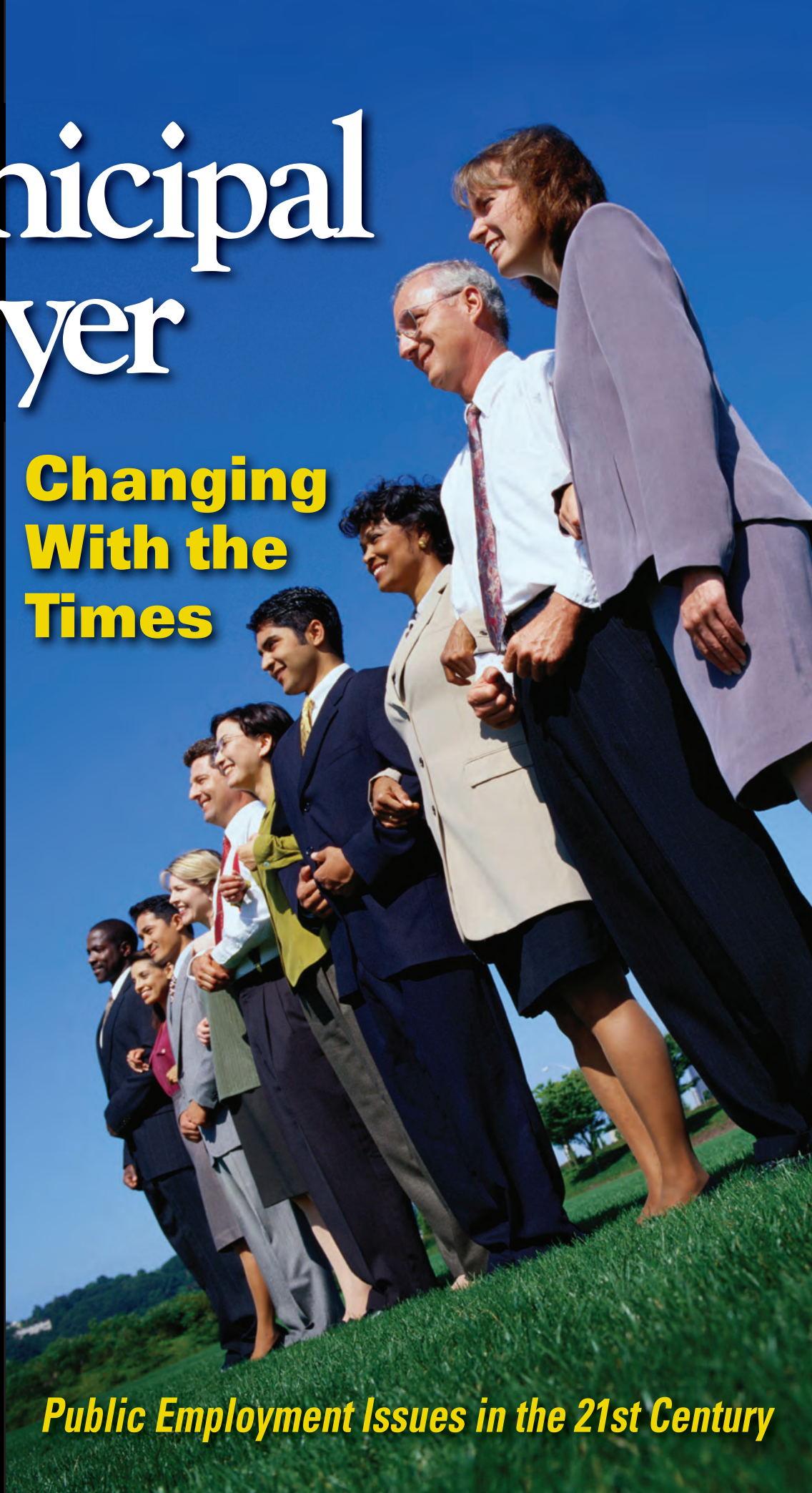
January/February 2009

Municipal Lawyer

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Inside IMLA

From a Legal Perspective

by Charles Thompson, Jr., IMLA General Counsel and Executive Director



It has now been two years since I took over as IMLA's Executive Director. During that period, I have found that writing this column is one of the more difficult jobs assigned to me. Sure, it is only three times a year, but I am afraid each time it seems more difficult. Not only am I faced with a fairly long lead time, which translates into writing something that can only be current if one has a surprising amount of foresight, but I really question if I have much that is new or compelling to say. Essentially, my task involves bringing members up to date on things that are happening at IMLA and the issues we face. Having said that, let me try to discuss a few of the issues confronting IMLA and local governments.

From a purely legal perspective, our participation, through our legal advocacy program, in some compelling cases highlights some of the challenges local government lawyers face. IMLA successfully participated in an important takings case in the Ninth Circuit, *Tapps Brewing v. City of Sumner*. The case involves a city's efforts to adddress stormwater runoff by making property owners, who improved their property, build and size storm sewers to conform to the city's storm sewer plan. The Ninth Circuit issued an excellent opinion unanimously upholding the right of state and local governments to impose reasonable development conditions and ensure a sustainable balance between environmental concerns and land use, and which incorporated many of the points made in our *amicus* brief. The property owners sought a rehearing (which the court denied) but the court issued an amended decision, adding only a footnote reflecting the court's conclusion that the city's regulation was materially related, in scope and effect, to the problem the regulation addressed. We expect the plaintiffs to seek certiorari in the Supreme Court and will be following this case closely.

These cases enjoy one central theme—the potential increased cost to local government should a decision adverse to local government either be made or upheld. Most local governments are already suffering in a down economy and adverse results in these cases can exacerbate that suffering.

Rose Acre Farm v. U.S. is another takings case we are following, but one that we have not participated in, so far. It involves a federal regulatory action. The case was recently argued in the Court of Appeals for the Federal Circuit. Almost 20 years ago, an outbreak of salmonella prompted the government to issue emergency regulations affecting the egg industry. Essentially, the regulations sought to protect public health by requiring egg producers whose facilities tested positive for salmonella to remove eggs from the raw table-egg market until the facilities were retested and then tested negative for salmonella, or until the facilities were depopulated, cleaned, disinfected and inspected. Instead of selling the eggs in the raw table-egg market, the eggs could only be sold in what is called the "breaker" egg market. There is a substantial difference in value between a table egg and a breaker egg in the marketplace. Thus, taking into account the 700 million eggs that Rose Acre Farms sold during the period it was subject to the restriction, the farm lost substantial monies by virtue of the difference; nevertheless, the farm continued to profit by selling its eggs during this period. Accordingly, the issue before the court is whether a taking occurs when a government regulation diminishes the profit a person can make from a regulated enterprise. The lower court ruled in the plaintiff's favor. Obviously, the issues in this case (if decided adversely to the government) will expand greatly the cost of regulatory action—in many cases, well beyond those damages that are readily apparent.

IMLA agreed to support the State of Alabama in its request for certiorari to the Supreme Court in another case, *Pope v. Alabama*, having significant potential adverse consequences. The case involves an old order designed to protect against discrimination in hiring. As with many 30-year-old orders, much has changed since the order was originally issued—so much so that the State sought to have

the order vacated and authorized a study to provide the factual basis to support its request. In the interim, a person who was adversely affected by the order filed suit. Later, that person's lawyer learned that the State was seeking to vacate the order and moved to intervene (according to one Assistant Attorney General, the lawyer stated he was doing so to jump the State's claim). Ultimately, the court agreed to vacate its order. When it did, the intervener's attorney sought attorney's fees as a "prevailing party." The Eleventh Circuit granted his request. IMLA joined as an *amicus* to urge the Supreme Court to review whether a prevailing party can obtain attorney's fees from another prevailing party with which that party is aligned. Sadly, the Supreme Court has decided not to grant certiorari in this case.

Another interesting case, *U.S. ex rel Wilson v. Graham County Soil Conservation District*, that IMLA has not yet joined and is pending a decision on whether certiorari should be granted involves the False Claims Act. An employee of a Soil Conservation District raised a number of concerns about the operations of the District with the local county commissioners and with the State. Believing those concerns serious enough, the County opted to conduct a review and determined that the District had acted improperly. The State conducted a similar review and reached a similar conclusion. Both the State and County acted promptly to correct the deficiencies. Nevertheless, the employee filed a False Claims Act action which the District sought to dismiss, based on a provision in the Act that precludes suits brought based on facts found in administrative reviews. The Fourth Circuit concluded that the Act was intended only to exempt suits that were derived from federal administrative reviews, not reviews conducted by state or local governments. The court has asked the Solicitor General to provide that office's insight into the case and as to whether certiorari should be granted. Should the Court grant certiorari, I expect that IMLA will participate as an *amicus*, as this case poses dire consequences for local governments and acts as a disincentive to local and state governments to conduct audits of, and report on wrongdoing in, federally-funded programs.

These cases enjoy one central theme—the potential increased cost to local government should a decision adverse to local government either be made or upheld. Most local governments are already suffering in a down economy and adverse results in these cases can exacerbate that suffering.

IMLA cannot support local governments in these and other cases without your help. Our advocacy programs (as well as our other programs) all require sufficient resources to keep them effective. For that reason, I am asking you to help us attract and retain members. I am also asking that you support our educational programming. We try very hard to provide excellent CLE programs in a cost-effective manner, and the evaluations of our programs confirm we are successful in pursuing that goal.

Because so many of our members report that travel budgets are being slashed, we are now offering audio/webinar programming at very affordable rates. By comparison, our fees are substantially less than many other CLE providers; yet, in comparison to others, who can subsidize their programming through substantially greater membership revenue, our rates are a little higher. Thus, if we can increase our membership base (or be assured of a "sell out" audience), we should be able to reduce some of our programming costs in the webinar/audio marketplace.

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Member News

IMLA Past President Appointed to Queen's Bench



On December 12, Bruce Noble, Q.C., an IMLA Past President (2004-2005) and the City Solicitor for Fredericton, New Brunswick, was appointed by Canada's Minister of Justice and Attorney General to the Court of Queen's Bench, Family Division, in the Province of New Brunswick. This is a tremendous honor and distinction. Bruce was sworn in on January 9, 2009, and will be serving in the City of Saint John. As a Canadian judge in a senior or superior level of trial court, he will be the Honourable Mr. Justice Noble.

Bruce has been an active IMLA member for very many years and, among his many distinctions, he served as the first Canadian President of IMLA. On leaving the world of local government law, Bruce notes: "Municipal law has provided me with a wonderful career and a fascinating life filled with what can only be called stimulating challenges. I have enjoyed the company and the advice of great attorneys on both sides of the border." Although he'll be leaving the municipal legal world, we're pleased to note that the Honourable Mr. Justice Noble intends to remain an IMLA member.

We're extremely proud and happy for Bruce, and wish him every success in the new chapter of his professional life. **ML**

The Americans with Disabilities Act

Does it Protect Employees from Termination for Misconduct Stemming from Mental Disabilities?

— by Siona D. Windsor —

On a daily basis, numerous municipal employers in the United States are faced with evaluating the permissible legal responses to an employee who displays threatening, violent, severely angry, or similar egregious or criminal conduct (misconduct) in the workplace. Many times, an employee claims that the misconduct is the result of a disability cognizable under the Americans with Disabilities Act of 1990 (ADA),[1] and requests reasonable accommodation when faced with discipline or discharge for the misconduct. The majority of federal appellate courts addressing the issue have concluded that the ADA does not protect employees from discharge for this type of misconduct, even when it is caused by the disability. These holdings are based on a conclusion that an employee who engages in this misconduct is not a "qualified employee" deserving of protection under the ADA.

However, a minority of federal courts have reached a different conclusion, as exemplified by a recent decision of the U.S. Court of Appeals for the Ninth Circuit. In *Gambini v. Total Renal Care, Inc.*, the court held that, where the misconduct stems from the disability, discharge for the misconduct amounts to termination because of the disability.[2] Thus, unless reasonable accommodation presents an undue hardship or the employer can raise the direct threat defense, the discharge violates the ADA.

This article will survey federal precedent addressing an employer's ability to discharge an employee for misconduct stemming from a mental disability, and examine the impact of the *Gambini* case.[3] It will also provide some practical tips for employers faced with deciding on the appropriate response to an employee's misconduct stemming from a mental disability.

The Act

The ADA prohibits an employer from discriminating against a disabled individual in job application procedures, hiring, advancement, discharge, compensation, training, and other aspects of employment.[4] The term "disability" means an individual: (a) with a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (b) who has a record of such an impairment; or (c) is regarded as having such an impairment.[5] The term "qualified individual with a disability" means "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[6] The ADA defines discrimination as the failure of an employer to make reasonable accommodation for an otherwise qualified individual with a disability, unless the employer can show that the accommodation would impose an undue hardship.[7]

To sustain a claim of disability discrimination under the ADA because of discharge from employment, the former employee must show that he is disabled within the meaning of the ADA; that he is qualified to perform the essential functions of the job, with or without reasonable accommodation; and that he was terminated because of the disability.[8]

An employer who discharges an employee can defend against a claim of ADA discrimination by proving: (1) the individual is not "qualified" to perform the essential job functions, even with reasonable accommodation;[9] (2) that accommodation would pose an undue hardship;[10] (3) the employee poses a direct threat to himself or others;[11] or (4) the misconduct, even though resulting from drug or alcohol abuse, is deserving of discharge under the same qualification standards for employment, or job performance and behavior, applicable to all other employees.[12] A provision —42 U.S.C. § 12114(c)(4)—codifies an employer's authority to discharge an employee for alcohol or drug-related misconduct, consistent with how it would treat the same conduct by non-disabled employees. Stated differently, there is a statutorily-created distinction between discharge for misconduct caused by drugs or alcohol, and discharge because of a drug or alcohol disability.

The provisions of the ADA do not specifically address the discharge for misconduct / discharge for disability dichotomy beyond the context of drug and alcohol-related misconduct. However, several courts interpreting the ADA have extended this dichotomy to egregious or criminal misconduct stemming from other disabilities. The application of this extension in the various circuits is the focus of the next two parts of this article. In brief, the federal circuits are split on this issue: the majority upholds the dichotomy, finding that a disabled employee loses the protections of the ADA by engaging in egregious behavior or criminal misconduct; the minority position requires an employer to engage in an analysis of whether the employee can

be reasonably accommodated or poses a direct threat to himself or others, before discharge for disability-caused misconduct is permissible.

Cases Supporting the Dichotomy

There is a long line of cases[13] from the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits (or district courts within these circuits) that hold that egregious conduct—such as physical violence or threatening coworkers or supervisors,[14] angry outbursts,[15] or criminal conduct[16]—is misconduct for which an employer can discharge the employee, even when the conduct stems from a mental disability. These decisions recognize the dichotomy between discharging an employee because of a disability, which may be unlawful discrimination under the ADA, and discharging an employee because of the misconduct associated with a mental disability. Based on these cases, the latter results in a determination that the misconduct means that the employee is not a "qualified individual" protected by the ADA. Thus, an employer need not defend its discharge of a disabled employee by showing there was no reasonable accommodation possible, or that the employee posed a direct threat to himself or others.[17] Relying on the standard related to drug and alcohol cases, many courts find that nothing in the ADA suggests that disabled persons should not be held to the same standards of conduct in the workplace as non-disabled employees.[18]

Practitioners in this area will also find support for the "discharge for misconduct vs. discharge for disability" dichotomy in the Equal Employment Opportunity Commission (EEOC) *Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities*.[19] Courts are entitled to give this EEOC Guidance deference.[20] In October 2008, the EEOC also issued a fact sheet, *Americans with Disabilities Act: Applying Performance and Conduct Standards To Employees With Disabilities*, that supports an employer's ability to discharge an employee for misconduct stemming from a disability under appropriate circumstances.[21]

On a daily basis, municipal employers in the United States are faced with evaluating the permissible legal responses to an employee who displays threatening, violent, severely angry, or similiar egregious or criminal conduct in the workplace.

The EEOC Guidance provides that an employer may discipline an employee for violating a workplace conduct standard even if the misconduct results from the disability, provided that the standard is job-related and consistent with business necessity. It further explains that an employer has the right to maintain a workplace free from violence or threats of violence, and to discipline disabled employees for misconduct in violation of this principle, so long as it would similarly discipline an employee without a disability. In support of this principle, the EEOC Guidance refers to the 1991 Federal Register comment that:

> The Commission has revised the second sentence of the interpretive guidance on § 1630.16(b) to state that an employer may hold individuals with alcoholism and individuals who engage in the illegal use of drugs to the same performance and conduct standards to which it holds "all of its" other employees. In addition, the Commission has deleted the term "otherwise" from the third sentence of the guidance. These revisions clarify that employers may hold all employees, disabled (including those disabled by alcoholism or drug addiction) and non-disabled, to the same performance and conduct standards.[22]

The EEOC Guidance clarifies that the duty to reasonably accommodate does not require an employer to excuse past misconduct,[23] but does require accommodation where the misconduct is not so egregious as to make the employee unqualified for the position, and it also provides some helpful examples describing this distinction.

Cases Rejecting the Dichotomy

The Second, Ninth and Tenth Circuits have rejected the doctrine that a disabled employee can be held to the same workplace conduct rules regarding egregious behavior or misconduct as non-disabled employees, except in the context of misconduct stemming from alcohol or drugs. Last year, in *Gambini v. Total Renal Care*,[24] the U.S. Court of Appeals for the Ninth Circuit faced, for the first time, the discharge for misconduct dichotomy for egregious behavior (as opposed to merely performance issues, such as excessive absences) outside the drug or alcohol context. The employee, Gambini, was discharged after a meeting with her supervisors, called to discuss her substandard performance. Gambini attended, but responded with a profanity-laced tirade before storming out. Prior to the outburst, she had informed her supervisors that she was seeking medical treatment for her bipolar disorder. Several coworkers had expressed their concerns about Gambini's outburst; one employee specifically asked that Gambini be prevented from returning to work. Shortly after she was terminated, Gambini notified her employer that her outburst was a consequence of her bipolar disorder and asked that the decision to terminate her be reconsidered. When the employer refused, Gambini sued, claiming that the employer discriminated against her in violation of the federal Family and Medical Leave Act and the Washington Law against Discrimination.[25] The district court entered judgment

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following a jury verdict in the employer's favor, and Gambini appealed.

The Ninth Circuit held that the district court erred in rejecting a proposed jury instruction that "conduct resulting from a disability is part of the disability and is not a separate basis for termination."[26] The court reasoned that, "where an employee demonstrates a causal link between the disability-produced conduct and the termination, a jury must be instructed that it may find that the employee was terminated on the impermissible basis of her disability."[27] Thus, the jury was entitled to infer that Gambini's violent outburst was a consequence of her bipolar disorder, which the law protected as part of her disability.[28]

In reaching this result, the *Gambini* court was interpreting the state anti-discrimination law; however, it relied on federal precedent interpreting the ADA in reaching its decision.[29] In particular, *Gambini* considered and applied the reasoning of *Humphrey v. Memorial Hosp. Ass'n*,[30] a case involving termination for excessive tardiness and absences. The *Humphrey* court rejected the disability vs. disability-caused misconduct dichotomy, except in the alcohol and drug context.[31] Instead, it found that:

> conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination. The link between the disability and termination is particularly strong where it is the employer's failure to reasonably accommodate a known disability that leads to discharge for performance inadequacies resulting from that disability.[32]

The *Humphrey* court left open the possibility that egregious or criminal conduct, even unrelated to alcohol and drugs, might be an additional exception to the alcohol and drug misconduct dichotomy.[33] The court in *Gambini* did not consider whether the employee's outburst was "egregious conduct" not deserving of ADA protection. Further, it did not analyze whether the rule in *Humphrey* should be limited to disability-caused performance issues versus misconduct issues, nor did it analyze or distinguish the existing EEOC Guidance references supporting the misconduct dichotomy. However, in response to an *amicus* argument, the *Gambini* court rejected the suggestion that its decision provided absolute protection from adverse employment actions based on disability-related conduct, pointing to the direct threat defense, and the inability to reasonably accommodate, as two bases for the discharge.[34] Since *Gambini*, there have been no cases that have applied its holding to arguably egregious or criminal conduct stemming from a mental disability.[35]

Clearly, municipalities governed by the Second, Ninth or Tenth Circuits must engage in a reasonable accommodation analysis and, possibly, a "direct threat" analysis, if available, before imposing employee discipline. However, even for municipalities located within federal circuits recognizing the misconduct dichotomy, prudence may still dictate a cautious approach, including going through a reasonable accommodation analysis.

The U.S. Court of Appeals for the Tenth Circuit, in *Hartog v. Wasatch Academy*[36] (a case cited with approval by the court in *Humphrey*), has also rejected the egregious conduct dichotomy. The Tenth Circuit concluded that under the ADA, an employer should normally consider whether misconduct stemming from a mental disability can be accommodated, and held that termination is only permitted under one of the affirmative defenses under the ADA (e.g., undue hardship or direct threat).[37] Otherwise, the employer must tolerate an employee's eccentric or unusual behavior caused by a mental disability, so long as the employee can perform the essential functions of the job.

In the Second Circuit case of *Sista v. CDC Ixis North America, Inc.*,[38] the court below had found that a former employee was not qualified for his position because of egregious misconduct stemming from a mental disability. Therefore, the plaintiff could not establish a prima facie case under the ADA. On appeal, the Second Circuit upheld the discharge decision, but held that the district court had erred in determining that plaintiff could not prove he was a qualified individual because of his misconduct. Although misconduct could certainly provide a legitimate and nondiscriminatory reason to terminate an employee, it was distinct from the issue of the minimal qualifications for performing a job. Therefore, a finding of misconduct could not preclude a plaintiff from meeting his prima facie burden of showing qualification for the job.[39] However, it is unclear if this case presents a softening of the Second Circuit's position on the misconduct dichotomy as it cited, with approval, the Seventh Circuit case of *Palmer v. Circuit Court of Cook County*[40] and its misconduct dichotomy reasoning for discharge, but rejected the ability to uphold the discharge on the basis of the plaintiff not meeting a prima facie case under the ADA.[41]

Post-*Gambini* Guidance

Given this split in the circuits, what should a practitioner do when the municipal client is considering discharging an employee because of misconduct stemming from a mental disability?

Clearly, municipalities governed by the Second, Ninth or Tenth Circuits must engage in a reasonable accommodation analysis and, possibly, a "direct threat" analysis, if available, before imposing employee discipline. However, even for municipalities located within federal circuits recognizing the misconduct dichotomy, prudence may still dictate a cautious approach, including going through a reasonable accommodation analysis. Here's why: A human resources manager or a supervisor (and certainly the advising municipal lawyer) trying to decide what discipline is appropriate knows (or is aware of) far less

at this stage of the process than he will know after spending two or three years litigating an ADA claim of unlawful discharge. Litigation invariably changes the landscape from how it looked on the day discipline was imposed, and affects the municipality's options in defending a case. Therefore, at the outset, it may be beneficial to support the discharge under several different theories, in case—as time goes by—the law or the facts foreclose or weaken the misconduct dichotomy discharge defense. The approach recommended below will give the municipality's attorney greater flexibility in defending the case, thereby potentially increasing the chances of success.

Generally, an employer deciding on the discipline to impose for misconduct stemming from a mental disability should try to justify the discharge on as many theories as are supportable. For employees who have permanent rights to employment (i.e., cause rights[42]), this means a municipal employer should first conduct a "just cause" analysis to decide whether discharge is appropriate.[43] Having a strong workplace violence policy (one that clearly lays out the consequences for violence and threats of violence) will enhance the likelihood of finding cause for termination. If this analysis establishes that an employee who was not disabled is deserving of discharge, the employer should take a further step and consider whether there is any evidence that a reasonable accommodation (such as leave to obtain treatment) should be permitted where the employee has requested possible accommodation, or the employer has clear notice of the need for an accommodation. An employer may also have the option of considering whether a termination is supportable because the employee poses a significant threat to the health and safety of others, or to himself. For at-will employees, where the employer believes that there could be an ADA challenge to a discharge decision, the employer should still analyze whether discharge would have been imposed on a non-disabled employee for the same or similar misconduct. As above, if the conclusion is that discharge is appropriate, the employer is still advised to engage in a reasonable accommodation analysis.

Having a strong workplace violence policy (one that clearly lays out the consequences for violence and threats of violence) will enhance the likelihood of finding cause for termination.

Employers faced with analyzing whether to reasonably accommodate or to discharge because of a direct threat will often need to rely on competent medical evidence. This can be done by sending the employee to an employer-selected doctor for a "fitness for duty" evaluation that addresses the likelihood of similar conduct in the future, and whether the employee presents a direct threat to himself or to others. Generally, employers rely on medical documentation provided by the employee to answer these questions. The reason municipalities tend to rely on employee-provided medical documentation is because of the minimal cost and the practical reality that an employee's treating doctor will have a better history of the employee. However, a countervailing consideration is that a treating doctor develops a rapport with the patient-employee and may be less likely to provide an opinion harmful to the employee's chances for continued employment, especially in the mental health context. Therefore, an opinion by an employer-retained doctor may more objectively assess the employee's fitness for duty.[44]

After concluding the discharge analysis, employers in the Second, Ninth and Tenth Circuits will only be able to sustain a discharge for misconduct stemming from a mental disability where there is no reasonable accommodation, or the employee poses a direct threat. In the other circuits, if there is arguably a reasonable accommodation available, the employer will need to weigh the risk of relying on the misconduct dichotomy in deciding whether to proceed with the termination. Factors to consider include the egregiousness of the misconduct, the employee's length of service, prior instances of assistance and accommodation that had not been successful, and clear, documented warnings given regarding the disciplinary consequences for a failure to stop the misconduct.

In close cases, an employer may want to consider using a "last chance" agreement in lieu of termination. These agreements offer the employee a chance to avoid termination in return for complying with the specified performance or conduct standards set out in the agreement. The agreement generally provides that further instances of specified misconduct by the employee will or may result in termination. There is a host of issues that must be considered in utilizing these agreements in the context of a disabled individual, including the validity of a particular agreement under the ADA, whether discharge under a "last chance" agreement would violate the ADA, and whether the agreement constitutes a reasonable accommodation, but the scope of these issues is beyond this article.[45]

Finally, employers in the Second, Ninth or Tenth Circuit faced with defending an ADA challenge to a discharge for egregious or criminal conduct stemming from a mental disability should argue for the application of the misconduct dichotomy. Although this appears contrary to recent holdings, *Gambini* left many questions unanswered. For example, that court did not consider whether the employee's outburst was "egregious conduct" not deserving of ADA protection (as has been suggested by the Ninth Circuit in *Newland v. Dalton*[46]), nor did it analyze whether the rule in *Humphrey* should be limited to disability-caused performance issues versus misconduct issues. Further, the *Gambini* court did not analyze or distinguish the EEOC Guidance supporting the misconduct dichotomy. Cases presenting examples of extreme misconduct may well be distinguishable from *Gambini*. The strong, well-reasoned precedent in most other federal circuits—that disabled employees who engage in egregious or criminal conduct are not qualified under the ADA—together with the EEOC Guidance supporting the dichotomy, provide support for such an argument. Further, there are few cases in the Second, Ninth and Tenth Circuits

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following the rationale of *Gambini* and similar cases, so there is no long, well-established law in this area. Ultimately, the issue may have to be resolved by the U.S. Supreme Court.

Conclusion

The federal circuit courts are split on whether an employer may discharge an employee for egregious or criminal conduct stemming from a disability without consideration of the provisions of the ADA, because the conduct makes the employee not a qualified individual. Until this conflict is resolved, municipalities located within the Second, Ninth and Tenth Circuits' jurisdictions should proceed cautiously when terminating a disabled employee under these circumstances. Municipalities within federal circuits that have recognized the "disability versus disability misconduct" dichotomy have more flexibility in concluding that a disabled employee whose egregious or criminal misconduct stems from a disability may be treated like a non-disabled employee in the same or similar circumstances. However, municipal employers may still wish to exercise caution, given the split of authority on the subject.

Notes

1. 42 U.S.C. § 12101 *et seq*. Title 1 addresses discrimination in employment; 42 U.S.C.A. §§ 12111 to 12117. In September 2008, Congress passed the ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, 122 Stat. 3553 (2008), which took effect January 1, 2009. See endnotes 5, 6, and 21 for the ADAAA's possible impacts on terminations for misconduct. References to the ADA will refer to the case and statutory law existing prior to the effective date of the ADAAA.
2. 486 F. 3d 1087 (9th Cir. 2007).
3. *Id*. The scope of this article does not address individual state laws, regulations, and constitutional provisions addressing disability discrimination.State and local laws applicable to a particular municipality must be consulted when analyzing the permissible scope of employer actions impacting a disabled employee's or applicant's terms and conditions of employment. Further, some cases discussed in this article may be restricted by court rule as to publication and citation in briefs; readers are cautioned to check each case for restrictions.
4. 42 U.S.C. § 12112 (a) (West 2008).
5. 42 U.S.C.A. § 12102 (2) (West 2008). The ADAAA retains the three-part definition of disability, but adds new provisions with the intent that "disability" be construed broadly to counter recent Supreme Court precedent that narrowed who qualified as a "disabled" person. Significant changes include (1) "substantially limits" will no longer be defined as either "significantly restricted" or "severely restricted"; (2) "major life activities" now include major bodily functions; (3) generally, the ameliorative effects of mitigating measures cannot be considered in assessing whether an individual has a disability; (4) impairments that are episodic or in remission may be disabilities if they are substantially limiting, when active; and (5) the "regarded as disabled" prong can be met if an employment decision was made because of an actual or perceived physical or mental impairment, regardless of whether the impairment limits, or is perceived to limit, a major life activity (unless the impairment is minor and transitory). At this juncture, it is not clear how case law development under the ADAAA will impact an employer's ability to terminate disabled employees for misconduct. However, after the ADAAA's enactment, the Equal Employment Opportunity Commission (EEOC) published a fact sheet on applying employer conduct standards to employees with disabilities. This fact sheet strongly supports the conclusion that the ADAAA will not prohibit the termination of disabled employees for misconduct under certain circumstances, discussed below.
6. 42 U.S.C.A. § 12111(8) (West 2008). The ADAAA changes this definition to "qualified individual," striking from the definition "with a disability." For a list of the specific changes made by the ADAAA, see the EEOC *Notice Concerning The Americans With Disabilities Act (ADA) Amendments Act of 2008*, available at http://www.eeoc.gov/ada/amendments_notice.html.
7. 42 U.S.C. § 12112 (b)(5) (West 2008).
8. Kaplan v. City of N. Las Vegas, 323 F. 3d 1226, 1229-30 (9th Cir. 2003).
9. Tyndall v. National Educ. Centers Inc. of Calif., 31 F. 3d 209 (4th Cir. 1994).
10. 42 U.S.C.A. § 1211 (West 2008).
11. 42 U.S.C. § 12113(b) (West 2008); 29 C.F.R. § 1630.15(b) (1991). A "direct threat" is "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. § 1630.2(r) (1991). *See* Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 78-79 (2002).
12. 42 U.S.C.A. § 12114(c)(4) (West 2008). Current illegal drug users are not qualified individuals under the ADA when an employer takes employment action on the basis of such use. 42 U.S.C.A. § 12114(a) (West 2008). *See also*, 42 U.S.C.A. § 12210 (West 2008). However, a person may still be qualified under the ADA if he or she is no longer using drugs and has been successfully rehabilitated, or is participating in a supervised rehabilitation program. An alcoholic is not automatically excluded from protection under the ADA due to his current use of alcohol, as it is not a "drug" within the meaning of the Act. 42 U.S.C.A. § 12114(b)(1) to (3) (West 2008).
13. Rehabilitation Act cases are also cited, as Section 504 of the Rehabilitation Act, 29 U.S.C.A. § 794 (barring disability discrimination in programs receiving federal financial assistance), and the ADA are construed similarly with regard to terms, conditions and privileges of employment. S. Rep. No. 101-116 at 25 (1989).
14. Rose v. Laskey, 110 Fed. Appx. 136, 137 -139 (1st Cir. 2004) (employee suffering from depression who threatened supervisor, whether the threat was hollow or not, was not qualified under ADA); Sever v. Henderson, 220 Fed. Appx. 159, 161-62 (3d Cir. 2007) (no violation of Rehabilitation Act for employer to terminate postal worker for threatening coworker, even if behavior stemmed from alleged mental disability. Employer entitled to hold him to "qualification standard"); Pence v. Tenneco Auto. Operating Co. Inc., 169 Fed. Appx. 808, 811 (4th Cir. 2006) (discharge for threatening coworker sustained, where employer honestly believed the employee guilty of misconduct); Jones v. Am. Postal Workers Union, 192 F. 3d 417, 429 (4th Cir. 1999) (no ADA violation in discharging postal employee for threatening his supervisor. After incident, employee hospitalized and discharged with diagnosis for schizophreniform disorder and post-traumatic stress syndrome, with good prognosis for full return to work); Hamilton v. Southwestern Bell Tel. Co., 136 F. 3d 1047, 1052 (5th Cir. 1998) (ADA does not insulate emotional or violent outbursts blamed on an impairment; an employee who is fired for outbursts at work directed at fellow employees has no ADA claim); Sullivan v. River Valley Sch. Dist., 197 F. 3d 804, 813 (6th Cir. 1999) (threatening other employees disqualifies one from a job); Chapa v. Adams, 168 F. 3d 1036, 1039 (7th Cir. 1999) ("People who threaten to kill their supervisors are not 'qualified' for [employment] even if their threats are hollow"); Palmer v. Circuit Court of Cook County, 117 F. 3d 351, 353 (7th Cir. 1997) (discharge of social worker against ADA challenge upheld; court finding social worker not a qualified individual under the ADA and, therefore, no reasonable accommodation analysis required, where delusional paranoia disorder caused her to make violent threats against coworkers and supervisors); Crawford v. Runyon, 79 F. 3d 743 (8th Cir. 1996) (threats against supervisor warranted discharge against employee's claim of pretext for termination for stress-related mental disorders); Adams v. Alderson, 723 F. Supp. 1531 (D.D.C. 1989), *aff'd*, 1990 WL 45737 (D.C. Cir. 1990) (a former employee unable to refrain from

physical violence toward supervisor due to obsessive compulsive disorder (OCD) and adjustment disorder was not otherwise qualified under the Rehabilitation Act).

15. Calef v. Gillette Co., 322 F. 3d 75, 86-87 (1st Cir. 2003) (discharge of employee who claimed misconduct stemmed from Attention Deficit Hyperactivity Disorder, ADHD, upheld where the employee had long history of anger and verbal and physical confrontation problems at work. He was fired for refusing to work a shift, becoming angry, saying irrational things to his superiors, and scaring them with his behavior. The ADA did not require an employer to retain employee who displayed threatening behavior that made coworkers feel unsafe, even if the behavior is part of a disability); Gray v. Champion Int'l Corp., 134 F. 3d 371 (6th Cir. 1997) (table) (court upholds discharge of employee for extended outburst where employee claimed the tirade stemmed from psychological condition and medication; employee was previously disciplined for outbursts and warned that termination was possible. ADA did not require employer to retain employee who engaged in egregious misconduct); Ray v. Kroger Co., 264 F. Supp. 2d 1221, 1228-29 (S.D. Ga. 2003); *aff'd*, 90 Fed. Appx. 384 (11th Cir. 2003) (discharge of grocery clerk with Tourette's Syndrome upheld where disability caused him to blurt out profanities and racial slurs at customers; court found the requested reasonable accommodation of acceptance and understanding of this conduct was unreasonable as a matter of law).

16. Harris v. Polk County, Iowa, 103 F. 3d 696 (8th Cir. 1996) (county attorney could refuse to hire a legal secretary previously convicted for shoplifting, even though the applicant claimed her criminal conduct stemmed from a mental disability, because an employer could hold disabled employees to the same standard of law-abiding conduct as all other employees).

17. *Palmer*, 117 F. 3d at 353.

18. *See, e.g.*, Williams v. Widnall, 79 F.3d 1003, 1006 (10th Cir. 1996); *Calef*, 322 F.3d at 86-87 (relying on *Johnson v. N.Y. Hosp.*, 96 F.3d 33 (2d Cir. 1996) (per curiam) and *Williams v. Widnall*); *Jones*, 192 F. 3d at 429 (relying on *Collings v. Longview Fibre Co.*, 63 F.3d 828, 832-33 (9th Cir. 1995)); Despears v. Milwaukee County, 63 F. 3d 635, 637 (7th Cir. 1995); Maddox v. Univ. of Tenn., 62 F. 3d 843, 846-48 (6th Cir. 1995); Little v. F.B.I., 1 F. 3d 255, 259 (4th Cir. 1993); *Gray*, 134 F. 3d at 371 (relying on *Maddox v. Univ. of Tennessee*); *Palmer*, 117 F. 3d at 353 (relying on *Johnson v. N.Y. Hosp.*); Newland v. Dalton, 81 F. 3d 904, 906 (9th Cir. 1996); and *Harris*, 103 F. 3d 696. Note, however, that cases not recognizing the "disability vs. misconduct stemming from the disability" dichotomy point to 42 U.S.C.A. § 12114(c)(4), confining this distinction to misconduct stemming from drugs and alcohol. *See* Den Hartog v. Wasatch Acad., 129 F. 3d 1076, 1085-88 (10th Cir. 1997).

19. The document is available at http://www.eeoc.gov/policy/docs/psych.html (last modified on Feb. 01, 2000) (hereinafter "EEOC Guidance"). The topic sections of the EEOC Guidance are not numbered.

20. E.E.O.C. v. Dinuba Med. Clinic, 222 F. 3d 580, 588-89 (9th Cir. 2000) (according deference to the EEOC Guidance).

21. *See* Section III.B in http://www.eeoc.gov/facts/performance-conduct.html. It is not clear if a court would give this fact sheet the same deference as the EEOC Guidance; nevertheless, the EEOC published this fact sheet post-ADAAA enactment and it appears that the EEOC's position on termination for misconduct stemming from a disability has not changed.

22. EEOC Guidance, *supra* note 19, citing Equal Employment Opportunity for Individuals With Disabilities, 56 Fed. Reg. 35,726 (July 26, 1991). 56 Fed. Reg. 35,733 refers to revisions that "clarify that employers may hold all employees, disabled (including those disabled by alcoholism or drug addiction), and non-disabled, to the same performance and conduct standards," *available at* http://www.eeoc.gov/policy/docs/902cm.html (last modified on Feb. 01, 2000).

23. *Id.* Because of this, the EEOC Guidance encourages employees with disabilities to request accommodations before their condition results in misconduct.

24. Gambini v. Total Renal Care, 486 F. 3d 1087 (9th Cir. 2007).

25. WASH. REV. CODE §§ 49.60.010 *et seq.* (2007).

26. *Gambini*, 486 F. 3d at 1093.

27. *Id.*

28. *Id.* at 1094.

29. *Id.* at 1093.

30. 239 F. 3d 1128, 1139-40 (9th Cir. 2001) (termination of employee with OCD, whose obsessive thoughts and rituals made it very difficult to get to work on time; court overturned summary judgment in favor of the employer, finding that termination for excessive tardiness and absences due to OCD was an impermissible termination because of the disability).

31. *Id.* at 1140 n.18. The *Humphrey* court cited *Newland v. Dalton*, 81 F. 3d 904, 906 (9th Cir. 1996) (holding that an employer may fire an employee who went on a "drunken rampage" and attempted to fire an assault rifle at individuals in a bar) and *Collings v. Longview Fibre Co.*, 63 F. 3d 828, 832 (9th Cir 1995) (discharge for drug-related misconduct at the workplace) as examples where disabled employees were held to the same conduct standards as non-disabled employees because of their alcohol or drug problems.

32. *Id.* at 1139-40 (internal citations omitted).

33. *See Newland*, 81 F. 3d at 906 (9th Cir. 1996) ("Attempting to fire a weapon at individuals is the kind of egregious and criminal conduct which employees are responsible for regardless of any disability"). *Humphrey* rejected that such an exception would be applicable to absences or tardiness resulting from a disability. *Humphrey*, 239 F. 3d at 140.

34. *Gambini*, 486 F. 3d at 1095.

35. Cases that have addressed substantive ADA issues relying on *Gambini* are *Manning v. Tacoma Pub. Sch.*, No. C06-5078 RBL, 2007 WL 2495138, *1 (W.D. Wash. Aug. 30. 2007) (summary judgment regarding ADA discrimination claim denied where possible knowledge of disability, ADHD, coupled with discharge for inattention to detail may point to termination being partially motivated by disability) and *Collins v. The Boeing Co.*, No. C06-1843RSM, 2008 WL 943152, *6 (W.D. Wash. Apr. 07, 2008) (summary judgment for employer granted where a plumber was fired for misuse of a computer and presented no medical evidence tying the misuse to his depression, and distinguishing *Gambini* where such medical evidence was presented).

36. 129 F. 3d 1076, 1085-88 (10th Cir. 1997) (court upholds discharge under "direct threat" defense where discharged boarding school teacher's adult bipolar son had attacked, and threatened to attack, school community members, finding that, under the "direct threat" principle, an employer may discipline an employee who poses a significant risk to the health or safety of others in the workplace. The fact that an employer may discipline an employee whose "disability-caused misconduct" threatens the safety of others in the workplace, however, does not mean that the employer may discipline an employee whose disability-caused misconduct does not pose such a "direct threat" and does not otherwise violate reasonable job-related qualifications consistent with business necessity, or fall within another ADA exception to protection).

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Municipalities and Employee Electronic Communications

— by Joshua K. Leader and Caroline C. Marino —



Consider this scenario: your department purchases and distributes BlackBerries to its employees. The devices operate on the municipality's service plan with a third-party provider. A few months later, a female employee complains that a male employee has been sending her and other female employees harassing, offensive messages from his BlackBerry. You review the content of the messages and confirm that the male employee has been using the device to send inappropriate material to his coworkers. Accordingly, you initiate disciplinary proceedings and inform him that his misconduct will result in a negative review in his file. A few weeks later, you are served with a complaint alleging that your review of "his" BlackBerry—owned by the municipality and issued on the municipality's service plan—constitutes an improper invasion of his privacy and violated his Fourth Amendment rights.

Does this sound far-fetched? A recent court ruling makes it clear that this is a real possibility, and far more likely to be an issue for municipal employers today given the prevalence of electronic communications in the workplace.

Recent Developments in the Law

In *Quon v. Arch Wireless Operating Co., Inc.*,[1] a city police department contracted for wireless text-messaging services for two-way pagers, which it then distributed to its employees. One employee, Jeff Quon, repeatedly exceeded the monthly text-message allotment on his pager, resulting in overage charges. The police department suspected that the overages resulted from the use of the pager to send personal messages. Although the police department had suggested that its official policy banning personal use of department-owned computers also applied to the pagers, there was no formal policy. Instead, the police department's informal policy was that employees who exceeded their monthly text-message allotment could avoid an audit of their messages if they paid the employer for any overages.

Although the department continued to allow Quon to pay for the overages in accordance with the informal policy for an extended period of time, it eventually obtained the transcripts of his text messages from the wireless provider to determine the cause of the constant overages. A review of the messages' content revealed that the overages were, in fact, attributable to personal messages. Quon filed a lawsuit against the police department alleging, *inter alia*, a violation of his Fourth Amendment right to privacy in the content of the messages.

The U.S. Court of Appeals for the Ninth Circuit determined that Quon had a reasonable expectation of privacy in his text messages, based on the police department's informal policy of foregoing an audit if the employee paid for any overages, despite the fact that the department owned the pager and paid for the wireless services. Additionally, the court held that the police department should not have been permitted to obtain transcripts of the messages from the service provider, since the federal Stored Communications Act[2] only permits the sender and addressee of the messages to view their content, regardless of who pays for the service.

Why is This Important?

Municipal employers need to stay abreast of developments in employees' privacy expectations and rights in electronic communications to avoid situations like that in *Quon*. A municipality may need to monitor or access its employees' electronic communications for many reasons, including:

- investigating employee misconduct, including sexual harassment and racial discrimination;
- responding to requests pursuant to freedom of information statutes, as discussed more fully below;
- discouraging employee use of municipal time and resources to conduct personal business; and
- protecting against illegal activities by employees, for which a municipal employer may be liable.

Many of these issues will also arise in the discovery context in litigation, and municipal employers should be aware of the scope of information that they may be required to access, review, and produce under the aegis of e-discovery obligations.

Constitutional Considerations

Municipal employers must be mindful of the potential constitutional implications when accessing their employees' electronic communications. Although the Fourth Amendment is more commonly associated with criminal matters, its protections extend to all unreasonable state-sponsored searches and seizures, including searches and seizures, by government employers or supervisors, of the private property of their employees.[3] As a result, a municipality's monitoring and review of its employees' electronic correspondence can potentially amount to an unlawful government search and seizure if those employees have a reasonable expectation of privacy in that

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correspondence. That determination is fact-driven and will turn on many of the issues discussed below.

Freedom of Information Obligations

Municipal employers also face the additional hurdle of satisfying their obligations under freedom of information laws without violating their employees' constitutional right to privacy. Many states have codified their own versions of the federal Freedom of Information Act,[4] thereby affording the public and the press the right to access state and local government records, including electronic correspondence, in order to remain informed about the process of governmental decision-making.[5] Although it is beyond the scope of this article, it is important to be aware of the breadth of the applicable freedom of information statute when evaluating expectation-of-privacy concerns in a particular jurisdiction. The definition of "public records" subject to inspection pursuant to freedom of information laws varies from state to state, and, in some instances, can be quite sweeping,[6] thereby increasing the likelihood that the electronic correspondence employees believe is private will, in fact, be subject to disclosure. Accordingly, municipal employers must strike the appropriate balance between freedom of information obligations and the privacy rights of their employees.

What Can Municipal Employers Do to Protect Themselves?

Although wireless devices and communications technology (such as text messaging and instant messages) are still relatively new areas for legal analysis and regulation, precedent developed in the more established areas of workplace computers and e-mail in both the public and private sectors is instructive. Courts have examined the following factors in determining whether an employee has a reasonable expectation of privacy in e-mail and other communications on employer-owned devices:

- whether the employer maintains a policy banning personal or other objectionable use;
- whether the employer monitors the use of the employee's computer or e-mail;
- whether third parties have a right of access to the computer or e-mails, including under the applicable freedom of information laws; and
- whether the employer notified the employee, or the employee was otherwise aware of, the applicability of a freedom of information statute and the employer's computer use and monitoring policies.[7]

Municipal employers must strike the appropriate balance between freedom of information obligations and the privacy rights of their employees.



These factors can translate into everyday workplace policies and procedures in a number of ways. Although all of these factors are instructive, no single one is dispositive: the courts have held that "given the great variety of work environments in the public sector, the question [of] whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis."[8]

Municipalities that wish to maintain access to their employees' electronic communications should adopt an explicit ban on the personal use of e-mail, computers, and other employer-issued devices, and specifically indicate that employer-issued devices are subject to monitoring, search, and review. Ways to accomplish this include articulating a policy in employee handbooks, requiring employees to periodically sign written acknowledgments of the municipality's policy, and even implementing an automatic prompt upon log-in on the device, that requires the employee to acknowledge that he or she has no expectation of privacy in the use of the system, and that the system is subject to inspection by the municipality at any time.

As seen in *Quon*, equally important as articulating and obtaining employees' acknowledgments of policies and procedures is ensuring that the municipality's departments act consistently with the articulated ban on personal use and the policy of regular monitoring, search, and review (including prohibiting any conflicting informal policies). This can be accomplished by implementing a regular back-up of electronic files, including e-mails, to a back-up drive accessible by supervisors, and informing employees of this. Municipalities that are particularly concerned with regulating electronic communications may even want to consider implementing routine searches of office computers and electronic files to further diminish employees' expectations of privacy.

Examples in Case Law

Case law further illustrates ways in which governmental entities have preserved their right to access employee e-mail. For instance, in *Hoff v. Spoelstra*,[9] a Michigan court determined that a city attorney did not have a reasonable expectation of privacy in her e-mails on the City's computer system. The City's information systems policy stated that such e-mails were considered City property and could be subject to public disclosure under the freedom of information statute, and specifically warned that personal messages could be accessed by City management without warning; therefore, employees were advised not to use e-mail to transmit any messages they would not want read by third parties.[10]

Similarly, in *Kelleher v. City of Reading*,[11] the Eastern District of Pennsyl-

vania found that the plaintiff city clerk did not have a reasonable expectation of privacy in her e-mail communications on the City's e-mail system. The City's guidelines expressly indicated that e-mails created, sent, or received using the City's system were City property; that the City reserved the right to access and disclose the content of all such messages, and that the e-mail system was strictly for official City messaging.[12] Further, the plaintiff had signed an acknowledgment indicating that she had received and read the guidelines, and the City had made a practice of monitoring and reviewing employee e-mails in the past.[13]

In *U.S. v. Angevine*,[14] the U.S. Court of Appeals for the Tenth Circuit found that a defendant college professor at a public university did not have a reasonable expectation of privacy in the files on his state-owned computer. The university advised its employees that it reserved and periodically exercised the right to view or scan any file or software stored on its computers or passing through its network, and caused a "splash screen" to appear at each start-up, warning its employees that all e-mails on the system were presumed to be public records, contained no right of privacy or confidentiality, and were subject to inspection by the university at any time, as deemed necessary to protect its business concerns.[15]

Some courts have held that even an informal acknowledgment that electronic correspondence may be subject to disclosure can constitute a waiver of an expectation of privacy in that correspondence. In *Pulaski County v. Ark. Democrat-Gazette, Inc.*,[16] a County comptroller, Quillin, was arrested for allegedly embezzling money from the County. He had been romantically involved with "Jane Doe," an outside contractor with the County. When a newspaper applied under a freedom of information law to have the County produce the comptroller's e-mail messages, including messages between him and Doe, Doe contested the disclosure of the e-mails, claiming it was a violation of her privacy. The trial court ruled that Doe had no expectation of privacy when conversing with Quillin on a County computer or using the contractor's business e-mail. The Supreme Court of Arkansas affirmed. Because the contractor had acknowledged in the correspondence—sent from her work e-mail account and accessed by Quillin on his County-issued computer—that she knew the e-mails could become public, she had effectively waived her expectation of privacy in the e-mails, despite the fact that some of the e-mails contained discussions of matters of a personal and private nature.[17]

Municipal employers who adhere to clear policies regarding their employees' lack of expectation of privacy in electronic communications can further protect their ability to access such communications by keeping any review as narrowly tailored and as minimally invasive as possible.

Appropriate Purpose and Scope

Municipal employers who adhere to clear policies regarding their employees' lack of expectation of privacy in electronic communications can further protect their ability to access such communications by keeping any review as narrowly tailored and as minimally invasive as possible. Courts have found that employers who properly informed their employees of their policies regarding electronic communications did not invade their employees' privacy when reviewing electronic materials, as shown by the following scenarios:

- Where the employer demonstrated that it had a legitimate business interest in reviewing the electronic communications, such as ensuring that the employee was not engaging in unauthorized activity that would harm the employer.[18]
- Where a review of the electronic communications and computer files was done remotely and was limited to materials accessible from, and available on, the employer's server, even in instances where the items on the server included e-mails saved from the employee's personal e-mail account, those saved in folders that the employee had designated "private," or those that were password-protected by the employee.[19]
- Where a review of computer files was conducted on a former employee's company-issued laptop, one that the employee believed he had the option to purchase upon termination, and where the review was conducted by a single person and did not include a search for, or audit of, the employee's personal e-mail account, information, or pictures.[20]

The Stored Communications Act

As use of wireless devices, text messaging, and other forms of electronic communication becomes more widespread in the workplace, it is important for municipal employers to keep themselves apprised of their rights in monitoring such communications. The Stored Communications Act (SCA) prevents a provider of communications services from divulging the content of correspondence sent and received through its servers to anyone except the sender and the addressee, without the lawful consent of the same. As a result, municipalities that purchase BlackBerry or cell phone service for their employees may not be entitled to request, from the service providers, transcripts of their employees' communications using those devices.[21]

Although the SCA provides that employers do not have an absolute right to review the content of text messages, employers can, nevertheless, discourage personal use of these services by implementing a clear, consistent policy prohibiting using the devices for personal, offensive, or other inappropriate purposes. A possible additional safeguard might be to require employees to sign written waivers of any expectation of privacy in their electronic communications on such devices, and even sign agreements permitting the employer to access the provider's records for those accounts.

Indeed, recent caselaw in the wake of *Quon* suggests that city employees who are advised that their text

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messages on a city's communications system are public information are not able to use the SCA to shield their communications. In *Flagg v. City of Detroit*,[22] the City of Detroit entered into a contract for text-messaging services with a non-party service provider, SkyTel, Inc., which provided messag-ing devices and corresponding services to various City officials and employees. The plaintiff sought production of the text messages sent and received on these City-issued devices from SkyTel. However, the City officials and employees had previously been issued a directive that "they should 'assume as a rule of thumb that any electronic communication created, received, transmitted, or stored on the City's electronic communication system is public information, and may be read by anyone,'" that such communications "should not be 'considered, in whole or in part, as private in nature,'" and that the employees should "bear in mind that, whenever creating and sending an electronic communication, they are almost always creating a public record which is subject to disclosure" under the applicable state freedom of information statutes.[23] The court determined that, because the employees had been given this directive, they impliedly consented, for the purposes of the SCA, to the production of their text messages by the service provider.[24]

Conclusion

As more and more employees rely on mobile e-mail and text messaging in their daily business, municipal employers must remain current about the law and about how to preserve their ability to monitor employee electronic communications. Although such safeguards may, at first glance, seem unnecessary or excessive, the reality is that municipal employers have a compelling interest in preventing employee misconduct and the misuse of municipal time and resources. Taking a few simple steps to help employees understand that their communications on employer-provided equipment are not private and are subject to employer review will ensure that the electronic services provided to municipal employees will help your municipality, not harm it.

Notes

1. 529 F. 3d 892 (9th Cir. 2008). On Jan. 27, 2009, the Ninth Circuit denied en banc review.
2. 18 U.S.C. § 2701 *et seq.* (West 2008).
3. U.S.C.A. Const. Amend. IV (made applicable to state government by U.S.C.A. Const. Amend. XIV); *see also,* O'Connor v. Ortega, 480 U.S. 709 (1987) (searches and seizures by government employers or supervisors of private property of their employees are subject to restraints of the Fourth Amendment).
4. 5 U.S.C. § 551 *et seq.* (West 2008).
5. *See, e.g.,* New York Freedom of Information Law, N.Y. PUB. OFF. LAW § 84 *et seq.* (McKinney 2008); California Public Records Act, CAL. GOV'T CODE § 6250 *et seq.* (West 2008); Illinois Freedom of Information Act, 5 ILL. COMP. STAT. ANN. 140/1 *et seq.* (West 2008); Florida Public Records Act, FLA. STAT. ANN. § 119.*01 et seq. (West 2008).*
6. *See, e.g.,* Pennington v. Clark, 16 A.D.3d 1049, 791 N.Y.S.2d 774 (N.Y. App. Div. 2005) (New York's Freedom of Information Law defines "public records," for the purposes of disclosure, as any information kept by an agency, regardless of the function or purpose for which such information is held).
7. In re Asia Global Crossing, Ltd., 322 B.R. 247 (S.D.N.Y. 2005); Curto v. Medical World Communications, Inc., No. 03CV6327 (DRH)(MLO), 2006 WL 1318387 (E.D.N.Y. May 15, 2006); Sprenger v. Rector and Bd. of Visitors of Virginia Tech., No. 7:07cv502, 2008 WL 2465236 (W.D.Va. June 17, 2008).
8. Quon v. Arch Wireless Operating Co., Inc., 529 F. 3d 892, 904 (9th Cir. 2008) (citing O'Connor *v. Ortega*).
9. Nos. 272898, 275979, 276054, 276257, 2008 WL 2668298 (Mich. Ct. App. July 8, 2008).
10. *Id.* at *9.
11. No. CIV.A.01-3386, 2002 WL 1067442 (E.D. Pa. May 29, 2002).
12. *Id.* at *8.
13. *Id.*
14. 281 F. 3d 1130 (10th Cir. 2002).
15. *Id.* at 1132-33. The case involved a prosecution for possession of child pornography, and the employer's policy also prohibited employees from using computers to "access obscene material as defined by Oklahoma or federal law." *Id.* at 1132.
16. 264 S.W.3d 465 (Ark. 2007).
17. *Id.* at 467-68. The court pointed to one particular e-mail exchange between Quillin and Doe as evidence that Doe lost any expectation of privacy and knew the risk that the e-mails could become public. The sexually explicit exchange included Doe's response: "Hey now. This is work email, goofball!", with Quillin responding: "Delete, delete, delete...."
118. Hilderman v. Enea TekSci, Inc., 551 F. Supp.2d 1183 (S.D. Cal. 2008).
19. *See* Thygeson v. U.S. Bancorp, No. CV-03-467-ST, 2004 WL 2066746 (D. Or. Sept. 15, 2004); McClaren v. Microsoft Corp., No. 05-97-00824-CV, 1999 WL 339015 (Tex. Ct. App. May 28, 1999).
20. *Hilderman,* 551 F. Supp.2d at 1203-04 (no evidence that the employer used the laptop to access the employee's private e-mail account or to otherwise "pry" into his personal affairs).
21. This prohibition depends on the exact technology being used (e.g., does the municipality use a BlackBerry Enterprise Server?) and whether the communications at issue run through the municipality's servers in any way.
22. 252 F.R.D. 346 (E.D. Mich. 2008).
23. *Id.* at 364-5.
24. *Id.* ("In light of this directive, a strong case can be made that City employees have given their implied consent to SkyTel's production of text messages to the City, at least under the circumstances presented here." The court added that, "[w]hatever any given City of Detroit employee might be able to say about his or her awareness of the City's electronic communications policy or any lack of rigor or consistency in its enforcement, such arguments are singularly ineffective—and, indeed, give cause for concern—when raised by two of the City's highest-ranking officials, at least one of whom unquestionably has policymaking authority for the City and authorized the policy in question." *Id.* at 365). The case involved the City and several individual defendants, including Christine Beatty—chief of staff to the now former mayor, Kwame Kilpatrick—seeking to prevent the disclosure on the basis of the SCA. ML

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Federalism and the Voting Rights Act

by Sophia M. Stadnyk
Senior Associate Counsel

The Supreme Court, at its first scheduling conference of the year, has granted review in the case of *Northwest Austin Municipal Utility District Number One v. Mukasey*, 2008 WL 4153806 (U.S. Jan. 09, 2009) (No. 08-322).

Northwest Austin Municipal Utility District centers around the "preclearance" obligation in the Voting Rights Act of 1965. Section 5 of the Act prohibits "covered jurisdictions" (states and political subdivisions with histories of racial discrimination in voting) from making any changes in their voting procedures without first demonstrating to the federal government (the Attorney General or a three-judge panel of the court) that the change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." If the Attorney General makes no objection after sixty days, or if the district court grants a declaratory judgment, the jurisdiction may implement the change. Congress adopted a formula that utilized two proxies for discrimination to be used in determining which jurisdictions would be "covered jurisdictions," and incorporated two procedures for adjusting coverage over time, including those that allowed jurisdictions to earn exemptions. A so-called "bail-out" provision, 42 U.S.C. § 1973b(a), allowed jurisdictions that met the stated requirements to terminate their Section 5 preclearance obligation.

Congress has reauthorized and extended these provisions several times, most recently in 2006 for a further 25 years (the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, §2, 120 Stat. 577). Significantly, in 1975, Congress amended the legislation by the addition of a prohibition of voting discrimination against certain language minorities (persons of American Indian, Asian American, Native Alaskan, and Spanish descent). As a result of the language minority amendments, Texas (and all of its political subdivisions) became a covered jurisdiction, subject to Section 5.

Just over a week after the 2006 reauthorization was passed, the Northwest Austin Municipal Utility District Number One, a small utility district in Austin, Texas, filed suit seeking a bail-out or, in the alternative, bringing a facial challenge to the extension, alleging that, in 2006, when Congress extended the provision, it lacked sufficient evidence of racial discrimination in voting to justify the provision's intrusion upon state sovereignty. The district court, in a ruling reported at 573 F. Supp.2d 221 (D.C. Cir. 2008), rejected both the request for a bail-out (finding that the plaintiff was not a "political subdivision" eligible to seek a bail-out because it did not conduct voter registration) and the challenge to the validity of the legislation. In upholding the law, the unanimous court held that, first, the applicable standard of review was the rationality standard in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), and not the stricter "congruence and proportionality" test (i.e., that the statutory scheme to remedy and prevent violations of the protected right was congruent and proportional to the record Congress developed and to the risk of future constitutional harm) in *City of Boerne v. Flores*, 521 U.S. 507 (1997), a Fourteenth Amendment case. Pointing out that "at its core" this was a Fifteenth Amendment case, the court explained that, "even if the *City of Boerne* cases changed the test for all statutes enacted pursuant to the Fourteenth Amendment, including provisions aimed at preventing racial discrimination in voting, those cases leave the Fifteenth Amendment standard untouched." Given the "extensive legislative record documenting contemporary racial discrimination in voting in covered jurisdictions, Congress's decision to extend Section 5 for another twenty-five years was rational" and, therefore, constitutionally valid under the Fifteenth Amendment. Although it rejected *Boerne* as the applicable standard, the court found, nonetheless, that the 2006 extension survived review under that standard as well. "Given section 5's tailored remedial scheme, the extension qualifies as a congruent and proportional response to the continuing problem of racial discrimination in voting," said the court, pointing to the fact that Section 5 was "geographically targeted, temporary, and applie[d] only to changes in voting procedures, not to all political or election-related activities in covered jurisdictions." (For an in-depth review of the decision, see the comment at 122 HARV. L. REV. 803 (Dec. 2008)).

Under the law, the utility district was entitled to file an appeal directly with the U.S. Supreme Court, and it did so on July 8, 2008. The appeal required five Justices to resolve it, including the issue of whether the Court should accept jurisdiction over the matter. U.S. Solicitor General Gregory G. Garre, in his motion asking the Court to rule on the issue without ordering written briefs and argument, argued that "the three-judge district court's unanimous, correct and careful disposition

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Sunday, April 19, 2009

Personnel Section Meeting

Meeting to Hear Comments on IMLA Board Restructure

IMLA/MCC Listserv Meeting

Legislative Update: Issues for Local Governments — Carolyn Coleman (NLC) and Jackie Byers (NACo)

State League Counsel and Municipal Attorneys Association Department Meeting — *Federal Lobbying Laws and Their Applicability to State Leagues and Associations*

Telecommunications Update:
The Changing Interpretations and Application of §253 of The Telecommunications Act — Kenneth Brunetti
Electric Transmission Line Infrastructure Build-Out and its Impact on Local Government — Michael Watza

Welcome Reception

Monday, April 20, 2009 — Work Session Topics include:

Green Buildings and Green Building Standards

- *Green Buildings and Municipal Environmental Policy* — Robert J. Phocas
- *Comparative Standards* — Anne Marie Vassalo
- *Developing a Green Building Ordinance* — Maria Chiaro
- Green Buildings (Topic TBA) — Carl Circo

Dealing with the Feds

- *Affirmative Litigation* — Linda Singer
- *Administrative Practice* — Lois Shiffer (General Counsel, National Capital and Planning Commission)
- FOIA

Making It Through the Meltdown— Survival Strategies for Municipal Lawyers



Transportation in the 21st Century

- *The Minneapolis Bridge Collapse, Its Causes and Ways to Prevent Similar Disasters* — Susan Segal and Thomas Johnson
- *Integrated Land Use and Transportation Planning* — Steve Meyer

Telecommunications

- *The Public Service Commission and Local Government* — Kevin Thompson
- *Finding and Handling Growth in the Stimulus Package* — Nicholas Miller
- *Maintaining PEG Quality and Accessibility* — Joe Van Eaton

Bankruptcy and the Local Government Lawyer

- *Dealing With Bankruptcy Issues at the Local Government Level: Collections, Police Power Enforcement, The Municipal Creditor and The Municipal Debtor* — Hon. Paul Mannes (invited); Karen Cordry (NAAG) and Peter Haskel

The U.S. Supreme Court

- *Pending and Recent Rulings* — Richard Ruda (State and Local Government Legal Center)
- *First Amendment:* Pleasant Grove City, Utah v. Summum — Mary Jean Dolan
- *The Supreme Court: The Personalities and Rivalries That Defined America* — Jeffrey Rosen

Keeping Current in a Time of Change: An Update on Hot Issues

- *New Housing Code* — Steve Nesmith
- *Current Issues In Takings Jurisprudence* — Elizabeth Wydra

Tuesday, April 21, 2009 — Work Session Topics include:

Facing the FACTA, The Fair and Accurate Credit Transactions Act

FTC

The Environment—Brownfields

- Panel Will Include Representatives of Local Government and The EPA

Ethics

- Topic TBA — Gayle Driver

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Aggressive Solicitation Ordinances

by Devala A. Janardan, Associate Counsel

In the mid-twentieth century, every state in the United States actively enforced vagrancy laws.[1] Many states and localities had imposed outright bans on begging in public places.[2] Although many states still have laws that regulate panhandling and vagrancy (or laws that authorize localities to do the same), laws that imposed outright bans have since been found to be unconstitutional by the courts.[3] States and localities now use tools with a more narrow scope, such as aggressive solicitation ordinances, to address issues related to panhandling.

Drafting an aggressive solicitation ordinance can put even the seasoned lawyer in a difficult situation—one requiring the sensitive consideration of the possibly competing interests of the unfortunate beggars, anxious citizens, concerned business owners, and the rights protected by state or federal constitutions. Many large cities have used aggressive solicitation ordinances for a number of years, and recently, an increasing number of small and mid-sized cities have passed, or are considering, similar laws of their own.[4] The following is a basic discussion of how courts analyze aggressive solicitation ordinances.

Some courts will first address whether panhandling itself constitutes protected expression under the First Amendment. For example, in *Gresham v. Peterson*,[5] the U.S. Court of Appeals for the Seventh Circuit refused to distinguish between an appeal for money by an organized charity and a beggar asking for donations.[6] The Seventh Circuit stated that "solicitation cannot be restricted without also risking the flow of information.…Beggars at times may communicate important political or social messages in their appeals for money, explaining their conditions related to veteran status, homelessness, unemployment and disability, to name a few."[7] After concluding that panhandling was protected under the First Amendment, the court analyzed the ordinance to see if it was content-neutral. The local law in this case defined "panhandling" partly as "any vocal appeal [for money] … [w]here the person being solicited receives an item of little or no monetary value in exchange for a donation."[8] The court stated that a "[c]olorable argument could be made both for and against the idea that the [ordinance] is a content-neural time, place, or manner restriction."[9] The argument against content-neutrality was basically the fact that a government official could determine whether a violation of the ordinance occurred only after determining the specific content of the solicitor's speech (i.e., was it a plea for money, and not a request for something else?). However, the court did not independently analyze the ordinance as content-based (and, therefore, coming under a strict scrutiny standard) since the parties had previously agreed that the law was content-neutral.

If a restriction is found to be content-neutral, the ordinance is then required to be narrowly tailored to achieve a significant government purpose, and must leave open alternative channels of communication.[10] In this case, the court found that the ordinance was narrowly tailored due to the fact that it was adequately restricted by time (night) and place (such as ATMs and banks).[11] The City's purpose in promoting the safety and convenience of its citizens was a significant interest, and a panhandler could solicit during the daytime, in other places (away from the specified commercial establishments), using other methods (for example, by holding up signs or by busking).

IMLA members looking for further information on aggressive solicitation ordinances should look at IMLA's updated Aggressive Solicitation Ordinance, available online at MyIMLA. It includes a model aggressive solicitation ordinance similar to the one upheld in *Gresham*.

Notes

1. *See* Donald Saelinger, *Nowhere to Go: The Impacts of City Ordinances Criminalizing Homelessness*, 13 GEO. J. ON POVERTY L. & POL'Y 545, 550 n.48 (2006).
2. *See* Michael M. Burns, *Fearing the Mirror: Responding to Beggars in a "Kinder and Gentler America"*, 19 HASTINGS CONST. L.Q. 783, 810-811 n. 142 (1992).
3. *See* Papchristou v. City of Jacksonville, 405 U.S. 156 (1972); Loper v. New York City, 999 F.2d 699 (2d Cir. 1993).
4. Jonathan Brunt, *Spokane Considers Ban on Aggressive Panhandling*, THE SEATTLE TIMES, Nov. 18, 2008, at http://seattletimes.nwsource.com/html/localnews/2008406112_webpanhandling18m.html; *see also*, Joe Killian, *High Point Council Oks Ban on Forceful Solicitation*, NEWS-RECORD.COM, Nov. 20, 2008, at http://www.news-record.com.
5. 225 F. 3d 899 (7th Cir. 2000).
6. *Id.* at 904.
7. *Id. See also*, Roulette v. City of Seattle, 850 F. Supp. 1442, 1451 (W.D. Wash. 1994) (noting that the City did not dispute the assertion that peaceful begging, or solicitation for charitable purposes, was entitled to some First Amendment protection).
8. *Id.* at 901.
9. *Id.* at 905.
10. *Id. at* 906 (*see also*, Ward v. Rock Against Racism, 491 U.S. 781 (1989).
11. *Id.* ML

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Bullying

It's Not Just Kid's Stuff





— by Douglas Haney —

We all remember those grade school bullies who made even the simple act of walking to class a miserable ordeal for their chosen victims. Fortunately, like teenage angst and acne, these adolescent tormentors have faded into childhood memories. Or have they? The truth is, many schoolyard bullies have grown up without growing out of their boorish behavior. They have simply traded the schoolroom for the workroom, and their classmates for their workmates. This article will explore the ongoing, but often unrecognized, problem of workplace bullying, recent legislative and judicial efforts to address this issue, and ways for municipal employers to deal with bullies in their midst.

Workplace Bullying Exists

Most employers believe that they maintain an employee-friendly work environment that is free from the harassing activities of workplace bullies. Unfortunately, the facts do not bear this out. Recently, one of the largest workplace bullying surveys conducted in the United States[1] found that a surprising 37% of America's workers —54,000,000 individuals—have been or are being bullied at work! This survey also found that:

- 72% of workplace bullies are supervisors,
- 60% of bullies are men,
- female bullies usually seek out female victims, while male bullies are "equal opportunity" harassers,
- the majority of bullying episodes last at least six months, and
- 40% of bullying victims never complain about their mistreatment.[2]

Shockingly, the study concludes that bullying is four times more likely to occur in the workplace than other forms of harassment.[3] Although other workplace surveys differ somewhat in size, scope and results,[4] it is beyond argument that workplace bullying does exist. It also exacts a high cost.

The Cost of Workplace Bullying

Perhaps as startling as the prevalence of workplace bullying is the high toll it exacts from its victims and their employers. Recent studies have shown that up to 75% of workplace bullying victims experience elevated levels of stress and anxiety, sleeplessness, loss of concentration, paranoia, depression, panic attacks, neurological changes, muscular-skeletal and digestive problems, or chronic fatigue.[5] The cost to employers is equally high, and includes increased employee absenteeism and turnover rates, more employee medical claims, a decrease in worker productivity and creativity, damage to the employer's business reputation, and lawsuits.[6]

One of the biggest and most basic problems faced by legislators intent upon making workplace bullying unlawful is creating a legal standard to use in determining what workplace conduct constitutes "bullying."

The Recent Push for Anti-Bullying Laws

One of the biggest and most basic problems faced by legislators intent upon making workplace bullying unlawful is creating a legal standard to use in determining what workplace conduct constitutes "bullying." A snicker, a putdown, or being ignored may all be part of normal human interactions. A supervisor who criticizes an underperforming employee may be giving that employee the motivation he needs to succeed at his job. A manager who demands perfection from her staff may be setting the high work standards that taxpayers demand from their public servants. Yet, these same actions, if repeated again and again, can also humiliate, degrade, and intimidate employees, and morph a tough management style into workplace bullying.

Nevertheless, despite the difficulties inherent in defining workplace bullying,[7] there is significant interest in enacting legislation that would outlaw such abusive conduct. While at present, no federal or state law in the United States expressly prohibits workplace bullying, it appears to be only a matter of time before such a law is enacted. California introduced the first workplace bullying legislation in 2003,[8] and since then, the pace has quickened. To date, 25 workplace bullying bills having been introduced in a dozen states—15 of them in the last two years alone.[9] Moreover, in 2006, the Hawaii Senate was successful in passing a resolution recognizing the existence of, and harm caused by, workplace bullying, and urging Hawaiian employers to develop and implement policies designed to promote a healthy and safe work environment.[10] Look for more legislative attempts to enact bullying legislation in 2009.

From an international perspective, this push for anti-bullying legislation is not groundbreaking. At a minimum, Sweden, Great Britain, Belgium, France, Ireland, and jurisdictions in Australia and Canada,[11] have already enacted anti-bullying laws that permit an employee to recover for injuries or ailments caused by workplace bullying.[12] With a new President and a more liberal Congress, the stars appear to be aligned for the enactment of the first workplace bullying laws in the United States.[13] However, until that happens, victims of workplace bullying will have to turn to the courts for relief. Ominously for employers, recent events suggest that such claims

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may now be receiving serious judicial consideration.

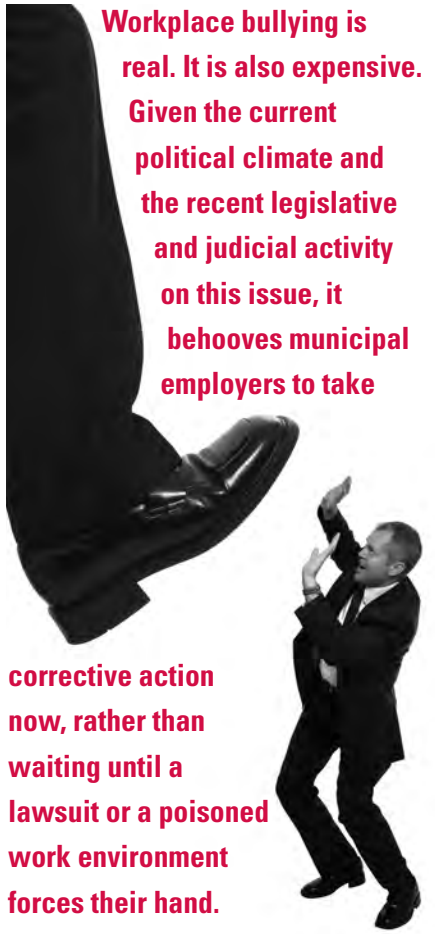
New Hope for Employee Lawsuits

While workplace bullying lawsuits in the United States remain a novelty, they have been successfully litigated elsewhere in the world. In Great Britain, for example, a Deutsche Bank employee was recently awarded approximately $1.5 million in damages as recompense for having had to endure repeated episodes of bullying that caused her to suffer emotional breakdowns and to be hospitalized as a possible suicide risk.[14] In Canada, a former Royal Canadian Mounted Police officer was awarded over CAN$740,000 in damages for having had to endure constant bullying that left her sleepless, tearful, and clinically depressed.[15]

In the absence of any federal or state bullying laws, plaintiffs' counsel in the U.S. have been left trying to fit bullying claims into the traditional common law tort theories of intentional infliction of emotional distress, tortious interference with employment, and assault.[16] However, absent evidence of severe physical or emotional harm, together with extreme and outrageous conduct by the bully, these claims have generally failed.[17]

The tide may be turning. On April 18, 2008, in the case of *Raess v. Doescher*,[18] the Indiana Supreme Court, in what may be the first successful workplace bullying lawsuit in the United States, upheld a jury verdict of $325,000 against a physician who bullied a subordinate employee. At first blush, this case appears to be no different from others in which employees have tried to address workplace bullying through traditional tort claims. Raess was a heart surgeon, and the plaintiff, Doescher, was an operating-room technician who assisted him during open-heart surgeries. When Dr. Raess learned about complaints being made to the hospital administration about his treatment of other operating-room technicians, he became angry. Screaming and swearing, he charged at Doescher with clenched fists, piercing eyes, a red face and popping veins. Backing Doescher against the wall, Dr. Raess stopped and stormed past him, saying "You're finished, you're history."[19] As a result of this incident, Doescher suffered major depression, with heightened anxiety and panic disorders. He responded by suing Dr. Raess, alleging a tortious interference with employment, the intentional infliction of emotional distress, and assault. His tortious interference claim was dismissed on summary judgment, and his remaining claims went to trial.

Workplace bullying is real. It is also expensive. Given the current political climate and the recent legislative and judicial activity on this issue, it behooves municipal employers to take corrective action now, rather than waiting until a lawsuit or a poisoned work environment forces their hand.



What makes this case unique is Doescher's trial strategy. He presented Dr. Raess as a "classic" workplace bully, and his trial witnesses included a "bullying expert," Dr. Gary Namie.[20] Not surprisingly, once Dr. Namie's name appeared on the plaintiff's expert-witness list, defense counsel filed a pre-trial motion *in limine* objecting to his testimony. They argued that Dr. Namie's testimony about workplace bullying was irrelevant to the legal issue of whether Dr. Raess committed the torts alleged, and that his conclusions about workplace bullying were the result of "junk science" that were not admissible under Indiana Rule of Evidence 702.[21] The motion was denied.

At trial, Dr. Namie testified about the phenomenon of psychological violence in the workplace, how a work environment where such violence is tolerated or encouraged can be created, and how a profile can be developed to identify the types of individuals prone to workplace bullying. Dr. Namie testified that Dr. Raess fit the profile of a workplace abuser; that the incident between Dr. Raess and Doescher was an episode of "workplace bullying;" and that Doescher had been subjected to an abusive work environment. At the close of evidence, defense counsel sought a jury instruction that "workplace bullying" was not at issue in the case and that there was no basis in law for such a claim. The trial court refused to give this instruction. The jury subsequently found for Doescher on his assault claim. On appeal, the Indiana Court of Appeals reversed and remanded, citing as error both the trial court's decision to permit Dr. Namie's testimony, and its refusal to give the tendered "workplace bullying" jury instruction.[22]

In a 4-1 decision, the Indiana Supreme Court reinstated the jury verdict. It sidestepped the issue of whether the trial court erred by permitting Dr. Namie's testimony by holding that the issue had not been properly preserved at trial.[23] Turning to the trial court's refusal to give the defense's tendered "workplace bullying" instruction, the court fired the shot heard around the employment law world—signaling, for perhaps the first time, a judicial recognition that evidence of "workplace bullying" is relevant to and can support an employee's tort claims against a workplace bully. In language that will assuredly find its way into future workplace bullying cases, the court stated that, as regards a contention that "workplace bullying" is not relevant to an employee's emotional distress and assault claims:

> [W]e disagree. In determining whether the defendant assaulted the plaintiff or committed intentional infliction of emotional distress, the behavior of the defendant was very much at issue. *The phrase "workplace bullying,"* like other general terms used to characterize a person's behavior, *is an entirely appropriate consideration in determining issues before the jury*. As evidenced by the trial court's questions to counsel during pre-trial proceedings, workplace bullying could be considered a form of intentional infliction of emotional distress.[24]

Obviously, it is too early to tell what effect the *Raess* decision will have on other workplace bullying cases. However, this decision could well become the landmark case that establishes "workplace bullying" as a new form of liability in the United States.

The Employer's Response

In light of *Raess v. Doescher,* and in the face of an increasing number of legislatures considering the enactment of workplace bullying laws, a prudent municipality would be well advised to get ahead of the curve and institute its own workplace "no bullying" policy. Obviously, this will not be quite as easy as it seems, as there is no universally-recognized definition of this type of workplace misconduct. However, difficulty has never been a good excuse for a lack of action, and there are numerous Web sites and publications available to assist an employer in this task. Such a policy should encourage the reporting of workplace bullying, provide a confidential complaint procedure (like that used for discrimination complaints), require the prompt and complete investigation of all bullying complaints, and provide for the proper punishment of employees who engage in workplace bullying or who retaliate against someone who files a bullying complaint.[25] Such a policy might read as follows:

> The City respects the personal worth and integrity of its employees. It recognizes that critical comments addressing job deficiencies, or intended to assist employees in improving their work performance or conduct, are occasionally necessary. However, the City will not tolerate workplace behavior designed to intimidate, torment, ostracize, degrade, humiliate, or otherwise "bully" an employee. Any City employee who believes that he or she has witnessed, or has been the victim of, workplace bullying is encouraged to report the matter to his or her immediate supervisor, or to the Director of Human Resources. All such reports will be promptly, confidentially, and impartially investigated, and confirmed misconduct will result in punishment, up to and including the immediate termination of the offender. Any employee who retaliates against another employee for the good-faith reporting of an incident of possible workplace bullying shall also be subject to discipline.

Most importantly, members of upper management must lead by example, by refraining from engaging in workplace bullying themselves.

Employers should also be proactive in identifying and addressing any current bullying situations that exist in their workplace. These efforts should include supervisory training on behaviors that may constitute workplace bullying, and how to appropriately mitigate the tensions caused by difficult interpersonal work relationships. In appropriate cases, behavioral counseling should be provided to those who exhibit bullying proclivities, and the employer's employee assistance program should be made available to those who feel that they are suffering from the effects of workplace bullying.

Conclusion

Workplace bullying is real. It is also expensive. Given the current political climate and the recent legislative and judicial activity on this issue, it behooves municipal employers to take corrective action now, rather than waiting until a lawsuit or a poisoned work environment forces their hand.

Notes

1. The Workplace Bullying Institute, *2007 U.S. Workplace Bullying Survey Research Report* (Sept. 2007), at www.bullyinginstitute.org/zogby2007/wbi-zogby2007.html.
2. *Id.* at 4, 7, 10, 14 and 15.
3. *Id.* at 9.
4. *See, e.g.,* Gary Namie, The Workplace Bullying Institute (WBI), *Survey of Abusive Workplaces* (2003), at www.bullyinginstitute.org; National Institute of Occupational Safety Health (NIOSH), *Most Workplace Bullying Is Worker to Worker, Early Findings From NIOSH Study Suggest* (July 28, 2004), at www.cdc.gov/niosh/updates/upd-07-28-04.html; Lora Keasley and Joel Newman, *Minnesota State University Workplace Bullying and Psychological Aggression Survey, Workplace Bullying Project Presentation Executive Summary* (May, 2008), at http://www.mnsu.edu/csw/workplacebullying; and WBI, *Employers Ignore Rampant Workplace Bullying; Co-Workers' Actions Dismal –WBI Labor Day 2008 Survey* (2008) at www.bullyinginstitute.org/research/res/wbi2008.html.
5. *See, e.g.,* WBI, *Survey of Abusive Workplaces* (2003) *supra* note 1 at 15; WBI Labor Day 2008 Survey, *supra* note 4 at 12; State of Washington Department of Labor and Industries, Report #87-2-2008 (Apr. 2008), at 2; WBI, *Bullying Compromises Target's Health and Safety,* at www.bullyinginstitute.org/ health.html; *No Bullying Allowed!* The Complete Lawyer, Vol. 4, No. 1 (Jan./Feb. 2008) at http://tinyurl.com/5owgf3; Press Release, American Psychological Association, *Bullying More Harmful than Sexual Harassment on the Job, Say Researchers* (Mar. 08, 2008) at http://www.apa.org/releases/bullying0308.html.
6. *See, e.g.,* WBI, *Survey of Abusive Workplaces* (2003), *supra* note 1 at16; Wendy H. Davis, *No Putting Up With Putdowns,* ABA Journal (Feb. 2008) at www.abajournal.com/magazine/no_putting_up_with_putdowns; Tierney Plumb, *Warning: Workplace Bullies Drive Away Other Employees,* Wash. Bus. Journal (Aug 03, 2007), at www.washington.bizjournals.com/washington/ stories/2007/08-06/smallb2.html; Liz Urbanski Farrel, *Workplace Bullying's High Cost: $180M In Lost Time, Productivity,* Orlando Bus. Journal (Mar. 18, 2002) at www.orlando.bizjournals.com/orlando/stories/2002/03/18/focus1/html.
7. The WBI Web site at http://workplacebullying.org includes a good definition of "workplace bullying." Another good online source is BullyOnline, the Web site for the U.K. National Workplace Bullying Advice Line at www.bullyoffline.org/workbully/defns.htm.
8. A.B. 1582, 2003-04 Reg. Sess. (Calif. 2003).

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IMLA Involved as *Amicus* in *California v. EPA*

by Devala A. Janardan, Associate Counsel

In 2007, the U.S. Supreme Court issued its opinion in *Massachusetts v. EPA*,[1] in which the Court determined that the Environmental Protection Agency (EPA) had the authority to regulate greenhouse gas emissions under Section 202 of the Clean Air Act (CAA).[2] While environmentalists and climatologists hail the case as a watershed, lawyers, generally, have been more cautious and recognize that this case is just the tip of a melting legal iceberg. One such "cold" case is *California v. EPA*[3] before the U.S. Court of Appeals for the D.C. Circuit, in which IMLA is participating as an *amicus*.[4]

The rules in question were approved by California's Office of Administrative Law in 2005, and require automakers to reduce greenhouse gas emissions from new passenger cars and light trucks.[5] In any other state, these provisions would be preempted by the CAA, which provides that "[n]o state…shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or motor vehicles engines…".[6] However, the next section contains the well-known waiver provision for California, which states that the Administrator of the EPA "shall … waive application … for the control of emissions … if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards."[7] However, the provision adds that a waiver will not be granted if (a) the determination of the State is arbitrary and capricious, (b) such State does not need such State standards to meet compelling and extraordinary conditions, or (c) the State standards and accompanying enforcement procedures are not consistent with Section 7521(a) of the Act.[8] California has applied for, and received, a number of waivers from the EPA concerning stricter emissions regulations, such as regulations to curb air pollutants that contribute to smog. In December 2007, however, EPA Administrator Stephen Johnson wrote to California Governor Arnold Schwarzenegger, denying California's application for a waiver for its greenhouse gas emission restrictions.[9] The Administrator rationalized that previously-approved waiver applications were possible due to a focus on a local or regional threat to health or public welfare. In the case of greenhouse gases, however, the focus is apparently not the same, with the Administrator taking the position that:

> the emissions of motor vehicles in California do not affect California's air pollution problem in any way different from emissions from vehicles and other pollution sources all around the world. Similarly, the emissions from California's cars do not just affect the atmosphere in California, but in fact become one part of the global pool of [greenhouse gas] emissions that affect the atmosphere globally and are distributed throughout the world, resulting in basically a uniform global atmospheric concentration.[10]

The Administrator ultimately concluded that California did not face an "extraordinary or compelling" threat from global warming. California filed a complaint in the U.S. Court of Appeals for the Ninth Circuit. In July 2008, the Ninth Circuit released an order dismissing the case for lack of jurisdiction, as the letter from the Administrator to Governor Schwarzenegger was not a "reviewable action," as defined under the CAA.[11]

The case is now before the D.C. Circuit Court of Appeals. IMLA's joint *amicus* brief was submitted on November 24, 2008.[12] The brief presents three main arguments: (1) that the waiver provision in the CAA was intended to preserve state innovation and regulatory flexibility, and the denial of this frustrates Congressional intent; (2) the CAA does not preempt California's greenhouse gas emissions standards; and (3) that EPA's denial conflicts with a "growing global consensus," as represented by the participation of the Canadian province, British Columbia, in the brief.

The first argument is presented through the CAA's legislative and judicial history. According to the brief, the EPA has admitted, in a prior case, "that it must not substitute its own judgment for that of California, and that it must leave decisions on controversial or ambiguous matters of public policy to California's regulators."[13] Moving back in time farther reveals the legislative history showing that California would "serve as a laboratory of innovation and develop motor vehicle standards that could benefit the Nation as a whole."[14] The second argument focuses on preemption. IMLA takes the position that the Administrator's decision "ignores the fundamental fact that California's power to enact public health measures does not derive from the federal government." In his letter, Administrator Johnson stated that the CAA "provides California with authority it would not otherwise have…".[15] IMLA argues that California's authority to enact regulations does not come from the CAA but, rather, from its police powers, and that the waiver provisions in the CAA recognize this

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The Poet Laureate of Potholes

by Sophia M. Stadnyk
Senior Associate Counsel

Antonio Batista, a 73-year-old retiree, had contacted his city councillor, Pat Saito, about several issues—an amount in his property tax bill that he felt was incorrectly included, and concerns about development issues and illegal parking in his community. He was unable to reach the councillor personally, and a response letter from her staff failed to reach him. This perceived lack of response, and a news item that reported Ms Saito's joking suggestion that potholes could serve the useful purpose of slowing down traffic, prompted Batista to write his first poem about Ms Saito, titled "What is good or bad with Mrs. Pat Saito" (including: "Why why why is She/ Is She looking for Pot/ holes when she showd [sic] be/ in the office doing/ her work?"). The poem, sent anonymously to other councillors (but not Ms Saito), was signed "the Bed Wolf." (Batista later explained he meant "the Bad Wolf".)

Apparently finding this to be an adequate outlet for his frustration, Batista followed this up with a second poem, also about Pat Saito and pot holes, which he posted on mail boxes and newspaper boxes in his neighbourhood. It included the following:

We are going to dig a pot hole
about six feet long and 3 feet wide
and five feet deep to hide
her body and God will take care
of Her Soul, but We can not
forgive her for doing nothing.
She can keep running
at a good pace but
We will make sure
that She is in HEAVEN
and out of the Race

It included a photograph of Saito and the line "Do You know Her?" When Ms Saito learned of the poem, she contacted the police. After Batista admitted he wrote the poem (pointing out that it was meant in fun), he was charged with uttering a threat to cause death and intimidation pursuant to s. 264.1(1)(a) of the *Criminal Code* (every one commits an offence who, in any manner, "knowingly utters, conveys or causes any person to receive a threat (a) to cause death…to any person"). After a two-day trial, he was found guilty on the death-threat charge and received a conditional discharge, subject to a 12-month term of probation. In his reasons, the trial judge referred to Batista's denial of any intention to threaten Ms Saito with the poem, noting the defense position that the poem was only "satire, intended to be in jest." However, he found that Batista had harboured a long-standing animus towards the councillor, and reviewed the last three stanzas of the poem "through the eyes of a reasonable person" before concluding that the poem was actually a threat. The trial judge rejected the freedom of expression argument, finding that a threat was not protected by s. 2(b) of the *Charter of Rights and Freedoms* simply because the target, the councillor, was an elected figure. Batista appealed.

The Ontario Court of Appeal allowed the appeal, set aside the conviction, and substituted an acquittal. In evaluating whether an offence occurred under s. 264.1(1)(a), a court was to look at the words objectively, within the context of all the written words, having regard to the person to whom they were directed, and then decide if the words conveyed a threat of serious bodily harm to an average, reasonable person (specifically, one who was "objective, fully-informed, right-minded, dispassionate, practical and realistic"). Second, the court was to consider whether the Crown had established that the accused made the threat knowing that it would be taken seriously. As to the "reasonable person" element, the court held that the testimony of the parking enforcement officer who reported the poem, the investigating police officer, and Ms Saito concerning their reactions, was not determinative, as "their evidence amounted to a personal opinion that did not necessarily satisfy the requirements of the legal test," and the "perspective of the reasonable person" was different. Nothing in the prior dealings between the parties, the content of the poem as a whole, or the manner of circulating it, supported the conclusion that the "threat" in the poem was meant to be taken seriously. Turning to s. 2(b) of the *Charter*, the court held that, while it had been unnecessary for the trial judge to engage in an in-depth s. 2(b) analysis, it was necessary for him to "consider the poem as political commentary before determining whether it constituted a threat at law." Specifically, the poem's purpose of "denigrating the elected councillor's level of job commitment or competence provide[d] important context for a consideration of whether the impugned stanzas of the poem constitute[d] a threat," as an informed reasonable person would "be cognizant of the right of ordinary citizens to criticize and ridicule their elected representatives." A consideration of all of these elements indicated that the court below erred: "[n]o matter how misguided, offensive, and badly written the poem, the words at issue cannot meet the legal definition of a threat." *R. v. Batista*, 2008 ONCA 804 (Ont. C.A. Nov. 28, 2008). **ML**



The IMLA Municipal Attorney List

Just When You Think You've Heard It All…

by Don Knight

In the last Listserv column, we all learned about how to search the Listserv archives, thanks to Lawton Langford, President and CEO of Municipal Code Corporation, the Nation's leading codifier of local government ordinances. Now it's time to put that knowledge to work. Let's try to find some of the interesting topics that have shown up on the List recently. But first, for those who don't have the last column handily available, let's recap with a short refresher course.

To search the archives, you must have a password. Creating a password is easy and can be accomplished online:

- go to *www.municode.com* and click the eighth bullet, "Listservs,"
- click the "FAQs" link at the top middle of the screen,
- click "Establishing a Password,"
- click "Click Here" adjacent to "Attorney List,"
- enter the e-mail address you used in subscribing to the Listserv, and a password (twice for verification purposes),
- click "Register Password" button at the bottom of the dialogue box,
- you will see a Confirmation Sent message—open your e-mail software and reply to the confirmation e-mail sent to you by the Listserv.

On completion of these steps, you'll have a password and can search the archives. Past Listserv messages are stored at the *www.municode.com* site. The length of time messages are available has not been limited, and MCC guarantees at least six months.

To search the archives:

- go to *www.municode.com* and click the eighth bullet, "Listservs,"
- click the "List Archives" link in the middle of the screen,
- log in using the e-mail address you subscribed with and your password,
- click the "Search Archives" link at the bottom of choices under the title "options," and
- enter your search word in the any of the dialogue boxes and click "search" at the bottom right.

Searches can be by author, date range or key word. A "hit list" of messages meeting your search criteria will be returned, along with an excerpt from the original message. Clicking on the "Item #" to the left of the hit list will open the original message.

Some Interesting Topics

One of the advantages of archive searches is that you can go back and find topics you may have missed or that you dismissed with "Poor guy, I'm glad I don't have to deal with that," only to find the same issue land on your desk a few weeks or months later. Here's a sample of some recent topics:

Porn on Library Computers. To filter or not to filter, that is the first question. And if you don't filter, how should you address the possibility of younger patrons being exposed to adult-oriented content on library computers being used by others? Should computers screens be easily viewable by passing patrons to discourage inappropriate use, or secluded, so that minors are not inadvertently exposed to adult content? And what about the librarians? Should they be expected to enforce "appropriate use" policies if that means they will inevitably be exposed to pornography?

"You're Telling Me We Have No Idea Who is Supposed to Be in Jail or When They Get Out?" One list member inquired about other local governments' experiences with a web-based police and jail-tracking system that had suffered a catastrophic loss of data. Ouch! "I'm sorry, Mr.—was it Smith?—yes, Mr. Smith, so how long were you going to be staying with us?"

The FACT Act of 2003. If your city operates a utility, it is likely subject to the new FTC Red Flag regulations. If you're thinking, "What's that?"—it's time to search the Listserv archive for information on what you need to do.

Good Samaritans Flee California in Search of Sanity. List members were alerted to a recent California Supreme Court decision, ruling that a young woman who pulled a coworker from a crashed vehicle wasn't immune from civil liability because the care she rendered wasn't medical. The court held that the "Good Samaritan" could be held liable for worsening the crash victim's injuries by pulling her from a smoking vehicle (and one the woman thought was about to burst into flames). If you find this hard to believe, you need to search the archives for yourself.

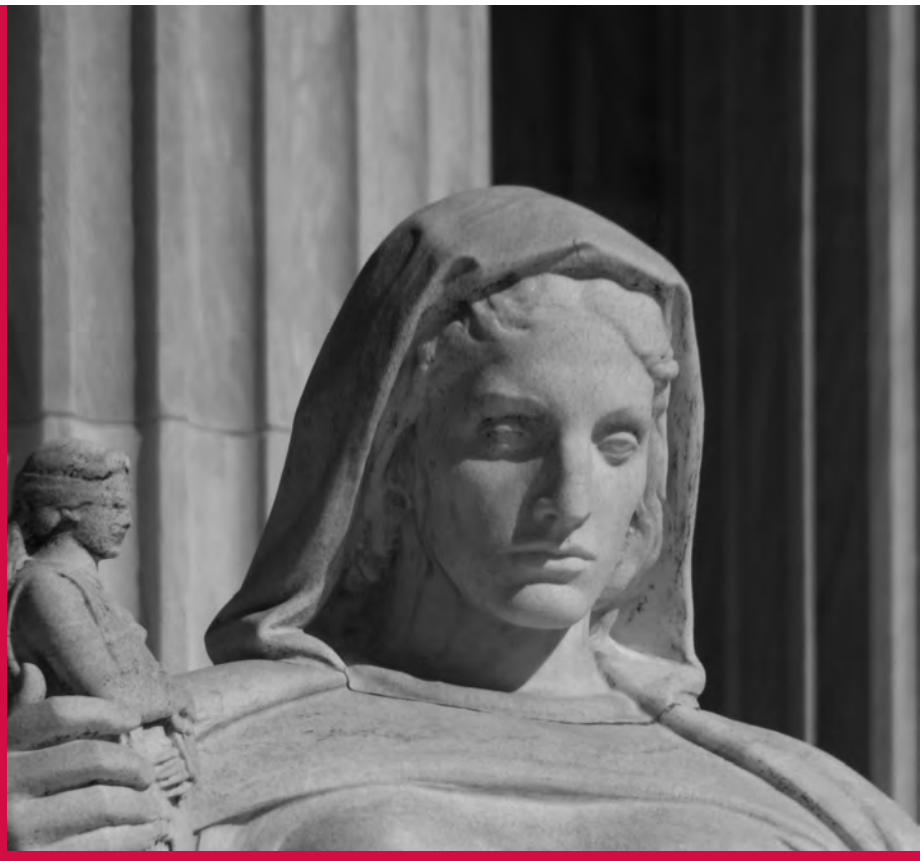
But Wait: There's More…!

Those samples aren't half the wacky or need-to-know topics you will see every week on the Listserv, so if you aren't already a member, what are you waiting for? ML

Don Knight is an Assistant City Attorney for the City of Dallas. He advises and represents city officials on a variety of legal matters, including telecommunications, cable, electric and gas utility regulation, technology acquisitions, and electric service agreements. Since 2001, Mr. Knight has served as the Chair of the Texas Coalition of Cities For Utilities Issues (TCCFUI), which represents over 100 Texas cities of all sizes.

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IMLA CAREERS



JOBS! In 2008, IMLA introduced an online job board, *IMLA Careers,* aimed specifically at serving the needs of the local government legal community. See http://careers.imla.org (or click on *Careers* on the IMLA homepage, www.imla.org). Rates are posted on the site—and IMLA members are entitled to discounted rates for using the site!





Civil Rights

Voting Rights and Photo ID

In 2005, the citizens of Albuquerque approved an amendment to their City Charter that required the production of photo identification for in-person voters in all municipal elections. The stated purpose was to prevent voter fraud and identity impersonation for in-person voting (thus, it did not address absentee voters). However, the amendment allowed a voter without the requisite identification to submit a provisional ballot, after completing a clerk-supplied affidavit as to identity. The vote would then be counted once the individual presented photo identification to the city clerk within ten days of the election date. Also, the city clerk provided free photo identification cards at any time, including on election day and during the ten-day period following an election. The plaintiffs, City residents and various organizations representing voters and homeless individuals, challenged the constitutionality of the Charter amendment, claiming that it violated equal protection and First Amendment rights. The district court granted summary judgment in favor of the plaintiffs on the equal protection claim and in favor of the defendants on the First Amendment claim. The City appealed. After the district court entered its final order, but before the oral argument in the Tenth Circuit, the U.S. Supreme Court decided the case of *Crawford v. Marion County Election Board*, 128 S.Ct. 1610 (2008), where the Court upheld, against a facial equal protection challenge, an Indiana requirement that photo identification be presented before voting. In *Crawford*, the Court held that the appropriate standard for evaluating constitutional challenges to a regulation affecting the right to vote was to balance the restrictions imposed by the regulation against its justifications. Justices Scalia, Thomas, and Alito, in a concurring opinion, stated that the burden imposed by the photo identification law was "minimal and justified," and that the law was a "generally applicable, nondiscriminatory voting regulation."

With the *Crawford* decision in mind, the U.S. Court of Appeals for the Tenth Circuit reviewed the grant of summary judgment. The City argued the plaintiffs' lacked standing, and that the law properly distinguished between in-person and absentee voters. In the court below, the plaintiffs successfully argued that the law created an arbitrary distinction between in-person and absentee voters by only requiring in-person voters to present identification. The Tenth Circuit disagreed, finding that absentee voting was fundamentally different than in-person voting and had its own set of procedures by which to confirm a voter's identity. The law was intended for in-person voters only and, since there were clear differences between in-person and absentee procedures, the law's distinction was proper. Next, analyzing the law using the balancing test in *Crawford*, the court ruled that the law was valid. The justifications for the requirement were to prevent voter fraud and impersonation. Dealing with the district court's finding that the City did not present any evidence of past instances of voting fraud, the Tenth Circuit referred to *Crawford*, where the Supreme Court did not require Indiana to present specific evidence of past conduct to justify its photo identification requirement. Balancing the government's need to prevent fraud against the burden on an in-person voter, a voter without ID could still cast a provisional ballot, and at most, would be burdened with an additional single trip to the city clerk's office. Because an identical burden was found to be permissible in *Crawford*, the court here found it was permissible as well, and the district court's judgment invalidating the law was reversed. *The American Civil Liberties Union of New Mexico v. Santillanes*, 546 F. 3d 1313 (10th Cir. 2008).

Red Light Cameras

In 2003, the City of Chicago installed so-called "red light cameras"—cameras to take photos of cars that ran red lights and made illegal turns. The ordinance provided that the vehicle owner was liable for the $90 fine, regardless of who was driving, although the ordinance exempted certain leases (in such cases, the lessee, rather than the owner, was responsible). Persons cited could defend by showing that the vehicle or its plates had been stolen or that the vehicle had been sold, but could not raise the defense that someone else was driving. The plaintiffs, various owners who had been fined under the ordinance, argued that the system violated the equal protection and due process clauses of the Fourteenth Amendment. The district court held otherwise and entered summary judgment for the defendants. On further appeal, the U.S. Court of Appeals for the Seventh Circuit affirmed. "Substantive due process depends on the existence of a fundamental liberty interest ... and no one has a fundamental right to run a red light or avoid being seen by a camera on a public street. The interest at stake is a $90 fine…, and the Supreme Court has never held that a property interest so modest is a fundamental right." Further, the ordinance was rational: the photographic evidence reduced the costs of law enforcement and increased the proportion of offenses that were detected. Placing the responsibility on the owner induced owners to exercise control over their vehicles, without foreclosing the opportunity for them to recover the cost from the wrongdoer. Lastly, the distinction between lessors and owners was not irrationally discriminatory, given that the City's goal was to impose the fine on the person who, based on readily-available legal documents, was

in charge of the vehicle. *Idris v. City of Chicago*, No. 08-1363, 2009 WL 18138 (7th Cir. Jan. 05, 2009).

Due Process—Claim Preclusion

Giragosian owned and operated a gun shop in the Town of Arlington, Massachusetts, and also offered training on gun safety at the premises. In 2007, while he was training a customer to use a handgun, the customer intentionally shot himself in the head. The same day, the Arlington Police Department investigated and concluded that Giragosian was not at fault, but suspended his licenses to carry and sell firearms, and requested the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to investigate his business. Giragosian challenged the license suspensions in state court, and the court hearing the matter granted his request to vacate the license suspensions. However, instead of reinstating the licenses, Ryan, the police chief, completely revoked the licenses, giving as reasons Giragosian's failure to report stolen firearms, failure to undergo a firearms safety instructor course mandated by the state court, and various violations uncovered in the ATF investigation. Giragosian responded with a 42 U.S.C. § 1983 suit in federal court, alleging that Ryan and the Town violated his rights under the Fourth and Fourteenth Amendments; he simultaneously brought a state court action also seeking reinstatement of his firearm licenses. The state court refused to reinstate the licenses, finding "sufficient grounds to conclude that the decision of [Ryan] in revoking [the] firearms licenses was reasonable and not arbitrary, capricious or an abuse of discretion." In the federal action, the Town argued *res judicata* (both claim and issue preclusion); Giragosian, for his part, argued that the federal court should ignore the state court judgment due to the lack of impartiality and numerous errors of law. The magistrate judge ruled and recommended to the district court that (1) issue preclusion barred the federal court from reexamining whether Ryan's actions were arbitrary, capricious, or an abuse of discretion, (2) the post-deprivation review process available in state court provided Giagosian with adequate process, and (3) qualified immunity shielded Ryan and the Town from suit. Accordingly, the district court granted the defendants' motion to dismiss under Rule 12(b)(6). Giragosian appealed.

On appeal, the U.S. Court of Appeals for the First Circuit considered whether Giragosian's federal claim was barred by the doctrine of *res judicata*. In Massachusetts, the doctrine encompasses both claim and issue preclusion and, generally, follows the rule that "when two actions are pending which are based on the same claim, or which involve the same issue, it is the final judgment first rendered in one of the actions which becomes conclusive in the other action ... regardless of which action was first brought." Under the doctrine of claim preclusion, Massachusetts evaluated three elements: the identity of privity of the parties; the identity of the causes of action; and a prior final judgment on the merits. The First Circuit held that all three elements for claim preclusion were met, as the parties were identical in both cases, the facts in both cases were identical and left no doubt that the causes of action were identical, and there was a final judgment in the state court. The court ruled that Giragosian had a "full and fair opportunity" to litigate his claim in state court and could have raised his constitutional claims at that time. Preventing him from proceeding with a claim in federal court protected "against the expense and vexation attending multiple lawsuits, conserved judicial resources, and fostered reliance on judicial action by minimizing the possibility of inconsistent decisions." *Giragosian v. Ryan*, 547 F. 3d 59 (1st Cir. 2008).

First Amendment

Parade Ordinances

The City of Seattle's parade ordinance required those wishing to march or have a parade to first obtain a permit from the City's chief of police. The ordinance indicated that the police chief, when issuing a permit, had the discretion to require marchers to use sidewalks, instead of the streets: "The Chief of Police may modify the place and hour of formation, the proposed line of movement or march, and the scheduled starting time in the interest of vehicular or pedestrian traffic safety." However, the chief had no authority to deny a permit. The Seattle affiliate of the October 22nd Coalition to Stop Police Brutality, Repression and the Criminalization of a Generation was an association dedicated to raising awareness about police brutality. The Coalition had applied for, and received, a permit to march every year since 2001. In 2003, a permit had been granted, but on the day of the march, one of the police officers present told members they could only use the sidewalks, as the parade permit had been "rescinded," and that the decision to rescind was "based on the number" of marchers (approximately 80 to 100). The City's ordinance did not include a minimum numbers requirement in all, or even most, parade permits as a condition of allowing marchers to use the streets, nor did it set the minimum requirement at a consistent number. The Coalition maintained that the City's permitting practices suggested that political or protest marches were more likely than other parades to have their permission to use the streets conditioned on a minimum number of marchers. It sued, claiming that the conduct of police officers at the Coalition's 2003 parade violated their free speech and due process rights, and that the parade ordinance, on its face, violated the First Amendment. It argued that restricting marchers to the sidewalks amounted to a constructive and impermissible denial of a parade permit.

The ordinance was a content-neutral time, place and manner regulation. The issue was whether the ordinance violated the free speech guarantees of the First Amendment because, on its face, it impermissibly granted "the licensing official ... unduly broad discretion," pursuant to *Thomas v. Chicago Park Dist.*, 534 U.S. 316 (2002). The U.S. Court of Appeals for the Ninth Circuit concluded that it did: "the ordinance by its terms gives the Chief of Police unbridled discretion to force

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marchers off the streets and onto the sidewalks, unchecked by any requirement to explain the reasons for doing so or to provide some forum for appealing the chief's decision. We therefore hold that the parade ordinance is facially unconstitutional." The ordinance allowed officials to restrict access to the streets whenever such a restriction was in the undefined "interest of" traffic and pedestrian safety. This language gave officials "less guidance and more leeway" than the standards the Supreme Court and the Ninth Circuit had previously approved, especially since the ordinance had no requirement that the reason for the restriction be articulated, or any mechanism for direct administrative or judicial review. In finding the ordinance to be invalid, the court also pointed to the implementation of the ordinance: as applied, the ordinance seemed to be akin to a permit scheme that allowed the deciding official to grant or deny a permit for speech; further, the police had been enforcing the ordinance "as though it authorized denying permits (relegating marchers to the sidewalks as normal pedestrians), although the City has repeatedly claimed that all permits must be granted." *Seattle Affiliate of the October 22nd Coalition to Stop Police Brutality v. City of Seattle*, 550 F. 3d 788 (9th Cir. 2008).

License Plates—Whose Speech?

Illinois permitted vehicle owners in the state to have, for a fee, specialized license plates that included a specific message or symbol. State law provided that at least 10,000 applications had to be received for each new license plate before the Secretary of State issued the specialized plates. Although the law did not specifically require it, the Secretary of State traditionally referred to the state legislature for enabling legislation concerning the plates. Choose Life Illinois (CLI) was a nonprofit agency that collected more than 25,000 signatures towards obtaining approval for a specialty license plate with the words "Choose Life." The Secretary informed CLI that he could not issue the plate without approval by the Illinois General Assembly. For the next few years, CLI tried to gather support in the Assembly for the license plate; however, the proposal died in a subcommittee. CLI then bought a First Amendment free speech claim against the Secretary, alleging that the refusal to approve the plates constituted viewpoint discrimination within a government-created forum for private speech. The district court granted summary judgment for CLI, stating that the Secretary did not need enabling legislation; further, the specialty-plate program established a forum for private speech, and excluding CLI's message of "Choose Life" was impermissible viewpoint discrimination.

The U.S. Court of Appeals for the Seventh Circuit addressed the questions of whether the messages on specialty license plates were the government's own speech, or private speech; if they were private speech, did the exclusion of CLI's proposed language violate the Free Speech Clause of the First Amendment? First, it held the message on the plates was private, not government, speech, siding with the position taken by the Ninth and Fourth Circuits. The specialty plates "serve[d] as mobile billboards for the organizations and like-minded vehicle owners to promote their causes and also [were] a lucrative source of funds." Although the State and the organization shared editorial control, the organization typically developed the plate design and the slogan or symbol that went on the license plate. In addition, the plates themselves were "most closely associated with the drivers and the sponsoring organizations, and the driver [was] the ultimate communicator of the message." The court next determined that the plates constituted a nonpublic forum, due to the fact that their primary purpose was vehicle identification, not facilitating an exchange of ideas, and because the plates themselves were "heavily regulated by policy and practice." Finding a nonpublic forum, the court reviewed CLI's exclusion from the specialty-plate program under a reasonableness standard. The exclusion was reasonable, as "[a]lthough the messages on [the plates were] not governmental speech, they [were] reasonably viewed as having the State's stamp of approval…it [was] reasonable for the State to maintain a position of neutrality on the subject of abortion." *Choose Life Illinois, Inc. v. White*, 547 F. 3d 853 (7th Cir. 2008).

Personnel and Employment

Employee Screening and Errors in Reports

Pendergrass was employed by a pharmacy, Rite Aid. He was suspected of theft and aggressively questioned about merchandise losses by the store's loss prevention officer. Pendergrass claimed that the officer coerced him into signing a false written statement. Subsequently, in January 2006, Pendergrass was fired for unexplained merchandise losses, fraudulent transactions, and other related infractions. At the same time, the employer published a report of the incident with ChoicePoint, a "data aggregation company that operates as a private intelligence service to government and industry." Employers accessed its database through the Internet or in other ways. The report apparently referred to "Cash Register Fraud and Theft of Merchandise," with a total theft amount of $7,313.00. This listing, Pendergrass alleged, resulted in him being turned away when he sought employment with CVS, Walgreens, and Target. One prospective employer advised him of the bad report. In January 2008, Pendergrass sued, alleging violations of the Fair Credit Reporting Act (FCRA) by Rite Aid and ChoicePoint, and raising a defamation claim under Pennsylvania law against Rite Aid and ChoicePoint. He alleged his employer had made the report "with malice or willful intent to injure [him]" and specifically intended to prevent him from getting future employment. He further alleged that ChoicePoint repeatedly republished the defamatory report, with the result that the plaintiff was "branded a thief" and unable to obtain employment. Rite Aid sought to dismiss the defamation claim on the basis that the applicable statute of limitations barred the claim. In Pennsylvania, the statute of limitations for defamation claims was one year from the date of publica-

tion. According to Pendergrass, Rite Aid was liable for each "republication" of its initial report, including the July 2007 viewing by Target, and any other republications occurring within the statutory limitations period.

The court presumed that the discovery rule delayed the beginning of the limitations period to November 30, 2006, when the plaintiff alleged he first learned of the defamatory report. Second, it declined to apply the "single publication" rule (that any one edition, broadcast, or similar aggregate communication was a single publication) in this case, "given the vast differences between traditional 'mass publication' for a general audience and confidential publication to a consumer reporting agency." Rite Aid did not circulate the report to a wide audience; instead, it transmitted it to ChoicePoint with the knowledge that it would be made available to subscribing customers upon request, and viewed on separate, distinct occasions. Therefore, there was no "aggregate publication." Accordingly, the motion was dismissed in respect of any republication of the report that occurred on or after January 2007, but granted for any republication occurring prior to that date, being time-barred. *Pendergrass v. ChoicePoint, Inc.*, No. 08-188, 2008 WL 5188782 (E.D. Pa. Dec. 10, 2008).

Employment Discrimination—Evidence

Stover, an African-American woman, was employed by the defendant school district as a secretary and administrative assistant. A few years prior to Stover's resignation in 2006, the District created and filled an unadvertised position for a "Central Office Administrative Coordinator." This position was filled by a O., a white man. His starting salary was significantly higher than what Stover was being paid, and he had a master's degree, while Stover had a bachelor's degree. When Stover learned of the new hire's salary, she argued that like O., she was an administrative assistant and performed substantially equal work, and, therefore, should be paid the same. She filed a charge with the Equal Employment Opportunity Commission (EEOC), alleging that the District had discriminated against her on the basis of race, and violated the Equal Pay Act (EPA). A year later, Stover filed a complaint in federal court, alleging race discrimination and a violation of the EPA, and adding claims for gender discrimination and retaliation. At trial, the district court precluded certain evidence, including evidence of the District's practice of not advertising employment openings. The district court ultimately permitted the case to go to a jury, and the jury returned a special verdict in favor of the District on all claims. The District also moved for, and was granted, an award of attorney's fees and costs. Stover appealed, claiming that the district court made several errors, including: not permitting alleged admissions of discrimination and discriminatory intent to be considered as direct evidence; permitting evidence of the new hire's qualifications; allowing evidence that attacked Stover's character; excluding evidence of the District's hiring practices; and dismissing the constructive discharge claim.

The U.S. Court of Appeals for the Fifth Circuit affirmed in part, reversed and vacated in part, and remanded. Dealing first with the district court's grant of summary judgment in favor of the District on the constructive discharge claim, the court applied the requirement that the employee must "offer evidence that the employer made the employee's working conditions so intolerable that a reasonable employee would be compelled to resign." Stover presented no evidence of a demotion, a reduction in salary or job responsibilities, reassignment to menial work, badgering or harassment, or offers of early retirement. "[A]t best, the evidence shows that Stover was disgruntled ... [but] none of the evidence increases the severity of pervasiveness of any harassment to the level required to support a constructive discharge claim." On Stover's challenges to various evidentiary rulings in the court below, the appellate court held that the district court properly admitted evidence comparing the skill, effort, and responsibilities required of the jobs performed by Stover and O. There was sufficient evidence presented at trial for the jury to conclude that the District did not discriminate against Stover on the basis of race or sex, so that her claim (that evidence that the District admitted discriminatory conduct and violations of the EPA should have been considered as direct evidence of discrimination) was not justified. Stover also claimed that the court below had erroneously permitted evidence that Stover had destroyed or deleted computer information. The appellate court found that this was not an abuse of discretion, as "the district court stated that Stover had portrayed herself to be a victim and work attitude was at issue. The court permitted the evidence for purposes of impeachment." Likewise, on the remaining argument—that the district court improperly precluded evidence of discriminatory hiring practices by the District—the Fifth Circuit found no error had occurred. The "lack of a policy requiring advertisement under these circumstances is not evidence of discrimination." *Stover v. Hattiesburg Pub. Sch. Dist.*, 549 F. 3d 985 (5th Cir. 2008).

Public Records

Production of Deleted E-mails

In the course of a public debate on whether to renovate a government building (a courthouse) or to demolish it, the Seneca County Board of Commissioners approved an architectural study of the County government's future space requirements. The resulting report identified five options. The report was circulated by e-mail to the Board members by Commissioner Nutter prior to August 2006, when the Board approved a variation of one of the options that included demolition. Nutter had received no e-mail responses from the other commissioners, and no one had raised the issue during any meeting prior to a Board resolution in an open meeting. Claiming there had been no public deliberations on the approved option, the applicant company sought to review all outgoing and incoming e-mails, including "all sent messages, received messages, deleted messages, and drafts of messages" of specified County Commissioners, including Nutter, up to August 2007. The records produced contain-

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ed no e-mails from Nutter's inbox between January 1 and July 19, 2007, and none from Commissioner Bridinger's inbox or sent-messages folder. The applicant claimed that Nutter admitted to deleting e-mails he received between January 1 and July 19, 2007, and that Bridinger admitted he deleted all e-mails until recently. There were also substantial gaps between the dates of e-mails provided by another commissioner. Under the County schedule for records retention and disposition, e-mail that had significant administrative, fiscal, legal, or historic value had to be retained; others could be deleted. According to the Board's clerk, the individual computer user was responsible for making the determination of when an e-mail could be deleted. The Board advised that it and its IT contractor had searched every computer hard drive of every person from whom e-mails were requested, and it provided every available document responsive to the request. Deleted e-mails could be possibly be retrieved from a hard drive with "very expensive forensic tools," but "that information would be considered deleted by the user and would not be available to the user." The company nonetheless applied to compel the Board to, among other things, recover the content of requested e-mails that had been deleted by the commissioners, and to make the recovered e-mails promptly available for inspection and copying. It argued that when a public officer "unlawfully" destroyed public records but the contents of the records could be recovered or restored, the public office's obligation to maintain the records included an obligation to take the necessary steps to restore the records and to make them available under the State's Public Records Act.

The court started with the proposition that deleted computer files, whether they were e-mails or otherwise, were retrievable or discoverable, as "the mere deletion of some of the e-mails by the commissioners did not necessarily destroy them." The applicant's computer expert indicated that at least some of the deleted messages could be retrieved through forensic recovery techniques. Second, the court found that it was a reasonable inference that the e-mails had been deleted in violation of County policy. There were substantial gaps in the responsive e-mails provided, and no incoming or outgoing e-mails were provided from Commissioner Bridinger's public account. "These facts raise the reasonable inference that the e-mails were deleted in violation of the county's records retention and disposition schedule; it defies logic that all public-office e-mail during these lengthy periods lacked significant administrative, fiscal, legal, or historic value." As these were public records, the "mere fact" that the cost of the recovery services could be expensive did not bar the court from ordering that recovery be attempted.

Several factors supported having the Board bear the expense of the forensic recovery of the deleted e-mails, including the fact that the Board failed to maintain the requested e-mails in accordance with the applicable schedule for records retention and disposition. Accordingly, the court granted the application to compel the Board to make reasonable efforts to recover, at its expense, the requested deleted e-mails and to make them promptly available for inspection. The court added, however, "that in cases in which public records, including e-mails, are properly disposed of in accordance with a duly adopted records-retention policy, there is no entitlement to these records under the Public Records Act." *State ex rel. Toledo Blade Co. v. Seneca County Bd. of Comm'rs*, No. 2007-1694, 2008 WL 5157733 (Ohio Dec. 09, 2008).

Search and Seizure

Traffic Stops—Tandem Drivers

The issue in this case was whether there was sufficient evidence of tandem driving such that probable cause to arrest the driver of one vehicle established probable cause to arrest the driver of a second vehicle. A police officer in New Mexico, Officer Marquez, saw Rodriguez-Rodriguez ("Rodriguez") driving a red Nissan just ahead of a brown pickup truck. Both vehicles had California plates and both were traveling at a speed below the speed limit. The driver of the brown pickup was stopped for a traffic violation, refused to answer questions, and tried to run away. The officer smelled marijuana and a large bundle of it was visible in the cab of the truck. Marquez contacted deputies to intercept the Rodriguez vehicle, and it was stopped some six miles away. Rodriguez consented to a search of his vehicle, where evidence was discovered linking him to the driver of the brown truck. Rodriguez was taken into custody, admitted to working in conjunction with the driver of the brown truck in the transport of marijuana, and was charged with various drug offenses. He sought to suppress the evidence, arguing that his traffic stop violated the Fourth Amendment because it was not supported by reasonable suspicion, and that his investigative detention amounted to an illegal arrest because it exceeded the scope of any arguably permissible stop and because the officers lacked probable cause to believe that he had violated the law.

The U.S. Court of Appeals for the Tenth Circuit affirmed the denial of his motion to suppress evidence. The critical question was whether Officer Marquez had probable cause to believe that Rodriguez was committing a crime. "Sufficient evidence that two vehicles are driving in tandem plus evidence that one vehicle contains contraband can provide probable cause sufficient to support arresting the driver of the other vehicle." Here, there was "considerable objective evidence that the brown pickup and red Nissan were driving in tandem," as the two vehicles traveled a mere two car lengths apart on a highway in very light traffic; Rodriguez abruptly sped off when Marquez stopped the pickup; and the driver of the pickup seemingly waited for Rodriguez's vehicle to elude Marquez's range of vision before he pulled over. When Officer Marquez discovered that the pickup truck was carrying marijuana, the evidence of tandem driving created probable cause that Rodriguez was committing a crime as well. This

probable cause was sufficient to support his traffic stop and any subsequent arrest. Rodriguez's constitutional rights were not violated even if his detention was an arrest, since the initial stop was permissible. *United States v. Rodriguez-Rodriguez,* No. 07-2214, 2008 WL 5340311 (10th Cir. Dec. 24, 2008).

Extra-Jurisdictional Arrests

Engleman, while staying with his parents in Oklahoma, noticed some prowlers and dialed 911. The call was routed to the local county sheriff's office, located in Arkansas, and Deputy Sheriff Murray and others were sent to investigate. The call was taken from a telephone number with an area code assigned to northwestern Arkansas, and the address given was a street address in Arkansas. While en route, the officers learned of an outstanding warrant for Engleman. The officers arrived and informed the parents about the warrant, and located Engleman in the home. Both Engleman and his father took the position that, as the house was actually in Oklahoma, not in Arkansas, the officers could not arrest Engleman. (Arkansas law authorized law enforcement officers to execute its arrest warrants "in any county in the state," but did not authorize out-of-state arrests.) Nonetheless, the officers arrested Engleman and took him to the county jail. Engleman brought suit under 42 U.S.C. § 1983, alleging that the officers used excessive force in violation of the Fourth Amendment, and that the arrest in Oklahoma was unreasonable under the Fourth Amendment: by arresting him in Oklahoma on an Arkansas warrant, Deputy Murray exceeded his jurisdictional authority, which violated Engleman's Fourth Amendment right to be free from unreasonable seizures. In the course of litigation, a satellite positioning system revealed that, while the postbox for the Engleman property was in Arkansas, the actual house itself was located in Oklahoma. The defendants moved for summary judgment, arguing that they were entitled to qualified immunity.

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Inside IMLA *continued from page 5*

These revenues help support our advocacy program and some of our other services, such as this magazine and our e-newsletters. The revenues also support some of our newer projects. As you know, we have started some groups for people with common interests. These groups include dedicated listservs and regular conference calls. The groups include "code enforcement," "coastal communities," "capital cities," "sports cities," "university cities/college towns," "counties," and will include "border communities," and "young lawyers." While the listservs are fairly inexpensive to operate, the conference calls are another matter. These groups provide great opportunities for our members to network with attorneys in other communities with common interests and common practice areas. We need additional revenues to sustain them.

Enough whining! We have a terrific program planned for the Seminar in April and we are already developing, with the City of Miami, a program for the Annual Conference that will be one of our best ever. If you have a construction project that has been affected by the economic slowdown and is late, in default, or you have claims, you will not want to miss our Annual Construction Law program, scheduled for March 1–3, 2009 in San Diego. **ML**

The Americans with Disabilities Act *continued from page 11*

Accord, Jarvis v. Potter, 500 F.3d 1113, 1121-22 (10th Cir. 2007) (court upholds termination of a postal worker who suffered from post-traumatic stress disorder, PTSD, and who would physically attack coworkers who startled him, under a "direct threat" defense).
37. *Id.* at 1087.
38. Sista v. CDC Ixis North America, Inc., 445 F. 3d 161 (2d Cir. 2006).
39. *Id.* at 169-74.
40. 117 F. 3d 351, 353 (7th Cir. 1997).
41. *Sista,* 445 F. 3d at 172-73. *But see* Husowitz v. Runyon, 942 F. Supp. 822, 832 (E.D.N.Y. 1996) (noting the Second Circuit rejects the distinction between a handicapping condition and specific conduct resulting from the condition in determining if an employer's decision to take action against an employee is based on the plaintiff's disability, relying on *Teahan v. Metro-North Commuter R.R. Co.*, 951 F. 2d 511, 515-17 (2d Cir. 1991)).
42. The majority of municipal employees have property interests in their employment, requiring cause for discharge. *See, e.g.*, Gilbert v. Homar, 520 U.S. 924, 928-29 (1997) (employees who can be discharged only for cause have a constitutionally-protected property interest in their tenure and cannot be fired without due process).
43. Generally, "just cause" factors include: (1) whether the employee had forewarning or foreknowledge of possible disciplinary consequences of his misconduct; (2) whether the employer's policy or rule is reasonably related to the orderly, efficient, and safe operation of the agency; (3) whether a fair investigation was conducted prior to imposing discipline; (4) any proof of misconduct; (5) whether the policy or rule was applied evenhandedly to all similarly-situated employees; (6) whether the punishment fit the severity of the conduct, in light of progressive discipline; and (7) any mitigating circumstances. *See* Discipline & Discharge in Arbitration, 33-35 (Norman Brand, ed., BNA Books 1998).
44. *See* Pence v. Tenneco Auto. Operating Co., Inc., 169 Fed. App. 808, 811 (4th Cir. 2006) (upholding an employer's decision to send an employee to the employer's doctor for medical evaluation for egregious behavior before interviewing him).
45. An excellent resource that addresses these questions is Beth Bates Holliday, Annotation, *Use of "Last Chance" or "Return to Work" Agreements Under Americans with Disabilities Act,* 6 A.L.R. Fed. 2d 453 (2005).
46. *See supra,* note 33. **ML**

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Cases *continued from page 37*

The district court accepted the magistrate's recommendation to grant summary judgment for the other officers, and as to the finding that Murray did not use excessive force and that the seizure was reasonable, but denied the motion with respect to Deputy Murray. He appealed, arguing that he was entitled to qualified immunity because it was objectively reasonable to believe that he was arresting Engleman in Arkansas.

The U.S. Court of Appeals for the Eighth Circuit reversed the denial of summary judgment. Engleman was required to proffer sufficient evidence to raise a genuine issue of material fact about whether a reasonable officer would have known that Deputy Murray's conduct violated a clearly established right. There were no material issues of fact, and, in the circumstances, notwithstanding the prohibition on executing an arrest warrant outside of the arresting officer's jurisdiction, it was objectively reasonable for an officer in Deputy Murray's position to have believed that he was executing the warrant in Arkansas. The 911 system identified Engleman's call as originating from a telephone number with an Arkansas area code and an Arkansas address and mailing address. The arrest warrant had been issued in Arkansas and stated that Engleman resided at 24512 Van Fleet Road in Arkansas, the same address that the officers were being called to. The fact that Engleman advised the officers they were in Oklahoma was not dispositive, as the "protests of a resisting arrestee generally do not make an objectively reasonable arrest unreasonable." Accordingly, Deputy Murray's actions were objectively reasonable in light of the law and the information he possessed at the time, and he was entitled to qualified immunity. *Engleman v. Murray*, 546 F. 3d 944 (8th Cir. 2008). ML

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Supreme Court *continued from page 18*

of the questions presented does not warrant plenary review here." Opposing the motion to affirm, the utility district noted that the "appeal puts before the Court the most federally invasive law in existence," arguing that the 2006 reenactment of §5 is not a congruent and proportional response to present-day voting-rights circumstances; it was, rather, an improper and unconstitutional extension of a response appropriate to the scope and scale of problems two generations past into a never-ending future." Specifically, it points out that the "America that has elected Barack Obama as its first African-American president is far different than when §5 was first enacted in 1965. Appellees barely acknowledge the deep-rooted societal change, preferring to assume that conditions remain similarly dire despite overwhelming evidence to the contrary. There is no warrant for continuing to presume that jurisdictions first identified four decades ago as needing extraordinary federal oversight through §5 remain uniformly incapable or unwilling to fulfill their obligations to faithfully protect the voting rights of all citizens in those parts of the country."

Clearly, this case has important implications for states and local governments; the question is, how will the Supreme Court weigh in? ML

Federal *continued from page 28*

inherent authority.[16] The final third of the brief focuses on the Province of British Columbia. In Canada, federal and provincial governments split up the responsibility for environmental policy. British Columbia passed, and received royal assent for, a law that enables the adoption of California's regulations.[17] Unfortunately, the law will not be effective unless California is permitted to utilize its own adopted standards. This action by the Province demonstrated the brief's argument that the problem of climate change is one that requires "international, national, and subnational efforts."

It is anyone's guess as to how far this case will go. During his campaign, President Obama stated that he would have approved California's waiver request, and the new EPA Administrator will certainly start the approval process.[18] As we've seen before, it's another waiting game, but when the issue is global warming, just how long can we wait?

Notes

1. Massachusetts v. EPA, 127 S. Ct. 1438 (2007).
2. Clean Air Act, 42 U.S.C. § 7521 (West 2008).
3. No. 08-1178, 2008 WL 416849 (D.C. Cir., filed on May 5, 2008).
4. IMLA is participating in a brief managed by the Constitutional Accountability Center, along with the National Association of Counties, National League of Cities, National Conference of State Legislatures, National Association of Clean Air Agencies, American Planning Association, City of New York, King County (Washington), and the Canadian Province of British Columbia. *Brief for National Conference of State Legislatures, International Municipal Lawyers Association, et al. as Amici Curiae Supporting Petitioners, California v. EPA*, No. 08-1171, 2008 WL 416849 (D.C. Cir., filed on May 5, 2008).
5. California State Motor Vehicle Standards, 73 Fed. Reg. 12156 (Mar. 06, 2008). Under the law, automakers will have to reduce greenhouse gas emissions by 30% by 2016.
6. 42 U.S.C. § 7543(a) (West 2008).
7. 42 U.S.C. §7543(b) (West 2008).
8. *Id.*
9. California State Motor Vehicle Standards, 73 Fed. Reg. 12,156 (Mar. 06, 2008).
10. *Id.* at 12160.
11. Order re: *California v. EPA*, No 08-70011 (9th Cir. July 25, 2008).
12. The brief is available at http://www.theusconstitution.org.
13. IMLA brief, citing *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F. 2d 1095, 1115 (D.C. Cir. 1979).
14. IMLA brief, citing statement of Sen. Murphy, 113 Cong. Rec. S32,476 (1967).
15. 73 Fed. Reg. 12,163 (Mar. 06, 2008).
16. IMLA brief at 12.
17. *Greenhouse Gas Reduction (Vehicle Emissions Standards) Act*, S.B.C. 2008, c. 21.
18. Zachary Coile, *Obama Expected to Back Auto-Emission Waiver*, San Francisco Chronicle, Nov. 11, 2008, at A1. ML

BULLYING *continued from page 27*

9. Besides California, State legislatures that have introduced workplace bullying legislation include Connecticut (SB 60 in 2008); Hawaii (SB 2353 in 2004, SB 481 - 2005, HB 232 - 2005, SB 3269 - 2006, HB 2840 - 2006, SB 253 – 2007, HB 868 – 2007 and HB 1806 – 2007); Kansas (HB 2990 – 2006); Massachusetts (H 3809 – 2005); Missouri (HB 1187 – 2005); Montana (HB 213 – 2007); New Jersey (A 3590 – 2006); New York (A 7801A – 2007, A 04921 – 2007, S 2715 – 2007 and A 10291 – 2008); Oklahoma (HB 1467 – 2007); Oregon (HB 2410 – 2005, HB 2639 – 2005 and SB 1035 – 2007); Vermont (H 548 – 2008 and S 312 – 2008); and Washington (HB 2142 – 2008 and SB 6622 – 2008). *See* WBI, *Healthy Workplace Bill Legislative Activity – History at a Glance*, at www.workplacebullyinglaw.org/hwbgrid.html.

10. S. Res. 106, 23rd Leg. (Haw. 2006). The resolution is titled "Urging Hawaii Employers to Develop and Implement Standards of Conduct And Policies for Managers and Employees to Reduce Workplace Bullying and Promote Healthful and Safe Work Environments."

11. *See* The Victimization At Work Ordinance (Sweden – 1993); The Workcover Queensland Act (Queensland, AUS – 1996); The Protection From Harassment Act (Great Britain – 1997); The Social Modernization Law (France – 2002); The Onkelinx Law (Belgium – 2002); The Occupational Health and Safety Act (Victoria, AUS – 2004); The Psychological Harassment Act (Quebec, Canada – 2004); The Occupational Health, Safety and Welfare Amendment Act of 2005 (South Australia, AUS – 2005); The Occupational Health And Safety Amendment Act (Saskatchewan, Canada – 2007); and the Code of Practice For Employers And Employees on The Prevention And Resolution of Bullying At Work (Rep. of Ireland – 2007). *See also*, Kate McCormack, *Bullying and the Anti-Discrimination Act*, Queensland Anti-Discrimination Commission (2002), at www.adcq.qld.gov.au/newsletter/issue09/Bullying.html; HR & Diversity Management, Ltd., *Bullying And Harassment*, at www.hrmgt.co.uk/bullying.html; Human Resources and Social Development Canada, *Rights, Respect and Dignity: Interface of Labour Standards and Human Rights Legislation*, at www.hrsdc.gc.ca/en/labour/employment_standards/fls/research/research14/page06.shtml; New Brunswick Advisory Council on The Status of Women, *Workplace Bullying* (March, 2007), at www.acswcccf.nb.ca/english/documents/Workplace%20bullying%20POSITION%20PAPER%20March% 202007.pdf; CBS News, *Saskatchewan's Workplace Bullying Ban Now In Effect* (Oct. 01, 2007), at www.cvc.ca/canada/ saskatchewan/stry/2007/10/01/saskatchewen -bullying.html; Jurgen Oste, *Social Partners Evaluate Legislation On Workplace Harassment* (Jan. 23, 2004), at www.eurofound.europa.eu/eiro/ 2003/12/feature/ BE0312304F.htm; Tony Dobbins, *New Code of Practice to Prevent Workplace Bullying* (May 21, 2005), at www.eurofound.europa.eu/euro/2007/04/IE0704029I.htm; and *Workplace Bullying*, at www.en.wikipedia.org/ wiki/workplace-bullying#Australia.

12. An extensive listing of laws worldwide that address workplace bullying, prepared by the Organization International del Trabajo, can be found at www.ilo.org/public/spanish/dialogue/sector/themes/violence/legal.htm.

13. *See, e.g.*, Catherine Saillant, *A Bulwark Against Bullies*, THE LOS ANGELES TIMES, Dec. 05, 2005, at www.articles.latimes.com/2005/dec/05/local /me-bully5.

14. Jasper Gerard, *Bullying Court Case Led Victim To Lost Family*, THE LONDON TIMES, Aug. 06, 2006, at www.timesonline.co.uk/tol/news /uk/article601386.ece.

15. Gerry Bellett, *Ex-RCMP Officer Harassed On Job Gets $1 Million*, THE VANCOUVER SUN, Jan. 24, 2006 at www.bullyinginstitute.org/education/bbstudies/rcmp.html. Another Canadian case is *Sulz v. Canada (Attorney General)* (2006), 263 D.L.R. (4th) 58 (B.C. S.C.) (damages award of $950,000.00 to another former RCMP officer who was severely harassed and belittled at work by a superior; expert evidence was that plaintiff was "competitively unemployable" as a result).

16. *See, e.g.*, Denton v. Chittenden Bank, 655 A.2d 703 (Vt. 1994).

17. *Id.* at 706-07 (employee's claim that supervisor embarked on insulting and vindictive course of conduct toward him amounting to intentional infliction of emotional distress failed, as supervisor's conduct did not reach level of outrage necessary for finding of intentional infliction of emotional distress. Law not intended to cover "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities"); Frye v. St. Thomas Health Svcs., 227 S.W.3d 595 (Tenn. Ct. App. 2007) (employee failed to establish that the hostile work environment she encountered was age discriminatory, as nothing in the record established that her immediate supervisor treated age-protected employees any differently than non-protected employees, rather, the testimony clearly showed that employee's supervisor was an "equal opportunity oppressor," using her intense, dominant, abrupt, rude, and hard-nosed management style on all hospital employees). Of course, if an actual battery occurs during a bullying episode, or evidence exists showing that bullying was based upon an employee's protected status, a victim's chances of success greatly increase. *See, e.g.*, E.E.O.C. v. National Educ. Ass'n, Alaska, 422 F.3d 840 (9th Cir. 2005) (a pattern of abuse in the workplace directed at women, whether or not it was motivated by lust or by a desire to drive women out of the organization, could violate Title VII of the Civil Rights Act of 1964); Araujo v. Welch, 742 F.2d 802 (3d Cir. 1984) (defendant army officer who supervised civilian plaintiff was entitled to immunity as government official on claims of verbal abuse and intentional infliction of emotional distress, but not on claim of physical abuse, as he was acting beyond the "outer perimeter" of his duty).

18. 883 N.E. 2d 790 (Ind. 2008).

19. *Id.* at 794. Doescher thought Raess was going to hit him, "[t]hat he was going to smack the s* *t out of me or do something." *Id.*

20. Gary Namie, Ph.D., a social psychologist, is regarded as one of the foremost authorities on workplace bullying. He is the co-founder and director of The Workplace Bullying Institute, a not-for-profit organization that is at the forefront of the international fight against workplace bullying.

21. *Id.* at 796. Indiana Rule of Evidence 702 provides, in part, that: "[e]xpert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable." Federal Rule of Evidence 702 also permits only expert testimony that is based upon reliable scientific principles.

22. 858 N.E.2d 119 (Ind. Ct. App. 2006).

23. *Raess*, 883 N.E. 2d at 796-97 ("Only trial objections, not motions in limine, are effective to preserve claims of error for appellate review. Failure to object at trial to the admission of the evidence results in waiver of the error....").

24. *Id.* at 799 (emphasis added).

25. Surprisingly, one study found that over 60% of employers faced with evidence of workplace bullying either *did nothing, or made matters worse* for the bullied employee! WBI, *2007 U.S. Workplace Bullying Survey Research Report*, *supra* note 1 at 10. This response simply won't fly in today's legal environment. **M**

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