, 2009)(plaintiff's motion for summary judgment granted; defendant's argument that Medicaid provided no private right of action waived because they failed to raise it timely; defendant's budget cuts resulting in failure to provide plaintiffs with personal care assistance placed plaintiffs at risk of institutionalization, prevented them from leaving institutions)

Crabtree v. Goetz, 2008 U.S.Dist.LEXIS 103097 (M.D.Tenn. Dec. 19, 2008)(denying defendant's motion for summary judgment, finding that budget cuts will force Tennessee residents into institutions because of denial of community services, extensive analysis of fundamental alteration/costs defense, finding that plaintiff's requested relief will cost state extra money does not defeat claim, finding that similarly situated people in nursing homes will not be harmed by plaintiff's requested relief, and finding that Tennessee has no operative Olmstead plan)

b. Other Title II cases

Frame v. City of Arlington, 2009 U.S.App.LEXIS 15136 (5th Cir. July 7, 2009)(holding that the statute of limitations for inaccessible streets, curbs, parking lots, etc. begins to run from the day that the public entity completes construction; rejecting argument of continuing violation or that the statute of limitations runs from when plaintiff first encounters inaccessible public place; holding that burden of proving when the statute begins to run is on defendant.)

Colonial Life and Accident Insurance v. Medley, 572 F.3d 22 (1st Cir. 2009)(reversing district court's holding that plaintiff's ADA claim against short term disability insurer who excluded psychological conditions was preempted by ERISA and finding that *Younger* abstention applied while Massachusetts Commission Against Discrimination was investigating claims)

Heckenswiler v. McLaughlin, 2008 U.S.Dist.LEXIS 76771(E.D.Pa. Sept. 30 2008)(holding that "safely serving an involuntary commitment mental health warrant is service or activity covered by Title II of the ADA")

c. Title I Employment Discrimination Cases

Hohider v. UPS, 2009 U.S.App.LEXIS 16395 (3rd Cir. July 23, 2009)(decertifying nationwide class of employees claiming policies of UPS discriminated on the basis of disability because district court wrongly failed to focus on whether class members were otherwise qualified)

d. Title III Cases

Frame v. City of Arlington, 2009 WL 1930045(5th Cir. July 7, 2009)(when construction violates Title III, the statute of limitation begins running at the time of construction; rejecting the possibility of injunctive relief for an 'ongoing violation')

e. Fair Housing Act Cases

LaFlamme v. New Horizons Inc, 605 F.Supp.2d 378 (D.Conn. 2009)(defendant operated housing for people with severe physical disabilities and imposed a requirement that tenants be able to live independently; after tenant was hospitalized for suicidality, she was not permitted to return because of concerns she could not live independently; defendant's independent living requirement and requirement that applicants to its housing release and discuss their medical records and ability to live independently in detail violated Fair Housing Act; Fair Housing Act's direct threat defense applied only to individuals who are direct threats to others)