

Applicant Number

MPT-1

717



*Peek et al. v. Doris Stern and  
Allied Behavioral Health  
Services*

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**Peek et al. v. Doris Stern and Allied Behavioral Health Services**

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**FILE**

**ROBINSON & HOUSE LLC**  
**Attorneys at Law**  
44 Court Drive  
Fairview Heights, Franklin 33705

**MEMORANDUM**

**TO:** Examinee  
**FROM:** Jean Robinson  
**DATE:** July 25, 2017  
**RE:** Peek et al. v. Doris Stern and Allied Behavioral Health Services

We represent a class of Union County women probationers in a lawsuit filed in federal court under 42 U.S.C. § 1983 of the Civil Rights Act. All probationers convicted of misdemeanors in Union County receive probation services through Allied Behavioral Health Services. Our complaint alleges that the defendants Allied and Doris Stern, in her capacity as executive director of Allied, are discriminating against women probationers based on gender.

The named plaintiff in our class action, Rita Peek, was sentenced to 18 months' probation by the Union County court in May 2016. (See attached sentencing order.) A condition of her probation was that she receive mental health counseling. To date, Peek has met all the requirements of her probation except for mental health counseling because Allied has failed to provide that counseling.

We filed suit in the U.S. District Court for the District of Franklin against Allied and Doris Stern alleging that they have developed a plan of services that disproportionately denies probation services to female probationers. Thus far, we have deposed Allied's Probation Services Unit director. During a recent case-management conference, the U.S. District Court judge raised the issue of whether the defendants are state actors and, therefore, subject to 42 U.S.C. § 1983. The judge ordered the parties to file simultaneous briefs on that issue alone.

Please prepare the argument section of our brief in support of our position that Stern and Allied are acting under color of state law and are subject to suit under 42 U.S.C. § 1983, relying on all available tests employed by the courts to determine whether parties are state actors. Follow our office guidelines in drafting your argument. Because the court ordered simultaneous briefs, you should anticipate the defendants' arguments and respond to them. Do not draft a separate statement of facts, but incorporate all relevant facts into your argument.

**ROBINSON & HOUSE LLC**

**OFFICE MEMORANDUM**

**TO:** All lawyers  
**FROM:** Litigation supervisor  
**DATE:** April 14, 2011  
**RE:** Simultaneously filed persuasive briefs

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All simultaneously filed persuasive briefs shall conform to the following guidelines:

**Statement of the Case** [omitted]

**Statement of Facts** [omitted]

**Body of the Argument**

The body of each argument should analyze applicable legal authority and persuasively argue how both the facts and the law support our client's position. Be sure to cite both the law and the evidence. Emphasize supporting authority but address contrary authority as well; explain or distinguish contrary authority in the argument. Because the court ordered simultaneous briefing, anticipate the other party's arguments and respond to them; do not reserve arguments for reply or supplemental briefing. Be mindful that courts are not persuaded by exaggerated, unsupported arguments.

Organize the argument into its major components. Present all the arguments for each component separately.

With regard to each separate component, write carefully crafted subject headings that illustrate the arguments they address. The argument headings should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. For example: Improper: Plaintiff has satisfied the exhaustion of administrative remedies requirement. Proper: Where Plaintiff requested an administrative hearing by timely completing Form 3B, but the prison has refused to schedule a hearing, Plaintiff has satisfied the exhaustion of remedies requirement.

**STATE OF FRANKLIN  
UNION COUNTY DISTRICT COURT**

**State of Franklin**

)

v.

)

**Case No. 2016-3098**

)

**Rita Peek, Defendant**

)

)

**SENTENCING ORDER**

Rita Peek, the above-named Defendant, having been found guilty of misdemeanor battery, a violation of § 35-87 of the Franklin Criminal Code, is hereby sentenced to 10 months in jail, but that jail sentence is stayed on the condition that the Defendant successfully complete a probation term of 18 months beginning on this date and subject to the conditions listed below.

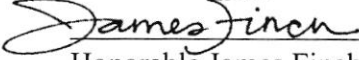
During the term of probation, the Defendant must successfully satisfy the following conditions:

1. Immediately report to the Union County Probation Officer to register as a probationer, and follow any rules or regulations established by the County Probation Officer.
2. When ordered by the County Probation Officer, report to Allied Behavioral Health Services, 806 W. Main St., Fairview Heights, Franklin, for those services ordered by this Court and any services ordered by the County Probation Officer.
3. Meet monthly with a counselor assigned by Allied Behavioral Health Services to review compliance with this Order; Allied Behavioral Health Services to inform Court of any violations of this Order.
4. Be evaluated for and undergo mental health counseling by Allied Behavioral Health Services.
5. Not consume any drugs or alcohol and submit samples of blood, urine, or both for tests to determine the presence of any prohibited substances.
6. Not violate any criminal statute of any jurisdiction.
7. Not leave the State of Franklin without the consent of this Court.
8. Pay to Allied Behavioral Health Services a fee of \$50 per month.

In the event that the Defendant fails to satisfy these conditions during the probationary term, probation may be revoked and the Defendant be subject to one or more of the following: (1) reinstatement of the original 10-month jail sentence, (2) extension of probation for a term of up

to three years on any conditions the Court deems appropriate, or (3) other relief that the Court deems just and proper.

Entered: May 31, 2016.

  
Honorable James Finch  
Union County District Court

**ROBINSON & HOUSE LLC**

**MEMORANDUM TO FILE**

**FROM:** Jean Robinson  
**DATE:** June 4, 2017  
**RE:** Peek et al. v. Doris Stern and Allied Behavioral Health Services

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Ever since 2014, when Union County began contracting with Allied Behavioral Health Services to provide misdemeanor probation services in the County, Allied has in effect given male probationers priority in receiving mental health counseling. As a result, Allied typically fails to provide female probationers with counseling. It is typical that when a woman's probation term ends without her completing counseling, Allied informs the sentencing court of the failure to complete counseling. The court then usually extends the term of probation, although the court does have the power to revoke probation and impose the original jail sentence.

Rita Peek, our named plaintiff, has experienced such a delay in undergoing counseling. She was sentenced to 18 months' probation on May 31, 2016, and ordered to undergo mental health counseling. Allied has failed to initiate that counseling. Peek is now over a year into her 18-month probation term. If Allied does not provide counseling services very soon, Peek will face an extension of her probation (with additional costs assessed to her). The sentencing court also has the power to reinstate her 10-month jail sentence if she does not complete the counseling within the probationary period.

Peek's criminal defense attorney filed a motion with the Union County court in March of this year, asking it to order Allied to immediately offer counseling to Peek. The court denied that motion. Peek's criminal defense attorney then contacted us.

In April, we filed a class action lawsuit (the class has been certified) in federal court alleging that Allied and Doris Stern, in her capacity as executive director of Allied, have violated female probationers' civil rights by disproportionately denying services to women, in violation of 42 U.S.C. § 1983, which entitles them to a civil remedy for the deprivation of their constitutional rights.

Later this month we are scheduled to depose James Simmons, the director of Allied's Probation Services Unit.

**Excerpts from Deposition of James Simmons  
June 26, 2017**

**Examination by Plaintiff's Attorney Jean Robinson**

**Q:** Please state your name and position.

**A:** James Simmons, director of the Probation Services Unit of Allied Behavioral Health Services.

**Q:** Explain the organization of Allied Behavioral Health Services.

**A:** Allied is a nonprofit organization formed in 1975 to provide mental health counseling and other services to residents of Union and neighboring counties. We have a board of directors that hires the executive director, who is currently Doris Stern. The board determines what services we offer, approves our entering into contracts, and sets policies, including personnel policies. Each year, Ms. Stern presents a plan detailing our program goals and means of accomplishing those goals, and the board approves it. Allied is a private entity, like any nonprofit.

**Q:** Who is on the board of directors of Allied Behavioral Health Services?

**A:** We have 11 board members. One of the county judges and the county director of public health services became members when we started offering probation services and expanded the board. Before that we had just nine board members, and those nine have always included community and business leaders, religious leaders, and active citizens.

**Q:** What influence do the two public officials have over the board?

**A:** They are simply 2 of 11 board members. The board requires a majority vote to act.

**Q:** How is Allied organized regarding the services it provides?

**A:** We have two units—the Family Services Unit and the Probation Services Unit, which I direct.

**Q:** To whom do you report?

**A:** To Doris Stern and through her to Allied's board of directors.

**Q:** Who pays you?

**A:** Allied.

**Q:** Who evaluates you?

**A:** Ms. Stern.

**Q:** Who evaluates the counselors who provide probation services?

- A:** I do, and Ms. Stern reviews those evaluations.
- Q:** Explain the relationship between Allied and Union County's Probation Office.
- A:** In 2013, the State of Franklin decided that counties could contract with private entities for probation services for those defendants convicted of misdemeanors. A year later, the Union County Probation Office asked us to contract with them for probation services. Most of what Union County wanted for those on probation for misdemeanors were counseling-related services that we already provided. So we prepared all the documents the county wanted and began providing probation services. The Probation Services Unit is the part of our agency that I direct. We carry out sentencing orders of the court. How we do so is up to us, as long as we follow court orders. We submit an annual plan and quarterly and annual reports to the county. Day to day, we do not deal with the county.
- Q:** How is Allied funded?
- A:** We are funded from several sources. The county pays for most of the probation services, with the probationers' fees making up the rest. And we get grants and funds from the community—fund-raisers, corporate donors, that sort of thing. Much of the funding for our counseling for persons not on probation comes from insurance; some comes from individual clients who pay for their own services. Altogether, Allied gets 40% of its funding from public sources and 60% from private sources.
- Q:** I need to clarify. Consider only the funding for the Union County probation program. How much of that is funded by a combination of funds from the county itself and fees paid by the probationers?
- A:** One hundred percent.
- Q:** Union County is a unit of local government, subject to the laws of Franklin, isn't that correct?
- A:** I am not a lawyer, but I believe that is correct.
- Q:** When operating probation services for the county, Allied must meet the requirements set by state law, isn't that true?
- A:** Yes.
- Q:** State law sets out minimum qualifications for the employees of entities like Allied which provide probation services, correct?
- A:** Yes.

- Q:** Isn't it true that Allied must set out an annual plan for providing probation services and have it approved by the County Probation Officer?
- A:** Yes.
- Q:** Each probationer served by Allied has been convicted of a misdemeanor crime in a Union County District Court in the State of Franklin, isn't that right?
- A:** Yes, each probationer served by us has been referred to us by the courts, but our other departments offer services that are not court-referred.
- Q:** Isn't it true that in each case when a person is convicted of a misdemeanor and placed on probation, the judge determines the conditions of probation?
- A:** Yes.
- Q:** Allied cannot deviate from those conditions, can it—that is, you cannot add or remove conditions?
- A:** We carry out whatever the judge orders.
- Q:** Who determines what kind of counseling services you provide to probationers?
- A:** Again, the sentencing court. We typically evaluate probationers to determine the extent of mental health counseling needed and decide when and how they receive those services.
- Q:** Are you familiar with my client, Rita Peek, the named plaintiff in this case?
- A:** Yes, ma'am. She is a Union County probationer and under our supervision.
- Q:** Isn't it true that the court ordered that Ms. Peek receive mental health counseling?
- A:** Yes. Among other things, the court ordered mental health counseling for her. We evaluated her during her second meeting with us, back in June 2016. The result was that she needed what we call "Level Two Counseling"—both group and individual therapy sessions. We put her on our list for mental health counseling.
- Q:** Have you provided such counseling to her?
- A:** Not yet.
- Q:** Ms. Peek is still on a waiting list for that counseling, 13 months after she was sentenced to probation, correct?
- A:** Correct.

**[Testimony regarding Allied's approach to providing counseling to women probationers is omitted.]**

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**Q:** Each quarter you report to the County Probation Officer on those probationers being served and what services were provided, correct?

**A:** Yes.

**Q:** As part of that report, the counseling waiting list is reported to, and approved by, the County Probation Officer each calendar quarter, correct?

**A:** Correct.

**Q:** During the last three quarters, at least, you have included Ms. Peek on the waiting list as needing mental health counseling and not yet served, correct?

**A:** I don't have the reports in front of me, but that is probably true.

**Q:** And the County Probation Officer has approved those quarterly reports, right?

**A:** Yes.

**Q:** I refer you to the reports Allied filed with the County Probation Officer. These show that 90% of the female probationers you serve do not even start, let alone complete, counseling within the probation term, isn't that correct?

**A:** If that is what the reports say, it must be true.

**Q:** In fact, 70% of the female probationers are given an extension of their probation term in order to complete counseling, isn't that true?

**A:** I believe that is true.

**Q:** These same reports show that, by contrast, 75% of male probationers receive and complete counseling within the period of their probation, isn't that correct?

**A:** If that is what the report says, then that is correct.

**Q:** In addition to providing mental health counseling to Ms. Peek, Allied is supposed to oversee her as a probationer, isn't that true?

**A:** Yes.

**Q:** Overseeing her means, among other things, ensuring that she reports to Allied monthly and complies with any required drug and alcohol testing, right?

**A:** Yes.

**Q:** Has Ms. Peek met all the conditions of probation imposed on her, other than receiving mental health counseling?

**A:** Yes, she has been a model probationer.

**Q:** If a probationer were to violate a condition of probation, you would report that to the court, wouldn't you?

**A:** Yes.

**Q:** If a probationer, such as Ms. Peek, failed to complete the conditions of probation, her probation could be revoked and she could be sent to jail, correct?

**A:** Yes.

**Q:** Or her probation could be extended, correct?

**A:** Yes.

**Q:** Probation is a restriction on a person's liberty, isn't it?

**A:** Yes.

**Q:** In that regard, being on probation is a restriction sort of like being in jail?

**A:** Well, it's a lot better than being in jail, but it is a restriction. Probationers have to comply with conditions of probation, they must meet with us in person each month, they cannot leave the state, and so on.

**Q:** And isn't it true that only the State of Franklin has the power to sentence someone to probation, set conditions of probation, revoke probation, and send someone to jail?

**A:** I am not a lawyer, but I believe that is so.

**Robinson:** No further questions.

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## EXCERPTS FROM FRANKLIN CRIMINAL CODE

### § 35-210 Misdemeanor Sentencing; Probation

For a person convicted of a misdemeanor, the court may impose a jail sentence not to exceed 12 months. The court may suspend the jail sentence and place the person on probation for a term not to exceed three years. When placing a person on probation, the court shall determine the conditions of probation.

### § 35-211 Probation Services

- (a) Each county shall appoint a County Probation Officer who shall be an employee of the county and shall provide probation services to the county as required by the Criminal Code, either directly or through other entities as provided by law.
- (b) Any county may elect to provide probation services for those convicted of misdemeanors by contracting with a private entity, provided that the private entity:
  1. Shall be a nonprofit entity.
  2. Shall receive approval from the County Probation Officer of an annual Plan of Services which must include
    - (i) oversight of those on probation;
    - (ii) monthly meetings with those on probation unless otherwise ordered;
    - (iii) drug and alcohol testing; and
    - (iv) drug and alcohol counseling, anger management counseling, vocational and mental health counseling, and referral to educational programs.
  3. Shall require that each individual providing such services possess at least a bachelor's degree in the relevant professional field or its equivalent as determined by the County Probation Officer.
  4. Shall submit to the County Probation Officer quarterly reports listing the names of probationers served during that quarter, the services provided to those probationers, and any other information required by the County Probation Officer, and shall receive approval of those reports from the County Probation Officer.
  5. Shall submit to the County Probation Office an annual report of services provided and all expenses incurred and receive approval of that report from the County.

**Lake v. Mega Lottery Group**  
United States Court of Appeals (15th Cir. 2009)

Olivia Lake sued the Mega Lottery Group pursuant to 42 U.S.C. § 1983, claiming that it fired her without due process. Mega moved to dismiss the complaint, arguing that as a private actor, it cannot be sued under 42 U.S.C. § 1983. The district court dismissed the complaint. Lake appealed. The sole issue on appeal is whether Mega acted as a state actor when it fired Lake. We affirm.

42 U.S.C. § 1983 provides for a cause of action against persons acting under color of state law who have violated rights guaranteed by the United States Constitution. *Buckley v. City of Redding*, 66 F.3d 190 (9th Cir. 1995). The Constitution's due process clause applies to states but not to private actors. However, private actors are not always free from suit for violating the Constitution. Constitutional standards protect those harmed by private actors when it is fair to say that the state is responsible for the offending conduct. To succeed on a § 1983 civil rights claim against a private actor, a claimant must prove that the private actor was a state actor.

To determine if an apparently private actor may still be a state actor, no one set of circumstances or criteria is sufficient. Rather, courts typically consider the range of circumstances when characterizing a private actor as a state actor for § 1983 purposes. Each set of factual circumstances must be examined in light of the critical question: whether "the State is responsible for the specific conduct of which the plaintiff complains." *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001).

There are two tests of those circumstances creating state action that are pertinent to Lake's claims. First, state action exists where the private actor was engaged in a public function delegated by the state. If the private actor exercises a function that has traditionally been a public or sovereign function, the private actor is not free from constitutional limits when performing that function. Second, a private actor engages in state action when the state exercises its coercive or influential power over the private actor or when there are pervasive entanglements between the private actor and the state. Under this test, "a state normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement . . . that the choice must in law be deemed to be that of the state." *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

Under either of these two tests, there is a further requirement to find state action: there must be such a “close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the state itself.” *Brentwood*.

### **Public function**

Lake claims that Mega is engaged in a public function, relying on *West v. Atkins*, 487 U.S. 42 (1988), and on *Camp v. Airport Festival* (15th Cir. 2001). In *West*, a privately employed doctor was a state actor when he was employed to provide medical care to inmates in a state prison. The state is required to provide medical care to those it imprisons, and when the doctor contracted with the state to provide that care, he became a state actor.

In *Camp*, the plaintiff sued Airport Festival, a private nonprofit entity created to organize an aviation festival, for violating his First Amendment rights when he was arrested for leafletting during the festival. The city’s police department had been directed to follow the instructions of festival organizers regarding security and arrests. Only the state has the power to deprive persons of their freedom by arresting them. When festival organizers accepted the authority to instruct the police regarding arrests, festival organizers became state actors.

Other examples of activities found to be public functions constituting state action include operating a local primary election, operating a post office, and providing for public safety through fire protection and animal control. Courts have narrowly construed the public function test to require that the action be one that is exclusively within the state’s powers. Thus, courts have rejected claims that those who operate hospitals, privately owned public utilities, or schools, or provide foster care are performing public functions. While the state sometimes performs these functions, they are not traditionally the *exclusive* prerogative of the state. Over the years, private organizations have often initiated and performed these functions.

Here, the State of Franklin established a state-operated lottery in 1985. In 2005, due to the financial costs of operating a lottery, Franklin entered into a contract with Mega to operate the lottery, with the profits reverting to the state. Operating a lottery is not a traditional function of state government. Many private entities operate similar activities through racetracks, casinos, sweepstakes, and other activities. Thus, Mega is not engaged in a public function.

### **State coercion or influence, or pervasive entanglement**

Lake next argues that there is state action because the state has coerced or influenced Mega to act. Lake argues that because Franklin contracts with Mega to operate the lottery, with the profits from the lottery becoming state proceeds, its influence over Mega is significant, if not coercive. She also argues that Franklin coerces Mega through its extensive regulation of the lottery, making Mega an agent of the state.

Lake's argument fails in light of the U.S. Supreme Court's ruling in *Rendell-Baker*. That case involved employees who claimed that their First Amendment rights were violated when they were discharged by a private school. The plaintiffs argued that the state's extensive regulation of education made the school a state actor. The Court rejected this argument because the state did not regulate, encourage, or compel the private board of trustees to fire the employees. Any government regulation was directed to education of the children, and did not compel the board to follow any particular personnel policies.

The state's exercise of its coercive power or influence must be such that the private choice can be said to be that of the state. Lake has failed to show any evidence that the State of Franklin required, recommended, or even knew about this, or any, personnel action. What the state regulates is the operation of the lottery, not the hiring and firing of Mega's employees.

Lake also argues that even if the state did not coerce Mega, there are additional pervasive state-private entanglements. She relies on *Brentwood*, 531 U.S. at 288. There, the U.S. Supreme Court ruled that the "nominally private character of the Association" could not overcome the pervasive entanglement with public institutions. Lake maintains that Franklin and Mega are entangled because of Franklin's heavy regulation of the lottery.

In *Brentwood*, the defendant Association regulated interscholastic athletic competition among public and private high schools in Tennessee. The Association's board found that Brentwood, one of the Association's member schools, had violated a rule prohibiting "undue influence" in recruiting athletes and, among other things, declared Brentwood's teams ineligible to compete in playoffs for two years. Brentwood sued the Association, alleging violation of its First and Fourteenth Amendment rights when the school was penalized for violating Association rules. The Association argued that it was not a state actor. The Court found that the Association's board of directors was composed primarily of representatives of public schools. The board effectively operated the sports program for the state's public high schools. The State Department

of Education formally adopted the Association's rules as the rules for public school sports programs. Based on these findings, the Court rejected the Association's claim, concluding that the relationship of the public schools and the Association constituted a pervasive entanglement that made the Association a state actor.

Lake also points to the pervasive entanglements in *Camp* as analogous to the State's control here over the lottery. In *Camp*, although the festival was organized by a nonprofit entity, the city permitted the festival to use the airport grounds at no cost; the city's personnel were extensively involved in planning for the festival while on city time and at city expense; the city promoted the festival through its tourism bureau; and the city's airport personnel controlled access of airplanes during the festival's air show. As noted *supra*, the city's police and first responders were effectively turned over to the festival organizers for the duration of the festival. These entanglements were extensive.

In contrast, the primary relationship between the State of Franklin and Mega is a contract, no different from that between the state and any other contractor. The State of Franklin contracts with private entities to build its buildings, deliver food for its prisoners, and furnish office supplies to state legislators, to name but a few contracts. These contracts do not constitute the sort of pervasive entanglement necessary to constitute state action. When the state enters into a contract to build a state building, the contract demands compliance with many regulations, yet it is left to the contractor to execute the contract. Franklin does not involve itself in the governance of Mega. It does not endorse Mega's personnel policies as the state had in *Brentwood* when the state Department of Education approved the Association's rules. Nor does Franklin involve itself directly in the operation of Mega as the city did in running the airport festival at issue in *Camp*.

#### **Connection to offending conduct: nexus**

Even if Lake had met one or both of the tests discussed above, Lake has failed to meet the further requirement of *Rendell-Baker* that there be a nexus, meaning a connection, between the state and the challenged action. That is, Lake has not shown that the offending conduct—her being discharged without due process—was somehow connected to the state's influence over Mega. Lake was discharged by Mega in the same way that any private corporation fires any employee. The state played no role in the discharge, so Lake cannot show the required nexus. Lake offers no facts that rise to the level of the circumstances where the state and private parties

have acted in concert to engage in denial of a party's civil rights. Mega's only participation with the state is to contract with the state to operate the lottery. Mega did not involve the state in any way in its decision to fire Lake.

Affirmed.

# NOTES

# NOTES