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Civil Rights Update

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The Naked Truth: The Constitutionality of Public-Nudity Ordinances

In the past few years, protests and marches have noticeably increased in number. Some of these activists strive for attention to increase awareness of the cause, others protest for political or social change. The Court of Appeals for the Seventh Circuit recently addressed whether protesting topless is constitutionally protected in *Tagami v. City of Chicago*, No. 16- 1441, 2017 U.S. App. LEXIS 22410 (7th Cir. Nov. 8, 2017).

Facts

In *Tagami v. City of Chicago*, Sonoku Tagami was an active supporter of the nonprofit organization GoTopless, Inc. and advocated for women's right to bare their breasts in public. *Id*. at *2. On August 24, 2104, Tagami participated in "GoTopless Day," an annual event where men and women walk the streets of Chicago topless to promote gender-equality and women's rights. GoTopless.org, http://gotopless.org/gotopless-day (last visited Dec. 4, 2017). She ultimately received a citation for violating the City of Chicago's public-nudity ordinance. Tagami contested the citation before a hearing officer but was found guilty and ordered to pay a $150 fine. *Tagami*, 2017 U.S. App. LEXIS 22410at *3.

Tagami subsequently filed suit against the city, alleging that the public-nudity ordinance was facially unconstitutional because it violated her First Amendment right of freedom of expression. *Id*. She further alleged that the ordinance was discriminatory on the basis of sex under the Fourteenth Amendment's Equal Protection Clause. *Id*.

The district court granted the city's motion to dismiss the equal protection claim under Federal Rule of Civil Procedure 12(b)(6). *Id*. The First Amendment claim survived. Tagami filed an amended complaint, which the city again moved to dismiss. The court construed the city's motion to be a request for reconsideration as to the First Amendment claim, and reversed its prior ruling, thereby dismissing both claims. Tagami appealed. *Id*.

First Amendment Claim

In analyzing Tagami's First Amendment claim, the Seventh Circuit first looked to the language of the public-nudity ordinance at issue which provided as follows:

> [a]ny person who shall appear, bathe, sunbathe, walk or be in any public park, playground, beach or the waters adjacent thereto, or any school facility and the area adjacent thereto, or any municipal building and the areas adjacent thereto, or any public way within the City of Chicago in such a manner that the genitals, vulva, pubis, pubic hair, buttocks, perineum, anus, anal region, or pubic hair region of any person, or any portion of the breast at or below the upper edge of the areola thereof of any female person, is exposed to public view or is not covered by an opaque covering, shall be fined not less than $100.00 nor more than $500.00 for each offense.

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Id. at *2 (citing CHICAGO, IL., CODE 8 §-8-080). The court noted that the city's ordinance did not regulate speech itself, it regulated conduct. *Id*. at *3-4. While some forms of expressive conduct are entitled to First Amendment protection, such protection exists only where the conduct is "inherently expressive," such that the conduct in question "comprehensively communicate[s] its own message without additional speech." *Id.* at *4. In other words, "the conduct itself must convey a message that can be readily 'understood by those who view it.'" *Id*. at *4-5.

The court concluded that a state of nudity is not in and of itself an inherently expressive condition and held that Tagami's public nudity did not *by itself* objectively communicate a message of political protest. *Id*. at *5. The court further noted that even if Tagami's nudity was communicative enough to warrant First Amendment protection, the claim was properly dismissed because it could not survive scrutiny set forth in *United States v. O'Brien,* 391 U.S. 367 (1968))known as the *O'Brien* test). *Tagami*, 2017 U.S. App. LEXIS 22410, at *6. Under the *O'Brien* test, the regulation of public nudity would be upheld if :

> (1) the regulation is within the constitutional power of the government; (2) the regulation furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the restriction on alleged First Amendment freedoms is no greater than essential to further the government›s interest.

Id. at *6 (citing *Foxxxy Ladyz Adult World, Inc. v. Village of Dix*, 779 F.3d 706, 712 (7th Cir. 2015) (describing the *O'Brien* court's intermediate standard of scrutiny). Thus, the court concluded that the ordinance would survive scrutiny under the *O'Brien* test because the City possessed an important interest in promoting moral norms and public order. *Tagami*, 2017 U.S. App. LEXIS 22410, at *7-8.

Equal Protection Claim

Tagami also alleged that the Equal Protection clause was implicated because the city's public-nudity ordinance was discriminatory on the basis of sex. *Id*. at *3. The city argued that the ordinance treated both men and women alike by prohibiting public exposure of male and female body parts that are traditionally considered to be intimate. *Id*. at *8.

The court disagreed with the city in part, noting that on its face, the ordinance imposes different rules for women and men because it prohibits public exposure of "the breast at or below the upper edge of the areola thereof of any *female person*." *Id* at *8-9 (citing CHICAGO, IL., CODE 8 §-8-080) (emphasis added). Despite the fact that the ordinance contains a sex-based classification, the court noted that the ordinance could still be "compatible with the Equal Protection Clause if the classification serves important governmental objectives and the 'discriminatory means employed are substantially related to the achievement of those objectives.'" *Id*. at *9 (citing ***United*** *States v. Virginia*, 518 U.S. 515, 533 (1996)). The court concluded that the intermediate-scrutiny test for sex-based legal classifications was "materially identical" to the scrutiny used in analyzing the First Amendment claim under the *O'Brien* test. Because the city had an important interest in restricting exposure of "intimate, erogenous, and private" body parts, the ordinance survived the *O'Brien* test and withstood the equal protection challenge. *Id*. at *8-10.

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Dissent

Justice Ilana Rovner dissented, claiming that the majority "nakedly" declared that Tagami's nudity, by itself, was not political protest. *Id*. at *12. Tagami was not sunbathing topless or streaking across a football field to appear on television. Rather, her conduct had one purpose—to engage in a protest to challenge the city's ordinance on indecent exposure that, on its face, treats women differently than men. *Id*. at *13. Thus, Tagami's First Amendment claim should not have been dismissed at the pleadings stage. Likewise, with respect to the equal protection claim, the city's ordinance sexualized the female form and imposed a burden of public modesty on women alone. *Id*. at *18. Therefore, Tagami's equal protection claim may have also prevailed. Justice Rovner concluded that both claims were potentially viable, and therefore, Tagami should have been permitted to develop the record in support of her claims and the city should have been required to present evidence to justify its actions. *Id*. at *19.

Conclusion

Due to social changes and the current political atmosphere, forms of political expression like the one at issue in this case are likely to continue—if not increase. While unpublished, this case serves as an important reminder to attorneys who represent municipalities to ensure that public ordinances clearly articulate a legitimate public interest and are not solely designed to prohibit expressive conduct.

About the Author

Emily J. Perkins is an associate in the Peoria office of *Heyl, Royster, Voelker & Allen, P.C.* She concentrates her practice in the area of employment/labor law, governmental law, and Section 1983 civil rights litigation. Ms. Perkins is involved in various employment matters, including hostile work environment issues, discrimination, and retaliation claims against employers. She works with employers of public entities in negotiating collective bargaining agreements and defending against unfair labor practice charges. Ms. Perkins has successfully defended clinical therapists and law enforcement officers in Section 1983 claims, and represented townships, villages, road districts and other governmental entities in a variety of litigation areas.

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