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law. The City appealed and Lone Star cross-appealed the court's finding of constitutionally sufficient notice.

The U.S. Court of Appeals for the Ninth Circuit affirmed the district court's rejection of Lone Star's constitutional notice claim, but reversed its grant of summary judgment on the invalid-ordinance claim. On the preemption argument, the court found the "claim [was] premised on an untenable notion of due process. It is a tenet of our federal system that state constitutions are not taken up into 14th Amendment such that a federal court may strike down a statute as invalid. … It is likewise axiomatic for the purposes of the Supremacy Clause that the constitutionality of local ordinances [be] analyzed the same way as that of statewide laws." Addressing the inadequate notice claim, the court held that, although due process generally required that notice be given before the government seized property, there were exceptions to that rule. Notice need not be given prior to a seizure when the interest at stake was small, relative to the burden that providing notice would impose. Here, Lone Star was not using the trailers for transportation but for advertising, and this use created a lesser interest than had the trailers served a transportation purpose. In addition, Lone Star was a chronic offender, lessening the risk of an erroneous deprivation. The City had an interest in preventing the public nuisance caused by Lone Star parking its trailers for extended periods in residential neighborhoods. *Lone Star Security & Video, Inc., v. City of Los Angeles*, 584 F. 3d 1232 (9th Cir. 2009)

Land Use
RLUIPA

Due to its growing congregation, the River of Life Kingdom Ministries ("the Church") wanted to upgrade from its existing location, a rented warehouse in Chicago, to a property it planned to purchase in the Village of Hazel Crest. However, by the time the Church entered into negotiations with the seller, the Village had adopted certain zoning ordinances and a Tax Increment Financing (TIF) plan to be applied to certain land, including the land desired by the Church. The ordinances permitted the following uses of land: general commercial/retail, gas stations, hotels, taverns, offices and meeting halls. The Village later amended the ordinances and removed meeting halls and other non-commercial institutions from its list of permitted uses. After the Church purchased the land and applied for special permission to use the property, which the Village denied, the Church filed a lawsuit. It alleged, *inter alia*, that the zoning ordinances violated the Equal Terms provision under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). The Equal Terms provision states that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a non-religious assembly or institution."

The U.S. Court of Appeals for the Seventh Circuit affirmed the district court's denial of a preliminary injunction. In coming to its decision, the court was persuaded by the Third Circuit Court of Appeals' decision in *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch* (in order to find a violation of the Equal Terms provision, a plaintiff was required to identify a non-religious institution that was treated better than a similarly-situated religious property with regards to the regulatory purposes of the land use regulation). This position, adopted by the Seventh Circuit, preserved a local government's ability to enact neutral laws of general applicability. Here, the Church argued that some permitted non-religious uses (such health clubs, hotels and salons) could be categorized as "assembly" uses and, since such business uses were allowed, the Church should be allowed to build in the area as well. The Seventh Circuit disagreed, stating that the "permitted entities [were] all *commercial* in nature, while churches, meeting halls, community centers, and schools (which [were] all uses excluded from the ordinance after the amendment) [were] not. A locality seeking to create a commercial area should be able to exclude non-commercial uses that do not contribute to its goal [of creating a tax revenue-generating commercial district] without violating RLUIPA." *River of Life Kingdom Ministries v. Village of Hazel Crest*, 585 F. 3d 364 (7th Cir. 2009).

Litigation and Liability
Negligence and the Duty To Preserve Evidence

Is the victim of a crime entitled to an award of damages for the negligent infliction of emotional distress due to the wrongful disposal of evidence collected during an ongoing criminal investigation? Dennis had been raped 20 years previously by an unknown man. Evidence was collected as part of that investigation, but her assailant was never caught. In 2003, Dennis saw a television program about a serial rapist and killer, and was convinced that he was her attacker as well. She contacted the sheriff's office to see if they would reexamine the evidence in her case. However, that evidence had been destroyed in 1995 pursuant to a court order, as it had been mislabeled as the evidence of a crime that could no longer be prosecuted and was, therefore, considered abandoned. Dennis brought an action against the sheriff's office for the negligent infliction of mental anguish and emotional distress resulting from the incorrect handling and the disposal of the evidence. She made no allegations of intentional destruction, but alleged that the actions of the sheriff's office were reckless, wanton, and grossly negligent. The sheriff's office admitted that a mistake was made but denied that it owed any special duty to preserve evidence, obtained during the investigation of a particular crime, for the benefit of the victim. After a bench trial, the trial court ruled that the sheriff's office was liable for the negligent infliction of emotional distress, finding that it had breached its duty to retain and preserve the evidence of the plaintiff's aggravated rape, and that the breach had caused the plaintiff's damages.

Addressing a matter of first impression, the Court of Appeal of Louisiana reversed. The sheriff's office was charged with a general, not personal, duty to preserve the peace and apprehend criminal offenders. There

was no statutory or jurisprudential duty to preserve the evidence in a criminal investigation for the personal benefit of the victim of a crime, and the record was "devoid of evidence of any special relationship or affirmative agreement or undertaking by the Sheriff's Office to preserve the evidence for the plaintiff's emotional well-being, personal sense of security, or possible civil remedy." Further, even if such a personal duty existed, the court "seriously question[ed] the cause-in-fact of the plaintiff's damages," as it could not be said that "but for" the negligent disposal of the criminal evidence, Dennis would not have suffered emotional distress. "It [was] evident …that regardless of whether the criminal evidence was preserved the serial killer was not linked to the plaintiff's attack," and "this reality [was] the cause-in-fact of the plaintiff's emotional distress." *Dennis v. Wiley*, No. 2009 CA 0236, 2009 WL 3164426 (La. Ct. App. Sept. 11, 2009).

Personnel and Employment

Drunk Calls Not FMLA Notice

Scobey was an employee of Nucor Steel -Arkansas. Pursuant to the employer's attendance policy, it was entitled to fire an employee after the fourth incident of an unexcused absence. On April 09, 2005, Scobey left a message with a supervisor, asking him to call back but without giving a reason. He also called another supervisor to say that he needed time off on the 13th to go to a funeral, and was told he could if another employee agreed to cover his shift. The next day, April 10, Scobey did not come to work. Instead, an apparently drunk Scobey called a manager, saying "he was through and done with us." The same evening, Scobey (still drunk) called a supervisor to say the same thing. On April 11, Scobey told his immediate supervisor that he had had a nervous breakdown. The supervisor thought Scobey sounded intoxicated and disbelieved his claim of a breakdown, concluding that he was making excuses to avoid work because he was drunk. Scobey failed to show up on April 12 and 13, but called the human resources department on the 13th to request Family and Medical Leave Act (FMLA) leave. On April 20, he was referred to a facility for treatment for alcoholism and depression. Nucor did not designate Scobey's absences for treatment as FMLA leave, but as paid leave, and demoted Scobey based on his unexcused absences due to drunkenness from April 10 to 13. Scobey sued Nucor, asserting interference and discriminatory retaliation under the FMLA. He claimed that his calls should have demonstrated to the employer that his inebriated state was a manifestation of his underlying depression and gave sufficient and timely notice that he had a serious health condition requiring FMLA leave. The district court dismissed his claims on summary judgment, finding that, on the interference claim, Scobey failed to provide notice that his absences might be FMLA-qualifying leave, and that, with respect to the retaliation claim, there was no genuine dispute as to whether Nucor demoted Scobey for absences that were not protected by the FMLA.

On appeal, the U.S. Court of Appeals for the Eighth Circuit affirmed, finding that the employee had failed to give his employer the necessary notice under the FMLA. In order to state a claim for interference under the FMLA, Scobey must have given notice of his need for FMLA leave. Although the FMLA did not define the type and timing of the notice required when the need for leave was unforeseeable, the employee "must do more than merely call in sick to trigger an employer's duties" under the Act. His request for a day off to attend a funeral was not protected by the FMLA. His calls stating that he wanted to terminate his employment were not notice that he needed time off from work, and the incoherent and drunken comments were "inadequate to apprise Nucor of any possible obligations under the FMLA." Because Scobey failed to show that he had provided adequate notice to Nucor that he had a "serious health condition" rendering him "unable to work," his FMLA interference claim failed. *Scobey v. Nucor Steel-Arkansas*, 580 F.3d 781 (8th Cir. 2009).

FLSA Overtime and "On Call" Duties

In a case that has some significance in this age of Blackberries, pagers, laptops and cell phones, an Ohio court has recently dealt with entitlement to overtime compensation and "on call" pager duties. The plaintiff had been employed by the defendant company as a customer service representative, and her duties included handling incoming calls from customers. She worked a 40-hour week in the office, but, because the employer also used a "roll-over" call system to deal with customer inquiries after regular business hours and on weekends, she would be paged for any calls that came in during these times (the calls did not go to her home phone). This meant taking the call, logging-in the call details, and scheduling a technician to come and address the problem. Each service call, from start to finish, could take as little as 30 minutes or as much as two hours to complete. The plaintiff claimed that her pager duties became near-daily and interfered significantly with her personal time; the employer alleged that monitoring the pager was completely voluntary and that the plaintiff was free to forego monitoring the pager at any time. After the plaintiff was fired for attendance problems unrelated to her pager duties, she brought an action under the Fair Labor Standards Act, 29 U.S.C.A. § 201 *et seq.* (FLSA), seeking compensation for the time she worked after hours and on weekends "on call," and for the time spent actually responding to such calls. The FLSA provides that an employee must receive compensation at "not less than one and one-half times the regular rate at which he is paid" for hours worked in excess of 40 hours per week, 29 U.S.C. § 207(a) (1), but the Act does not specify whether time spent "on-call" constitutes time spent working.

The employee filed a motion for summary judgment and the district court denied the motion. Notwithstanding the lack of an express provision in the FLSA, the U.S. Supreme Court had held that such time was compensable in some cases. On-call time spent at home could be compensable if the restrictions

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