

IN PRACTICE

## CIVIL RIGHTS

### The Risk of Retaliating Against Criminal Citations Filed by Civilians

How businesses should respond when customers complain

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Recent decisions from the state and federal courts have shed light on the lengths to which an ordinary citizen can go in enforcing the law. A distinctive feature of New Jersey law allows civilians to issue citations for certain criminal offenses. While some matters initiated by citizen complaints are referred to mediation (i.e., complaints involving disputes between individuals or groups), many complaints involving traffic violations or criminal matters cannot be resolved using the mediation process and are heard before a local municipal court judge.

In *State v. Bradley*, 2011 N.J. Super. LEXIS 56 (N.J. Super. App. Div.

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April 7, 2011), the court placed limits on the power of an ordinary citizen to enforce the law. In this case, the citizen complainant filed a citation for simple assault against the defendant. The municipal court judge dismissed the matter for lack of probable cause to issue an arrest warrant. The complainant attempted to appeal to the law division in the Superior Court and was denied. The court held that the complainant had no standing to bring the appeal as the court rules specifically provide that only a prosecuting attorney may appeal a judgment dismissing a criminal complaint. Pivotal to the court's decision was the well-established public policy that a prosecutor is governed by rules of professional conduct and case law, which ensures fairness in the process rather than vindication of individual interests.

Although the *Bradley* decision places limits on a citizen's pursuing prosecution after his complaint is dismissed, the initial right to issue citations remains unfettered. In fact, a pair of civilians in southern New Jersey has made

headlines by issuing hundreds of citations against local businesses for failure to ensure handicap-parking access. Maryann Cottrell and Richard Holland are ordinary citizens and self-described advocates for the handicapped who routinely visit businesses and observe compliance with state handicap parking laws. When they believe a violation has occurred, they issue a citation, either to the offending individual or to the business for failing to ensure proper access to the handicap spot.

While some have hailed their crusade, others have complained that their actions are little more than an opportunity to harass businesses and their customers. Nonetheless, their conduct has raised issues over how a business should respond to these citations. Many businesses have fought back and banned the complainants from their premises, at which point Cottrell and Holland have invariably filed civil lawsuits claiming discrimination and retaliation under the Americans with Disabilities Act (ADA) and the New Jersey Law Against Discrimination (NJLAD).

The discrimination claims have been routinely dismissed on the basis of lack of standing under the statutes. To succeed in a discrimination claim, a plaintiff must prove that he or she was discriminated against on the basis of his or her disability. While Cottrell and Holland care for Cottrell's disabled daughter, they are not themselves handicapped and are, therefore, unable to bring a discrimination claim.

Under a theory of retaliation, however, the plaintiffs have had some suc-

cess in ensuring their claims are not immediately dismissed as a matter of law. To succeed in a retaliation claim, a plaintiff does not need to prove a disability, nor does a plaintiff need to be an employee of the defendant. To have standing under Article III of the Constitution, he need only allege an injury-in-fact, namely that he is suffering a real or immediate threat of harm. Once a plaintiff establishes standing to bring the retaliation case under the ADA or the NJLAD (the analysis is identical under both laws), a plaintiff must prove that he engaged in a protected activity, suffered an adverse action, and that a causal connection exists between the protected activity and the adverse action.

Under this framework, the federal district courts have heard multiple cases brought by Cottrell and Holland. Based on the court's analysis, discussed below, the success of the plaintiffs' suits often turn on whether they can prove (1) that they are suffering or will suffer in the future a real threat of harm, and (2) that they were banned as a direct result of the statutorily protected act of issuing citations.

In *Cottrell v. Rowan University, et al.*, 2011 U.S. Dist. LEXIS 38186 (D.N.J. April 5, 2011), the plaintiffs were banned from a local university campus after the school received numerous complaints that the plaintiffs were harassing staff, students and visitors. The university banned the plaintiffs from the campus based on 10 documented incidents over the course of three months in which the plaintiffs were rude, hostile, disruptive and aggressive in enforcing handicap-parking laws. The plaintiffs had an opportunity to appeal the ban through a university administrative proceeding. The court dismissed the discrimination claim based on lack of standing and,

with respect to the retaliation claim, the court held that the ban was a result of the plaintiffs' documented harassing and volatile behavior, and not the citations issued for parking violations. As such, the court dismissed the retaliation claims because the plaintiffs could not prove the causal connection between a protected activity (issuing the citations) and the ban from the campus.

In contrast, the plaintiffs were successful in arguing that their handicap parking enforcement efforts were a protected activity under the ADA and the NJLAD in *Cottrell v. J&D Discount Liquor Gallery, Inc.*, 2010 U.S. Dist. LEXIS 104310 (D.N.J. Sept. 30, 2010). The defendant in that case stated that its actions in banning the plaintiffs from its premises were motivated both by a desire to curb the enforcement activities of the plaintiffs (and the related litigation expenses) and by a desire to protect their customers from being photographed and harassed by the plaintiffs. Based on these reasons, the court declined to rule on whether the discrimination claim would proceed under the typical Title VII burden-shifting, mixed-motives theory or whether a different analysis would apply. The court's ruling, however, made clear that the plaintiffs' acts of issuing civilian complaints and enforcing state handicap parking laws are, in fact, a protected activity under the ADA and the NJLAD.

Despite its view, the court acknowledged the difficulties suffered by local businesses:

The Court is not unsympathetic to small business owners who may have failed to guarantee the integrity and availability of their handicap parking spaces, but are ultimately vindicated

of any alleged ADA violations. Having to defend against parking complaints and civil rights claims may prove financially burdensome for businesses and distract from their normative operations. Nevertheless, if the result in this case seems unduly harsh to such businesses and their owners, they have available remedies: remain ADA compliant, defend themselves in municipal and other proceedings against alleged infractions, and avoid retaliatory conduct. In those cases where ADA allegations are objectively unfounded, brought in bad faith, or cause tortious harm by unlawfully impacting or impairing legitimate business activities, additional remedies may be available.

The interaction of the law-enforcement rights of New Jersey's citizens with the retaliation provisions of the ADA and NJLAD creates unique issues. Any guidance provided to a client regarding action to restrain these law enforcement activities must consider the costly litigation that may follow. At the outset, a client should be vigilant in complying with all state laws and have written policies regarding the same. If there comes a time, however, that a client believes that its business or its customers are being harassed by a citizen filing recurrent citations, legal counsel must ensure that the client is fully informed of the risks involved with banning the complainant from the premises. Before a business bans an individual engaging in ongoing citation issuance, it is crucial that all instances of harassment be documented and that nondiscriminatory reasons for the ban can be proven. ■