



Oakland County Legal News

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July 11, 2013

ASKED AND ANSWERED

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Kathleen Klaus on AATA Decision

The United States District Court, Eastern District of Michigan, recently ruled that the Ann Arbor Transportation Authority (AATA) did not have to run an advertisement that said, "Boycott 'Israel'—Boycott Apartheid," and contained a menacing drawing of a spider crushing skulls.

AATA attorney Kathleen H. Klaus of Southfield-based Maddin, Hauser, Wartell, Roth, & Heller PC talked to The Legal News about the case.

Mathis: How long have you been attorneys for the AATA, and what does your work for them typically involve?

Klaus: This is our first case for the AATA in this case. We specialize in the defense of complex litigation matters, including defending government agencies in 42 U.S.C. 1983 actions like the Coleman case.

Mathis: The man who wanted to run the ad, Ann Arbor activist Blaine Coleman, filed suit in 2011, alleging that the AATA's advertising policy was unconstitutional and that the AATA violated his constitutional rights when it decided not to run his ad to Boycott Israel and Apartheid. Was the AATA tempted at that point to back down?

Klaus: First, I would not credit Mr. Coleman with being an "activist." Second, the goals of the AATA's advertising policy were to promote ridership and to afford its patrons a safe and comfortable environment. The AATA staff and board believed that Mr. Coleman's proposed display was contrary to the goals of the policy and would in fact impair the AATA's mission. Their view was validated in the litigation by expert testimony. Because allowing Mr. Coleman's poster to be displayed on a bus would both violate the advertising policy and harm the AATA, I do not believe the AATA was ever tempted to change its decision to reject Mr. Coleman's proposed display.



KATHLEEN KLAUS

Coleman to run a counter ad. Were they wrong to do so?

Klaus: I believe that the ACLU's suggestion that the "answer" to hate speech is more hate speech is inconsistent with the AATA's goals of increasing ridership and ensuring that its riders have a safe and comfortable environment.

Mathis: U.S. District Judge Mark Goldsmith first ruled that AATA's advertising policy created a public forum, and that AATA was therefore wrong to reject the ad. Why did the AATA then decide to revise its policy to make it a limited public forum?

Klaus: The AATA believed that it had established a limited public forum with its initial policy. If you read Judge Goldsmith's opinion, you will note that he was troubled by the reasoning in a Sixth Circuit case that held that a public transit authority may not act as a limited public forum if there are impermissibly vague provisions in its advertising policy. Judge Goldsmith disagreed with this reasoning, but was obliged to follow it. Because the

Mathis: Right from the start, why didn't AATA just go ahead—on First Amendment grounds—and run the ad?

Klaus: The AATA believed that its buses and other property were limited public fora and that it could restrict certain types of speech (like speech that holds up a group of people to scorn or ridicule) without violating the First Amendment.

Mathis: The ACLU took on Coleman's case and encouraged those who disagree with

original AATA policy contained a "good taste" requirement that was vague, the AATA buses and other property were rendered a public forum by default. When we revised the policy, we took out the "good taste" requirement and Judge Goldsmith found that this restored our status as a limited public forum.

Mathis: Judge Goldsmith ultimately found that AATA's revised policy created a limited public forum and that the AATA could reject the ad under the revised policy, without violating the constitution. Are there any negative effects of the new policy?

Klaus: The revised policy is more restrictive than the prior policy in that it bans all political speech and not just campaign advertisements. We adopted the more restrictive language because it was approved by the Sixth Circuit in a different case, and adopting that policy verbatim was the best way to protect the AATA from future litigation over its advertising policy.

Mathis: Is this type of litigation an effective way of promoting free speech?

Klaus: The AATA adopted a more restrictive advertising policy as a defense to this type of suit and Mr. Coleman was not allowed to display his poster on an AATA bus. When the AATA first received notice from the ACLU that it intended to sue, the AATA offered to sit down with the ACLU and discuss the specific provisions of the advertising policy that the ACLU found problematic. The ACLU rejected this and our subsequent efforts to discuss revisions to the policy. I think the ACLU could have achieved a better result—from its perspective—with different tactics.