IN THE
UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

No. 16-3650

RONALD CALZONE,
Plaintiff/Appellant,

v.

CHRIS KOSTER, et al.,
Defendants/Appellees.

Appeal from the United States District Court
Eastern District of Missouri
The Honoable Stephen N. Limbaugh, Jr.

BRIEF OF APPELLEES

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SUMMARY AND WAIVER OF ORAL ARGUMENT

Appellant Ronald Calzone ("Calzone") filed his Complaint pursuant to 28 U.S.C. §2201, §2202 and 42 U.S.C.§1983, seeking declaratory and injunctive relief, as well as nominal damages against defendants Chris Koster, J. Bret Johnson and Jeremiah W. Nixon, all in their official capacities ("Appellees"). Appendix ("App") 5. Calzone alleges that subsections 1, 2, and 7 of Section 304.230 of the Missouri Revised Statutes are unconstitutional on their face and as applied to him in violation of the Fourth Amendment. Calzone and Appellees filed cross motions for summary judgment. App. 30, 49. In its Memorandum and Order dated July 28, 2016, the district court granted summary judgment in favor of Appellees and denied summary judgment to Calzone. Addendum 1-13. Calzone now appeals the district court's decision.

Appellees do not believe oral argument is necessary. Calzone, however, has requested 20 minutes of argument. Should the Court grant this request, Appellees request equal time of 20 minutes to argue.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases (continued)

Statutes

Rules and Regulations

STATEMENT OF THE CASE

Calzone is a small business owner who operates a cattle and horse ranch. App 74. In connection with the operation of his business, Calzone owns and makes use of a dump truck. App. 74. The dump truck has Missouri commercial vehicle license plates. Calzone holds a commercial vehicle trucking license. App 8, 74. On June 3, 2013 Calzone took his truck to an inspection station for its biannual commercial vehicle inspection. This inspection is conducted by the Missouri Highway Patrol. App. 75. After the inspection was completed, Calzone proceeded to drive his commercial vehicle on a Missouri highway. App. 75. Calzone states that he was not conducting any activities associated with his business, but instead was on a personal errand. App. 75. While on his way to conduct his personal errand, Calzone was stopped and pulled over by Corporal J.L. Keathley, a Missouri State Highway patrolman. App. 75. In addition to his regular duties as a highway patrolman, Corporal Keathley is also a Commercial Vehicle enforcement trooper. As a Commercial Vehicle enforcement trooper, Corporal Keathley has been trained and is

empowered pursuant to statute to perform random roadside inspections of any commercial vehicles on Missouri highways. App. 43-4, Appellees Supplemental Appendix ("Supp. App.") 4-7. Corporal Keathley stopped Calzone's truck because he did not recognize the markings on the side of his commercial vehicle. When asked to submit to an inspection by Corporal Keathley and after a considerable amount of time had passed before Calzone gave Corporal Keathley his decision, Calzone refused to allow his truck to be inspected. As a result, Corporal Keathley issued Calzone a citation and allowed Calzone to resume driving. App. 44.

STANDARD OF REVIEW

Cross motions for summary judgment were filed by both Calzone and Appellees. The district court granted Appellees' motion for summary judgment on Count I of Calzone's claim that subsections 1, 2, and 7 of Section 304.230 of the Missouri Revised Statutes are facially unconstitutional. The district court also granted Appellees' motion for judgment on the pleadings as to Count II based on the application of the statute to Calzone. The district court denied Calzone's motion for summary judgment. On appeal, this Court reviews *de novo* both a grant of summary judgment and a dismissal based upon judgment on the pleadings. *Eisenrich v. Minneapolis Retail Meat Cutters and Food Handlers Pension Plan*, 574 F.3d 644, 647 (8th Cir. 2009); *Faibisch v. University of Minnesota*, 304 F.3d 797, 803 (8th Cir. 2002). Dismissal is warranted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Eisenrich, supra; Faibisch, supra.*

SUMMARY OF THE ARGUMENT

All the challenged subsections of the Missouri statute satisfy the requirements specified by the United States Supreme Court for determining that a statute is not in violation of the Fourth Amendment. Calzone also does not have a claim against the Appellees for the application of the Missouri statute in this instance since none of the Appellees participated in the challenged roadside stop of Calzone's truck.

Finally, Calzone does not have a claim under 42 U.S.C. § 1983 since his claims against Appellees are brought in their official capacities only.

ARGUMENT

I. The Challenged Subsections of Section 304.230 Do Not Violate the Fourth Amendment and Are Not Facially Invalid.

Calzone contends that subsections 1, 2, and 7 of Section 304.230 (R.S.Mo. 2000) are facially unconstitutional.[1] He argues that the enactment of these subsections violates the Fourth and Fourteenth Amendments of the United States Constitution as well as the Missouri constitution.[2] He asks for declaratory, injunctive and nominal damages as relief against the Appellees.

Section 304.230 states in part:

> (1). . . Beginning January 1, 2009, only law enforcement officers that have been approved by the Missouri state highway patrol under section 304.232, members of the Missouri state highway patrol, commercial vehicle enforcement officers, and commercial vehicle inspectors appointed under subsection 4 of this section shall have the

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[1] Calzone states he is only challenging subsections 340.230(1), (2), and (7). Thus, no other subsections of this statute will be addressed.

[2] All of Calzone's arguments in his brief are addressed to the alleged violation of the Fourth Amendment. To the extent he is still claiming violation of the Fourteenth Amendment and Missouri Constitution Article 1, §15, these claims should also be dismissed for the same reasons as dismissal of his Fourth Amendment claim.

> authority to conduct random roadside examinations or inspections to determine compliance with sections 304.170 to 304.230, and only such officers shall have the authority, with or without probable cause to believe that the size or weight is in excess of that permitted by sections 304.170 to 304.230, to require the driver, operator, owner, lessee, or bailee, to stop, drive, or otherwise move to a location to determine compliance with sections 304.170 to 304.230.. . .
> (2) Any peace officer approved under section 304.232 or any highway patrol officer is hereby given the power to stop any such conveyance or vehicle as above described upon the public highway for the purpose of determining whether such vehicle is loaded in excess of the provisions of sections304.170 to 304.230 . . .
> (7) The superintendent may also appoint members of the patrol who are certified under the commercial vehicle safety alliance with the power to conduct commercial motor vehicle and driver inspections and to require the operator of any commercial vehicle to stop and submit to said inspections to determine compliance with commercial vehicle laws, rules, and regulations . . .

A. Calzone does not have standing to challenge the facial validity of Subsections 1 and 2 of Section 304.230.

In order to have standing, a litigant must seek relief for an injury that affects him in a "personal and individual way." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, n. 1 (1992). The injury must be "real, immediate, and direct." *Keller v. City of Fremont*, 719 F.3d 931, 947 (8th Cir. 2013). Thus, the litigant must have suffered an injury in fact,

there must be a causal connection between the litigant's injury and the conduct complained of, and lastly it requires a likely injury that will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61. A generalized grievance is not sufficient. *See Arizona for Official English v. Arizona*, 520 U.S. 43, 64-65 (1997). Moreover, a Fourth Amendment challenge is personal in nature which may not be vicariously asserted. *See Raskas v. Illinois,* 439 U.S. 128, 133-34 (1978).

Calzone argues that subsections 304.230 (1) and (2) could apply to any vehicle. He points to the definition of a commercial vehicle stated in section 301.010(7) which is applicable to sections 304.170 to 304.230. He argues that pursuant to this definition, hypothetically, almost any vehicle could be classified as a commercial vehicle, including, for example, small passenger cars carrying merchandise such as "food, flowers or balloons." (See Calzone brief at p. 13). Whether or not this hypothetical would ever occur, there is no dispute here that Calzone was not in a small passenger vehicle at the time of the challenged stop in question. He is, in fact, a commercial driver with a commercial driver's license, and the truck he was driving is a commercial vehicle that he

uses, however often, in the operation of his commercial business. See App. 74, 81, 85. Whatever Calzone's criticism of subsections 340.230 (1) and (2) and how they are applied to passenger vehicles, that situation does not relate directly to him and he, therefore, does not have standing to challenge these subsections on behalf of drivers of passenger vehicles. *See Hollingsworth v. Perry*, 570 U.S. ____ , 133 S.Ct. 2652, 2663 (2013).

B. Subsections 1, 2, and 7 of Section 340.230 are facially valid.

Moreover, all three challenged subsections of the Missouri statute are facially valid and not in violation of the Fourth Amendment. A facial challenge to the constitutionality of a statute is a difficult challenge on which to succeed. *United States v. Salerno*, 481 U.S. 739, 745 (1987). "Facial challenges are 'best when infrequent' and 'are especially to be discouraged' when application of the challenged statute to the case at hand would be constitutional when the facts are eventually developed." *United States v. Stephens*, 594 F.3d 1033, 1037 (8th Cir. 2010 (quoting *Sabri v. United States*, 542 U.S.600, 608-09 (2004)).

In *New York v. Burger*, 482 U.S. 691 (1987), the United States Supreme Court laid out the test for determining whether a statute

allowing warrantless administrative searches was in violation of the Fourth Amendment. The Court recognized that while the Fourth Amendment protects searches of commercial premises, the expectation of privacy in commercial premises "is different from, and indeed less than, a similar expectation in an individual's home." *Burger*, 482 U.S. at 700. This is particularly true in the case of "closely regulated" businesses. *Id.* Thus, in *Burger,* the Court determined that if the business being considered is closely regulated, the statute being challenged might be permissible in certain circumstances under the Fourth Amendment.

While the Supreme Court has not expressly addressed the question of whether commercial trucking is a closely regulated industry, numerous circuits, including the Eighth Circuit have done so and concluded that commercial trucking is a closely regulated business. *United States v. Mendoza-Gonzalez*, 363 F.3d 788, 794 (8th Cir. 2004); *United States v. Ruiz*, 569 F.3d 355 (8th Cir. 2009); *see also United States v. Delgado,* 545 F.3d 1195 (9th Cir. 2008); *United States v. Maldonado*, 356 F.3d 130 (1st Cir. 2004); *United States v. Fort*, 248 F.3d 475 (5th Cir.

2001; *United States v. V-1 Oil Company*, 94 F.3d 1420 (10th Cir. 1996)[3]; *United States v. Dominguez-Prieto*, 923 F.2d464, (6th Cir. 1991). There is no doubt that commercial trucking is a closely regulated industry.

If an industry is deemed closely regulated, *Burger* holds that the statute survives Fourth Amendment scrutiny if three criteria are met. The state must have a substantial interest in regulating the industry, the warrantless inspections must be necessary to further the regulatory scheme and the warrantless inspection regime must serve as a constitutionally adequate substitute for a warrant. *Burger,* 482 U.S. at 702-03.

All three requirements are met by the subsections of the Missouri statute here. The statutory subsections are all part of an extensive scheme, both state and federal, to ensure safety on the highways. See 49 C.F.R. Parts 390 – 397; §§ 304.170-230, and 307.400 (R.S.Mo. 2000). Section 307.400 conveys upon the Director of the Department of Public Safety the authority to "regulate the safety of commercial motor vehicles

[3] The two Tenth Circuit cases cited by Calzone in support of his argument are inapposite since they both involved noncommercial vehicles which did not come within the meaning of the statutes involved.

and trailers . . . to govern and control their operation on the public highways of this state. . . .” Missouri’s highest court has also recognized the substantial interest in the safety of those who travel along its state highways. *State v. Rodriguez*, 877 S.W.2d 106, 109 (Mo. banc 1994). (“The state’s interest in stopping, weighing and inspecting vehicles is the product of concern for the safety of those travelling [the] state highways and the necessity of minimizing the destructive impact of overweight vehicles on those highways.”). Calzone argues that he is only a local commercial driver who is limited by his license in the short distances he can travel in his truck. Whether interstate or local, however, the State of Missouri still has the same concerns relating to safety and destructive impact on its roads.

The second criteria under *Burger* is also satisfied. Because of the mobile nature of the commercial vehicle industry, both interstate and intrastate, commercial vehicles and their cargo move quickly in an out of jurisdictions. In acknowledging the necessity of inspections of commercial vehicles, the Ninth Circuit in *Delgado,* considering the same Missouri statute as here, stated “inspections are sometimes the only way

in which violations can be discovered." *Delgado*, 545 F.3d at 1202 (quoting *Maldonado*, 356 F.3d at 136). The Ninth Circuit then went on to hold that §340.232(4) was not in violation of the Fourth Amendment.[4] Surprise inspections are, therefore, an effective component when attempting to achieve safety and to lessen the destructive impact on Missouri roads.

Finally, the third criteria is also satisfied. The inspection program proscribed in the Missouri statute provides an adequate substitute for a warrant. The *Burger* court specified that a warrantless inspection must provide notice and limit the inspecting officer's discretion. *Burger*, 482 U.S. at 711. Commercial drivers in Missouri are on notice that their commercial vehicles are subject to a variety of rules and regulations all designed to ensure the safe operation of these vehicles on Missouri highways. See § 307.400 (R.S.Mo. 2000). Moreover, there are limits to these inspections. These inspections are only for purposes of regulatory compliance with sections 304.170 to

[4] The wording of section 340.232(7) is exactly the same wording as that upheld in *Delgado* except it applies to commercial vehicle enforcement state troopers as opposed to commercial vehicle officers as in section 340.232(4).

340.230 (R.S.Mo. 2000). They are, therefore, permissible under *Burger*. *See Ruiz*, 569 F.3d at 357; *Delgado*, 545 F.3d at 1203. In addition, these inspections are made pursuant to the North American Standard Inspection Program for commercial vehicles. App. 43, 46; Supp. App. 4. This Circuit has determined that this inspection program adequately limits officer discretion and also provides notice of a possible roadside inspection. *Gonzalez*, 363 F.3d at 794.

There is no doubt that all three challenged subsection of section 340.230 satisfy each of the requirements specified under the Supreme Court's test laid out in *Burger* to be upheld as constitutional. These subsections are, therefore, not facially invalid.

II. Appellees Are Entitled to Judgment on the Pleadings as to Count II of Calzone's Complaint.

The district court also determined that Appellees are entitled to judgment on the pleadings as to Count II. Calzone seeks injunctive and declaratory relief from the Governor, Missouri Attorney General and Missouri Superintendent of Highway Patrol all in their official capacities. App. 5. All the allegations in Count II of Calzone's Complaint, involve actions allegedly committed by Corporal J.L.

Keathley, the Commercial Vehicle enforcement trooper, and not the Appellees. The district court correctly determined that Calzone sued the wrong party. Under these circumstances, Calzone has no claim against any of the Appellees for unconstitutional application of sections 340.230(1), (2), and (7) as to him.

III. Appellant has no Claim Against the Appellees Pursuant to Section 1983.

Calzone cannot recover against the Appellees pursuant to 42 U.S.C. § 1983 since they are only being sued in their official capacities. App. 5. Section 1983. however, only allows actions against persons in their individual capacity. *Will v. Michigan Department of State* Police, 491 U.S. 58 (1988). Calzone, therefore, has no claim against Appellees pursuant to this statute.

CONCLUSION

For all the reasons stated herein, This Court should affirm the district court's decision in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that an electronic copy of the Brief of Defendants/Appellees was delivered this 8th day of February, 2017, via the Court's electronic case management system.

/s/Deborah Bell Yates
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that the text of the foregoing document contains 2,060 words and complies with Fed. R. App. P. 27(d)(1). This brief has been prepared in a proportional spacing typeface using Century Schoolbook with 14 Point Font and complies with the typeface and style requirements specified in Fed. R. App. P. 27(d)(1).

/s/Deborah Bell Yates
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ADDENDUM

Page(s)