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IN THE WASHINGTON STATE SUPREME COURT

HIRED HANDS LLC.; KENNETH SMITH,
Plaintiffs/Appellants,

v.

WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES,
Defendants/Respondents.

APPEAL FROM THE THURSTON COUNTY SUPERIOR COURT
Honorable Christopher Lanese, Judge

REPLY BRIEF OF APPELLANTS

JACKSON MILLIKAN
WSBA No. 47786
2540 Kaiser Rd. NW
Olympia, WA 98502
(360) 866-3556
Attorney for Appellants

TABLE OF CONTENTS

1. FREE SPEECH ARGUMENTS 1
2. DUE PROCESS ARGUMENTS 9
3. ATTORNEY FEE ARGUMENTS 11
4. CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Amer. Beverage Ass’n. v. San Francisco, No. 16-16072 (9th Cir. Jan. 31, 2019)..... 2, 4, 5
Astrue v. Ratliff, 560 U.S. 586 (2010)..... 12
Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n of New York, 447 U.S. 557 (1980) 1
DeWeese v. Town of Palm Beach, 812 F.2d 1365 (11th Cir. 1987) 9, 10
Domico v. Rapides Parish School Bd., 675 F.2d 100 (5th Cir. 1982)..... 11
Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229 (2010)..... 4
NIFLA v. Becerra, 138 S.Ct. 2361 (2018)..... 2, 3
Nike, Inc. v. Kasky, 539 U.S. 654 (2003)..... 1
Planned Parenthood of SE PA. v. Casey, 833 U.S. 884 (1992)..... 2
Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980)..... 8
Riley v. National Federation of the Blind of North Carolina, 487 U.S. 781 (1988)..... 1, 2
Riverside v. Rivera, 477 U.S. 561 (1986)..... 13
Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47 (2006) 8
Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) 1
Silverstreak, Inc. v. Washington State Dept. of Labor & Indus., 125 Wn. App. 202 (2005)..... 12
Troster v. Penn. State Dept. of Corr., 65 F.3d 1086 (3rd Cir. 1995) 8
United States v. United Foods, Inc., 533 U.S. 405 (2001) 1
Zauderer v. Office of Disciplinary Counsel of Supreme Court, 471 U.S. 626 (1985) 2, 3, 5

1. FREE SPEECH ARGUMENTS IN REPLY

1.1 Strict Scrutiny applies.

Free Speech analysis begins by “categorizing the type of speech at issue.” Riley v. National Federation of the Blind of North Carolina, 487 U.S. 781, 787 (1988). In Riley, although the speaker was indeed soliciting funds, the speech was not “purely commercial.” Id. at 788 (quoting Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980)).

The purity component is lost on the Department. See e.g. BR at 16 (characterizing commercial speech as “broadly defined” yet “solely” economic in the same sentence). However, as used in Riley, the word “purely” is a redundant failsafe because the definition of commercial speech already includes its own internalized purity component. Commercial speech is always defined with limiting language that reiterates this purity requirement.

See, e.g., commercial speech “usually defined as speech that does *no more than* propose a commercial transaction” (emphasis added); ... commercial speech defined as “expression related *solely* to the economic interests of the speaker and its audience” (emphasis added).

Nike, Inc. v. Kasky, 539 U.S. 654, 678 (2003) (quoting United States v. United Foods, Inc., 533 U.S. 405, 409 (2001); Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 561 (1980). See also CP 109.

The commercial speech cases also presume the speaker has, or will have, voluntarily broken expressive inertia, such that any compelled speech

occurs *in* the extant advertisement or similar transactional communication. See e.g. National Institute of Family and Life Advocates v. Becerra, 138 S.Ct. 2361, 2372 (2018) (“our precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information *in* their ‘commercial speech.’”) (emphasis added and citation omitted)¹; Zauderer, 471 U.S. 626, 650 (holding commercial speech review triggered by disclosure requirement only compelling “somewhat *more* [speech] than they might otherwise be inclined to present.”) (emphasis added). Thus compulsory commercial speech cases mainly involve adding factual information into extant purely economic propositions.²

By contrast, financial disclosure requirements for solicitors and a worn license requirement for electricians compel “speech that a speaker would not otherwise make,” triggering strict scrutiny. Riley, 487 U.S. at 795. The Department has attempted to bridge the divide between factually supplemented, extant commercial speech and forced expression by pretending the electrician at work is “already making” a statement that she

¹ The parties have heretofore cited this case as “Becerra,” however because the latest 9th Circuit case calls it “NIFLA,” so will this brief. See Amer. Beverage Ass’n. v. San Francisco, No. 16-16072 (9th Cir. Jan. 31, 2019).

² The Department conflates the “substantial obstacle to a woman seeking abortion” model of undue burden analysis with the commercial speech undue burden analysis by invoking the only paragraph in the 5-part, 68-page Planned Parenthood of SE PA. v. Casey opinion directed toward the informed consent speech requirements “that the physician provide...information” about the abortion “but only as part of the practice of medicine.” 833 U.S. 884 (1992). Because the worn license requirement compels worn and not spoken speech, and because said speech is not medical procedure-specific, and because the Hired Hands worker is an electrician and not a surgeon, the ‘informed consent to abortion’ doctrine is inapposite.

has “met the Department’s requirements to obtain a certificate – announcing to all observers that they are qualified to perform the work.” BR at 12.

The Department has crafted this “already” speaking fiction to countenance the worn license as a de minimis health and safety disclosure tagging along with extant commercial speech. However, by the time *Hired Hands* has begun to work, the transaction has already been proposed and accepted. Therefore, whatever speech occurs during the work is afforded full protection even though it may be entwined with further statements of a transactional nature like, for instance, a change order or a referral and bid to do another electrical job (and, according to the Department, the incessantly spoken commercial expression of licensure).

Finally, it is significant that here the speech is forcibly affixed to the electrician’s body. It is undeniable that even the most banal scrap of factual print laying in a ditch takes on meaning when affixed to a human’s chest - especially where affixed by State compulsion and betraying personal identity. Strict scrutiny applies.

1.2 The new case: Amer. Beveridge Ass’n. v. San Francisco.

Zauderer v. Office of Disciplinary Counsel of Supreme Court is not applicable to this appeal. 471 U.S. 626 (1985). It was only raised by *Hired Hands* out of caution because the NIFLA v. Becerra Court recognized the posted ‘unlicense’ rule would fail even under such “deferential review.” 138 S.Ct. 2361, 2376-77 (2018). American Beveridge Ass’n. acknowledged the elective nature of the deference shown NIFLA’s posted

‘unlicense’ requirement (which deference also need not be shown the worn license requirement) but determined that such deference was mandatory as to the “health warnings on [sweetened beverage] advertisements” at bar.³ No. 16-6072 at 1 (9th Cir. Jan. 31, 2019).

American Beveridge Ass’n. applied Zauderer after making the threshold determination that “the Ordinance regulates commercial speech and compels certain disclosures.” Id. at 3. Once the court determined the speech was purely commercial, it was bound to apply the Zauderer test because, as the Department has correctly argued, it also “applies outside the context of misleading advertisements.” Id. However, commercial speech remains prerequisite and the court only recognized the additional inclusion of “health and safety warnings,” neither of which can be said to honestly describe the worn electrical license requirement. Id.

American Beverage Ass’n. affirms the Department’s reading of NIFLA’s application of the Zauderer test: “The Zauderer test, as applied in NIFLA, contains three inquiries: whether the notice is (1) purely factual, (2) noncontroversial, and (3) not unjustified or unduly burdensome.” Id. at 4; see also BR at 16-19. However, contrary to the Department’s assertions, the ‘undue burden’ analysis looks quite similar to a ‘less restrictive means’ test. BR at 17 (the Department mischaracterizes it as a “least restrictive means” test, though Hired Hands has never asserted this).

³ The court selected Zauderer over Central Hudson scrutiny because the health warning compelled rather than restricted the commercial speech at issue. See also Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 249 (2010).

The most important lesson from American Beverage Ass’n. is that Zauderer does not apply to the worn license requirement. The second most important lesson is that -if this Court decides to apply Zauderer without deciding whether it applies (as is in vogue)- the Department “has the burden of proving” the worn license requirement will “meet all three criteria to be constitutional.” No. 16-6072 at 4 (9th Cir. Jan. 31, 2019). While this formulation of Zauderer may be considered less exacting, it is certainly more scrutinous than rational basis review.

Because all three elements must be met, American Beverage Ass’n. begins by attacking the lowest hanging fruit, noting that a smaller sized health warning and label border would “accomplish Defendant’s stated goals.” Id. In other words, because a less burdensome alternative would have sufficed, the challenge was likely to succeed on the merits and the preliminary injunction should have been granted. In still other words, the existence of a viable, less burdensome alternative necessarily implies a burden may be undue. The litany of viable alternatives to a worn license has been discussed thoroughly at AB at 18-20; CP 55-56.

San Francisco also fumbled the burden of showing that the health warning would “not ‘drown out’ Plaintiff’s” other commercial speech. Id. Though the worn license requirement does not place Hired Hands’ commercial speech before this Court, it is significant that the everyday non-commercial free speech of the worker is likely to be altered or chilled while

wearing a state credential in both the public and private fora often occupied by the working electrician.

The private worker's everyday speech need not, as the Department suggests, be "ideological" to enjoy full First Amendment protection. BR at 19-23. If the worker is wearing a license and speaking, then the two forms of expression are inherently entwined. The chilling effect is closely related to the privacy implications which, in a feat of cognitive dissonance, the Department claims cannot coexist with a database containing the same license information. BR at 25, n. 11. Yet many of the people in that database no doubt cast secret ballots or have unlisted phone numbers, just as many of the attorneys whose names and related licensing information appear at WSBA.org elect to leave their nametags on the registration table when entering a CLE or conference.

The Department also advances several furtive propositions that deserve only cursory treatment. First, the Department has finally come out and explicitly equated workers to "meat products" and toxic chemicals like "mercury." BR at 17. If such an objectification were realistic, which it is not, then Zauderer might have utility here because the worker would then be a product and the worn license a label. Second, the Department pretends that a working electrician speaks nothing but "expression related solely

to...economic interests,” which presumption resembles the meat analogy.
BR at 17.⁴

Third, the Department equates the worn license requirement to the constitutional compulsion of informative dialogue regarding (and “tied to”) ensuring informed consent to an abortion procedure. BR at 12. The false equivalence between “the practice of medicine [and] the electrical profession” is in no way rehabilitated by citation to a 1939 opinion from Georgia, where then-governor Talmadge’s resistance to the Rural Electrification Act was finally wearing down. BR at 11; see also *supra* at pg. 2, n. 2. Irrespective of the apparently mystical “nature of electricity,” the Department might constitutionally require an electrician to explain to a customer that old knob-and-tube branch circuits are generally 12-gauge, whereas an upgrade to modern duplex wiring will result in most undedicated circuits carrying the same amperage of 110-volt current over lighter 14-gauge conductors. Of course, such a requirement would be unconstitutional if the electrician were hired to merely swap out a bad breaker.

Finally, assuming *arguendo* that workers are meat and the worn license is a safety warning label, the Department has nonetheless failed to satisfy the second prong of the inapplicable Zauderer test. The Department instead erroneously places the burden on Hired Hands, stating that “the company is vague about specifics of that message...of state association”

⁴ Instead of honest debate about the constitutionality of forcing citizens to *wear* government papers, the Department repeatedly calls the requirement a “disclosure” or mere “certification” rule. BR at 8, 9, 11-14, 16, 18-19, 22, 25-27.

and that Hired Hands “must demonstrate...[the worn license] inherently conveys a message of fealty.” BR at 20. However, the controversial nature of forcing a private citizen to wear a government paper has been extensively discussed. AB at 21 (discussing the dangers of being perceived as a “deep state” affiliate); CP 74-77 (discussing The Holocaust and debate of the First Congress).

The Department then analogizes the private electrician to a Pennsylvania state prison guard, a government-funded university, and a shopping mall. BR at 20-22 (citing Troster v. Penn. State Dept. of Corr., 65 F.3d 1086 (3rd Cir. 1995) (finding that, although the record was not developed enough to support a job-saving preliminary injunction, prison guard Troster had made out a “colorable compelled expression claim” against his State employer’s rule adding an American flag patch to his uniform); Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47 (2006); and Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980)). This misallocation of, and consequent failure to carry, the burden of proof is fatal under both Zauderer and the truly applicable test of strict scrutiny. It might be accurately stated that the worn license rule is an exercise of state power for power’s sake.

2. DUE PROCESS ARGUMENTS IN REPLY

The Department's circuitous extra-jurisdictional journey dredged up authority persuasive of Hired Hands' position. For instance, in DeWeese v. Town of Palm Beach, the city ordinance criminalizing the plaintiff's shirtless jogging was struck down under probing rational basis review. 812 F.2d 1365 (11th Cir. 1987); BR at 28-30. The court was careful to note that there was, indeed, "such a liberty interest" in the 11th Circuit, though not there considered a fundamental one. Id. at 1367.

Purporting to apply rational basis review, the DeWeese court then employed scrutinous tools like questioning the legitimacy of the law's stated purpose as pretextual, placing a burden on the town to "indicate[] how [the law] will help preserve" town characteristics, considering "history and tradition" (a textbook fundamental rights analysis), and even conducting its "own research" in this regard. Id. at 1367-69. If this Court chooses to apply that degree of scrutiny, the worn license requirement will ultimately fail on the same arguments already advanced.

By way of review, it is absurd to imagine that trained and licensed electricians will be somehow transformed into a safety-promoting force by taking the license out of their wallets and placing it on their chests -to say nothing of the laughable potential for better insulation from electrical shock. Nor is there any indication that lawyers are more likely to commit malpractice without a worn bar card, or that pilots are more likely to crash planes if their airplane wing lapel pins are removed, etc.

Indeed, the savvy impostor would have better chances portraying a lawyer if donning a suit, and the aspirant unlicensed electrician might easily modify, print, and don the sample license located on the Department's website. Speaking of websites, the Department might want to crack down on the perpetually 'graduating' class of 'Home Depot Pros' who are incessantly churned out by electrical installation classes at every store. See e.g. <https://www.homedepot.com/workshops/#store/4724> for registration at the Tumwater store. See also CP 54.

Nor is there any law against performing one's own untrained, unlicensed electrical work, provided the homeowner acquires a permit from the Department where required. The Department's inspections are presumed sufficient to prevent danger in this context, yet we are to somehow believe that this protocol is insufficient for those who have dedicated their lives to the electrical profession. It is more plausible that DeWeese's bare chest would offend the delicate sensibilities of Palm Beach residents than that the constant visibility of a professional's credential will create the capacity for uninterrupted status verification, thereby deputizing the public and the workforce to smoke out unlicensed workers, resulting in safer electrical installations.

The DeWeese court contrasted the shirt ordinance with those upheld when applied to state police, state school children, and state educators. Id. at 1368. The court noted that the 11th Circuit contained "no case that sustained, or even addressed, the authority of a state or municipality to

regulate the dress of its citizens at large.” Id.; BR at 29, n. 13. Citizens at large, like Hired Hands, have an interest in personal appearance that is superior to those who are employed by the government -especially here in the 9th Circuit and the great State of Washington. Nonetheless, the Department repeatedly attempts the unworkable analogy to employees and wards of the state. BR at 28.⁵

Even under the Department’s inapposite, extra-jurisdictional authorities, it is apparent that the worn license rule is unconstitutional. For instance, the Department cites Domico v. Rapides Parish School Bd., which describes that circuit’s “bright line” gradation of school hair style rights as a function of the students’ age, with no constitutional tolerance for such regulations at the college level. 675 F.2d 100, 102 (5th Cir. 1982). Hired Hands implores this Court to consider the trained and licensed electrician striving to earn a living outside the state university campus environment to be imbued with equal or greater liberty, regardless of whatever nomenclature it may ascribe to the chosen level of analytical scrutiny.

2. FEE ARGUMENTS IN REPLY

The Department argues and Hired Hands agrees “there has been no finding that Hired Hands is a qualified party,” making a fee ward “premature.” BR 33 at 33, n. 14. RAP 18.1(b) requires Hired Hands to “devote a section of its opening brief to the request for fees [and] expenses.”

⁵ This footnote is to assign self-evident error to the Department’s footnoted argument that “at large” connotes only requirements binding “all citizens.” BR at 29 n. 13.

RAP 18.1(c) mandates that Hired Hands file and serve a “financial affidavit no later than 10 days prior to...oral argument.” An oral argument date has not yet been ordered.

Where, as here, the trial court never had opportunity to “exercise its discretion whether fees should be awarded for litigation in that court and, if so, to decide the amount of such fees,” Hired Hands anticipates that this Court may choose to remand for such determination, whereupon the foregoing affidavits would also need to be presented before Thurston County Superior Court. Silverstreak, Inc. v. Washington State Dept. of Labor and Industries, 125 Wn. App. 202, 218 (Div. 1 2005), *aff’d on other grounds*, 159 Wn.2d 898 (2007). Whatever court rules on this issue, there should be consideration given to the purely constitutional nature of the challenge.

The EAJA is usually applied to challenges of administrative agency conduct, whereas Ken Smith has performed a civic duty in checking an abuse of power in the nature of a civil rights action. 42 U.S.C. Sec. 1988(b) would be the statutory basis if Ken Smith had chosen a federal forum. Courts often compare the policy rationale of the two statutes. See e.g. Astrue v. Ratliff, 560 U.S. 586, 597-99 (2010).

Since Washington does not require code-pleaded fee demands, both statutes should be considered. See e.g. Target National Bank v. Higgins, 180 Wn.App. 165, 180 (Div. 3 2014) (“It is sufficient that the charged party received actual notice of the statute prior to trial, thereby putting that party

on notice of the risk of an attorney fees assessment.”); see also CR 54(c) (“every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.”).

The Court need not award fees under 42 U.S.C. Sec. 1988(b) in order to consider its policy rationale. “Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms.” Riverside v. Rivera, 477 U.S. 561, 574 (1986). In this case, there was never an expectation of monetary recovery. Ken Smith sought only vindication of constitutional rights. He served the greater good and should be compensated accordingly.

3. CONCLUSION

Ken Smith and Hired Hands have demonstrated that the worn license requirement is a violation of Free Speech and Due Process. The statute and the rule should both be invalidated and attorney fees and costs awarded.

I, Jackson Millikan, respectfully submit, and swear under penalty of perjury by Washington State law, that I have electronically served, this brief on counsel of record this 18th day of March 2019

s/Jackson Millikan

Jackson Millikan WSB# 47786
Attorney for Appellants
Law Office of Jackson Millikan
2540 Kaiser Rd. Olympia, WA 98502
360.866.3556

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