

POOL PASS CONFISCATED FOR "LURKING" AROUND CHILDREN

James C. Kozlowski, J.D., Ph.D.  
© 2010 James C. Kozlowski

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV § 1. Procedural due process requires a person who may be deprived of a liberty or property interest to be provided notice and an opportunity to be heard at a meaningful time and in a meaningful manner. A city's unwritten policy is procedurally deficient and denies due process when it includes no guidelines and allows police officers unfettered discretion to ban a person from a public park for an indefinite period of time. Further, such an unwritten policy is unconstitutionally vague when the policy fails to give adequate notice of what conduct is prohibited.

In the case of *Kennedy v. City of Cincinnati* (6th Cir. 2/16/2010), plaintiff Robert Kennedy alleged his constitutional rights had been violated when a pool supervisor (defendant David Hudepohl) employed by the Cincinnati Recreation Commission ("CRC") had a city police officer (defendant Jeffrey Zucker) confiscate Kennedy's pool pass and order Kennedy not to enter any CRC recreational property open to the public for an indefinite period of time.

The federal district court denied a motion by defendants Zucker and Hudepohl for summary judgment which would have dismissed Kennedy's claims without a trial. In so doing, the federal district court held that "access to the public pools constitutes a cognizable property interest" and, therefore, further trial proceedings were necessary to determine "what process Kennedy was afforded regarding the revocation of his pool pass."

CREEPING PEOPLE OUT

The City of Cincinnati, through the Cincinnati Recreation Commission ("CRC"), operates swimming pools and recreation facilities. Recreation programs and facilities are open to all citizens regardless of race, gender, color, religion, nationality, sexual orientation or disability.

The City offers access to its swimming pools by issuing pool tokens, which cost \$10. Pool tokens, however, are not issued automatically. The City retains "discretion to refuse to issue a token depending on circumstances" and must refuse to issue a pool token for the following seven reasons:

- [1.] The City may not issue a token to a person suspected of having an infectious or communicable disease.
- [2.] The City may not issue a token to a person with head lice or ringworm.
- [3.] The City may not issue a token to a person with an obvious infectious wound.
- [4.] The City may not issue a token to a sex offender.
- [5.] The City may not issue a token to a known violent or dangerous person.
- [6.] The City may not issue a token to persons known to have violated pool rules in the past.

[7.] The City may not issue a token to a person who is obviously high or intoxicated.

When a pool token is issued, the new member completes and signs a membership card, which states:

I agree to follow the rules and policies and procedures of the Cincinnati Recreation Commission. I understand that my membership may be revoked without a refund if I do not follow the rules.

Membership cards are kept at the pool where the new member purchased the token and contain the identifying number of the token that was purchased. The tokens are not transferable and may not be used by more than one person.

The CRC's rules, policies, and procedures in effect during the relevant time period were contained in the CRC Aquatic Division Program Brochure 2007. The rules provided that the CRC "has the responsibility to provide a clean, pleasant, and safe environment for public swimming."

Because "[s]ituations may occur that require immediate corrective action," the CRC grants lifeguards "full authority to act in order to ensure the safety of swimmers."

The Brochure also contained a list of "General Facility Rules," including the following: "Only adults supervising children are permitted inside [the] pool area wearing street clothes, and should remain back near the fence, not up by the pool."

## SCHOOL INCIDENT

During 2007, Jeff Brokamp was the principal of Mt. Washington Elementary School, which is located next to Mt. Washington pool. For two days in "April or May" of 2007, Kennedy allegedly was "staring" at children at the elementary school during a field day. The children and teachers felt "uncomfortable" with Kennedy "standing very close" to them. Therefore, the teachers sent two students into the school building to inform Brokamp of the situation and their discomfort. Brokamp followed the students into the field, watched Kennedy for a "few seconds" and then approached and introduced himself. Brokamp spoke with Kennedy for a "few minutes" and asked him to move away from where the children were playing. Kennedy subsequently left the area.

## POOL PASS

Ann Couzins was the pool manager for Mt. Washington pool in 2007. According to Couzins, Mark Celsor, the director of the Mt. Washington Recreation Center, had asked her to "keep an eye on" Kennedy even before he joined the pool because of the incident that had occurred at Mt. Washington Elementary School. This request was also made by pool supervisor and defendant David Hudepohl, who asked Couzins "to go ahead and keep an eye on him" and to maintain a log of Kennedy's actions. Couzins testified that for "four or five days in a row" she saw Kennedy

"just standing outside the gate watching the pool and looking at the kids." She described his behavior as "a little bit strange."

In June 2007, Kennedy purchased a pool token from the CRC for \$10. During June, Kennedy frequently used the pool token to visit the CRC operated pool in the neighborhood of Mt. Washington. As instructed, Couzins kept a record of the pool staff's observations of Kennedy. Couzins did not personally see Kennedy interacting with any of the children at the pool, but noted the observations of the other lifeguards. She testified that all of the lifeguards observed Kennedy at the pool watching the kids, and that they "all felt uncomfortable around him." Couzins specifically described how lifeguard Jenny Sallee saw Kennedy trying to "throw a ball with a boy, or follow him into the woods." The boy and his mother lived in Kennedy's apartment building. Multiple parents at the pool also approached Couzins to communicate that they felt uncomfortable with Kennedy's presence at the pool.

On June 20, 2007, Kennedy watched a swim meet at the pool. Tamara Kluckman-Gory, a teacher at the Hamilton County Justice Center, noticed Kennedy observing the meet with a "fixed smile, fixed kind of a scary smile." Kluckman-Gory testified that mothers were concerned that Kennedy was staring at the children, and she had heard that there was worry that "somebody at the pool could be a pedophile." She decided to "confront" Kennedy and walked over to speak with him. After exchanging pleasantries, Kluckman-Gory informed Kennedy that he was "kind of creeping some people out." Thereafter, Kennedy "mumbled something" and left the pool area.

#### CALL POLICE

On June 21, 2007, Kennedy arrived at the pool and sat on a bench approximately six feet from it. Kennedy was wearing a shirt, shorts, and sandals; he wore a swimsuit beneath his shorts. Hudepohl observed Kennedy reading a newspaper, but suspected he was actually watching children in the pool.

Hudepohl called his supervisor, Jincey Yemaya, who instructed Hudepohl to contact the police. Hudepohl called the police and asked that Kennedy be investigated because Kennedy had previously been "removed from the playground for lurking and staring at young kids during recess and was seen by guards following children back into the woods."

Cincinnati Police Officers Christine Smith and defendant Jeffrey Zucker arrived in the Mt. Washington School parking lot, where they were met by Hudepohl. Hudepohl informed the officers that:

- (1) Kennedy was wearing street clothes in violation of CRC rules and regulations;
- (2) he had been "lurking along the fence line" and not swimming in the pool area;
- (3) parents had expressed concerns regarding Kennedy's behavior; (4) the principal from Mt. Washington Elementary School had banned Kennedy from "Olympic day"; and (5) Kennedy had been seen at a swim meet, standing at the fence watching children.

Thereafter, the officers approached Kennedy in the pool area, accompanied by Hudepohl. Zucker questioned Kennedy for approximately fifteen minutes, during which time Zucker informed him

that the officers were there "as a precaution" because people were concerned Kennedy was "child watching."

While Zucker spoke with Kennedy, Smith queried her computer to check whether Kennedy had any outstanding warrants or whether he was listed as a sexual predator in Hamilton County. From her search, Smith determined that Kennedy was not listed as a sexual predator and had no current warrants.

Zucker questioned Kennedy for approximately fifteen minutes, asking a few more questions regarding why Kennedy was at the pool. Zucker then terminated his investigation because there was no longer any reasonable suspicion that Kennedy had committed any crime that could be verified, nor was there any indication Kennedy was committing, or about to commit, any crime.

Zucker informed Hudepohl of this fact. The police officers then asked Hudepohl how he wanted to proceed. Hudepohl informed the officers that Kennedy would be banned from Mt. Washington pool for the rest of the season, and asked Zucker to confiscate Kennedy's pool pass and order him off the premises.

Zucker fully complied with this request. Zucker approached Kennedy and told him that Hudepohl, acting as an agent of CRC, was requesting that Kennedy surrender his pool pass. In addition, Zucker informed Kennedy that Hudepohl was barring him from "CRC property in Mt. Washington, i.e., the ball fields and the pool area, as well as Mt. Washington School." Accordingly, Zucker ordered Kennedy to not enter any CRC property for an indefinite period of time.

Kennedy argued that his alleged "wearing street clothes in violation of CRC rules and regulations" was not a legitimate reason "why his pool pass was confiscated, and not the reason he was ordered off of CRC property permanently." Moreover, Hudepohl testified that, while he has consistently approached other individuals for violating this rule and has asked them not to return to the pool wearing street clothes, he had never reported them to the police or banned them from the pool.

## DUE PROCESS

Because he had "paid \$10 to purchase the pool token," Kennedy maintained that he had "an enforceable entitlement to the token," which amounted to a "property interest deserving of due process protection" under the Fourteenth Amendment. For Kennedy to prevail on his procedural due process claim, the court noted that Kennedy "must show that he was deprived of a constitutionally-protected property or liberty interest and that the deprivation occurred without due process."

Further, to "have a property interest in a benefit" subject to constitutional protection, the court found "a person clearly must have more than an abstract need or desire for it." Rather, the court found a person "must, instead, have a legitimate claim of entitlement to it." Moreover, the Supreme Court has recognized that "the range of interests protected by procedural due process is not infinite" and a "protected property interest generally must be more than a de minimis [i.e., trivial or inconsequential] interest."

In this particular situation, the court noted that Kennedy had not cited any legal authority "establishing a right to enter CRC properties or a constitutionally-protected property interest in his pool pass." In the opinion of the federal circuit court, when viewed against the background of Supreme Court case law, Kennedy's property interest, if any, in his \$10 pool pass "of which the City deprived him" was "de minimis when viewed against the background of reason." As a result, the federal circuit court held that "Kennedy did not have a protectable property interest in his \$10 City pool token" which was "sufficient to invoke the procedural protections of the Due Process Clause."

## LIBERTY INTEREST

Kennedy had also claimed that "his ban from CRC properties deprived him of his liberty interest to enter certain public spaces, as guaranteed by the Due Process Clause of the Fourteenth Amendment." As noted by the federal circuit court, "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." Further, the court found "this right to remove from one place to another according to inclination" has been identified as "an attribute of personal liberty" protected by the Constitution.

Indeed, it is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is a part of our heritage, or the right to move to whatsoever place one's own inclination may direct identified in Blackstone's Commentaries. 1 W. Blackstone, Commentaries on the Laws of England 130 (1765).

Applying this reasoning to the facts of the case, the circuit court found it was "clear that Kennedy had a liberty interest to remain in a public place of his choice" and that "defendants interfered with this interest."

Assuming that Kennedy's version of the facts are true, defendants have barred Kennedy from entering any property deemed a part of the City of Cincinnati's recreational system, which presumably encompasses more than its public pools, and certainly encompasses more than Mt. Washington pool. The City's action is reminiscent of a partial banishment, which serves to expel Kennedy from certain portions of City property.

Further, in the opinion of the court it was "apparent that Kennedy had a clearly established right to remain on public property based on the Supreme Court's holdings." Under the circumstances of this case, the court found defendants had "fair warning" that their conduct was "unlawful."

Any competent government official, particularly a police officer, should have realized that he cannot deprive a person, who has not committed a crime or violated some regulation, nor was likely to do so, of access to public grounds without due process of law.

Accordingly, the court found Kennedy had alleged sufficient facts which, if proven at trial, would establish that "Zucker violated Kennedy's constitutional rights by banning him from all City recreational property without due process of law."

CONCLUSION

As a result, the federal circuit court, therefore, held that "Kennedy possessed a constitutionally-protected liberty interest to use municipal property open to the public and that depriving him of his liberty interest, without procedural due process, constituted a violation of a clearly established constitutional right." Accordingly, the federal circuit court concluded that further proceedings at trial were necessary to resolve "the scope and duration of Kennedy's ban from CRC grounds, as well as whether or not the facts support a revocation for good cause under the pool's rules."

At trial, Kennedy would have an opportunity to prove his allegation that the conduct of defendants Hudepohl and Zucker, acting within their official capacity as pool supervisor and police officer, had not provided him with meaningful notice or an opportunity to be heard as required by the Fourteenth Amendment Due Process Clause before depriving him of his "liberty" interest to enter and freely move about the city's public recreational facilities.

\*\*\*\*\*

James C. Kozlowski, J.D., Ph.D. is an associate professor in the School of Recreation, Health, and Tourism at George Mason University in Manassas, Virginia. E Mail: [jkozlows@gmu.edu](mailto:jkozlows@gmu.edu) Webpage: <http://mason.gmu.edu/~jkozlows>