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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Inside Canada

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nately expensive, if not impossible to achieve. Other than the plaintiff's own unfortunate experience, there is no evidence that what she tripped over was so obviously hazardous that the [City], had it even been aware of the elevation difference, was required to repair" it.

Both cases are available from the B.C. courts' website at http://www.courts.gov.bc.ca. **ML**

Ordinances

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down economy. The court rebuked the County for changing its tone just weeks later and calling an emergency meeting with the unions to discuss a financial picture that was volatile.

This case is now on appeal, with opening briefs submitted by the time this *Municipal Lawyer* issue goes to print. One issue that wasn't discussed at all in the opinion was whether or not a furlough plan constitutes a "law" under the Contracts Clause. In this case, it is arguable that there was no legislative act that impaired the contract, as the furlough plan was implemented by the County Executive. IMLA will be filing an *amicus* brief as well in support of the County, as it feels that the court substituted its opinion for that of duly elected local government officials, particularly in the situation where the court chastised the County for not utilizing its UFB, a fund which most local governments save for one-time disaster situations, not for ongoing expenses like employee salaries.

Notes

1. *Webster's New Collegiate Dictionary* 462 (1979).
2. Cal. Exec. Order No. S-13-09 (July 1, 2009), available at http://gov.ca.gov/executive-order/12634.
3. For a good FAQ document on the interaction between FLSA and furloughs, go to http://www.imla.org/images/stories/pdf/Events/AudioConferences/personnel/FLSA/furloughfaq.pdf.
4. IMLA conducted a teleconference in August 2009 on *Furloughs and Reduction in Force Policies*. Send an email to djanardan@imla.org, reference this article, and I'll send you the presentation slides from the event.
5. Fraternal Order of Police v. Prince George's County, No. AW-08-2455 (D. Md. Aug. 18, 2009).
6. U.S. Const. art. I, § 10, cl. 1.
7. *Id.*
8. U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 25-26 (1977).
9. Baltimore Teachers Union v. Mayor and City Council of Baltimore, 6 F.3d 1012, 1015 (4th Cir. 1993) (emphasis in original).
10. *Id.*
11 U. S. Trust Co. of New York, 431 U.S. at 25.
12. *Fraternal Order of Police*, No. AW-08-2455, quoting *Baltimore Teachers Union*, 6 F.3d at 1018.
13. *U.S. Trust Co. of New York*, 431 U.S. at 25.
14. *Fraternal Order of Police*, No. AW-08-2455 at *30.
15. Baltimore Teachers Union v. Mayor and City Council of Baltimore, 6 F.3d 1012, 1020 (4th Cir. 1993). **ML**

Cases

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imposed were "so onerous as to prevent employees from effectively using the time for personal pursuits." This was a highly fact-specific inquiry, and summary judgement was inappropriate in light of issues of material facts in dispute on whether the restrictions imposed on the plaintiff while monitoring the pager on evenings and weekends had prevented her from effectively using her time for personal matters. The evidence suggested that, even assuming the plaintiff's on-call duties forced her to remain at home, it did not necessarily follow that she was restricted from engaging primarily in personal pursuits during her on-call time. "Merely having to remain at home would not, in and of itself, prevent Plaintiff from engaging in a variety of personal pursuits." Further, other employees had testified that the pager duty was voluntary and that this duty did not confine them to their homes. However, the court agreed that the plaintiff was entitled to overtime compensation at one and a half times her normal hourly rate for the time she actually spent dealing with each after-hours page. *Abdelkhaleq v. Precision Door of Akron*, No. 5:07 CV 3585, 2009 WL 2762356 (N.D. Ohio, Aug. 28, 2009).

Schools

IDEA

T.Y., a child with autism, was placed in a special education class within New York City's public school system. The Individuals with Disabilities Education Improvement Act (IDEA) entitled all children with a disability to access to a free and appropriate public education. At the heart of IDEA is the Individualized Education Program (IEP). This is a plan, resulting from meetings between parents, educators, and representatives of the school district, which not only establishes annual and short-term goals for student performance, but also provides for specially-designed instructions and services for the disabled child. If parents are dissatisfied with an IEP, their complaint will be heard by an impartial hearing officer (IHO), whose decision can subsequently be appealed to a state hearing officer (SHO), whose decision, in turn, can be further appealed to a state or federal court.

T.Y.'s IEP stated that he would receive three 30-minute sessions of individual speech therapy a week, two 30-minute sessions of individualized occupation therapy, and a similar amount of physical therapy. What the IEP did not mention was the specific school where the therapy would take place, except to state that it would be a school that specialized in providing education for children with disabilities. When T.Y.'s parents received notice of the actual school, they did a site visit and found the school to be unsuitable for T.Y. They also rejected another school put forward by the school district. T.Y. was subsequently enrolled in a specialized private school and his parents ultimately brought a lawsuit against the City. The lawsuit contended, among other things, that the IEP materially violated T.Y.'s right to a free and appropriate education because it did not provide adequate speech services, and was procedurally deficient because it did not include a specific school placement.

The U.S. Court of Appeals for the Second Circuit affirmed the lower

court's grant of summary judgment in favor of the City. It began by stating, "[b]ecause administrative agencies have special expertise in making judgments concerning student progress, deference is particularly important when assessing an IEP's substantive adequacy." The court noted that the IHO and SHO did modify the IEP to include additional speech-therapy and parenting sessions, so the court found "no reason to second guess the reasonable, professional determinations of the IHO and SHO in this case." The procedural issue of whether an IEP needed to list the specific school where the services would be provided resulted in a more thorough analysis. The IDEA stated that "the parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to…the identification, evaluation, and educational placement of the child." In addition, the Act defined an IEP as a statement that includes "the anticipated frequency, location, and duration of those services." The court concluded that the terms "placement" and "location" did not mean a specific school location, but, rather, the general environment of the program, relying on a federal Department of Education commentary as well as a Senate Report (both stated that these terms referred generally to an environment, such as a classroom, where the education would take place). Thus, an IEP's failure to identify a specific school location did not constitute a per se procedural violation of the IDEA. *T.Y. v. New York City Dept. of Educ.*, 584 F. 3d 412 (2d Cir. 2009).

Flag Display Ban

Due to previous incidents of racial tension and strife, Burleson High School in Texas had adopted a policy that prohibited the display of the Confederate flag on school grounds. The school district also had a dress code providing that there would "be no tolerance for clothing or accessories that ha[ve] inappropriate symbolism, especially that which discriminate[d] against other students based on race, religion, or sex." In the 2002-03 school year, prior to the policy, there were 35 reported instances of race-related problems, including situations where the Confederate flag was involved. Subsequently, when several students came to school with purses that had large images of the Confederate battle flag, school administrators treated the incident like any other dress code violation and gave each student the choice of leaving the purse in the administrative office until the end of the school day, or having a parent or someone else come and pick up the purse. Instead, the students chose to go home for the day. The students subsequently appealed the policy prohibiting displays of the flag using the school district's internal administrative procedures. The district superintendent denied the appeals on the basis that, if the ban was not enforced, "the number and types of confrontational incidents on campus would increase dramatically, resulting in material interference and substantial disruption of the educational environment." The students, for their part, had argued the flag represented, to them, their family history, "American history and a political symbol…of limited government and resistance to unconstitutional authority." They brought a Section 1983 action against the school and school district, alleging that the ban abridged their rights under the First and Fourteenth Amendments to freedom of speech and expression; that the dress code violated their due process rights under the Fourteenth Amendment because it was vague and overbroad; that they were deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment because the code was enforced against them while other students were permitted to wear attire with politically, racially and ethnically provocative symbols, and other grounds. The district court granted summary judgment in favor of the school defendants. On appeal, the U.S. Court of Appeals for the Fifth Circuit affirmed.

The court was persuaded by the fact that the policy was adopted after racial strife at the school, some of which resulted from students' displays of the Confederate flag, and accepted that the "Confederate flag in certain circumstances [was seen] as a symbol of racism and intolerance, regardless of whatever other meanings may be associated with it." Further, there was "ample, uncontroverted evidence that elements of the [school's] student body [had] continually manifested racial hostility and tension." Applying the standard in *Tinker v. Des Moines Ind. Community Sch. Dist.*, 393 U.S. 503 (1969) (students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," but school officials, nonetheless, retain some authority, consistent with constitutional safeguards, to prescribe and control conduct in the schools), the court found that the school officials reasonably anticipated that visible displays of the Confederate flag would cause "substantial disruption of or material interference with school activities." On the vagueness claim, the code was clear: it specifically prohibited visible displays of the Confederate battle flag. Further, the plaintiffs were never suspended (they voluntarily chose to go home), and "this light sanction militate[d] against their vagueness claim." The equal protection claims was also properly dismissed because the students failed to provide evidence that the ban was enforced unequally and because the prohibition on the flag was justified under *Tinker*. *A.M. ex rel. McAllum v. Cash*, 585 F. 3d 214 (5th Cir. 2009). ML

2010 ANNUAL CONFERENCE,
San Francisco, CA,
October 10-13
IMLA'S 75TH ANNIVERSARY

2011 MID-YEAR SEMINAR,
Washington, D.C.,
April 10-12

2011 ANNUAL CONFERENCE,
Chicago, IL., Sept. 11-14

2012 MID-YEAR SEMINAR,
Washington, D.C.,
April 22 -24

2013 MID-YEAR SEMINAR,
Washington, D.C.,
April 14-16

2014 ANNUAL CONFERENCE,
Baltimore, MD.,
Sept. 10-14
– 200TH ANNIVERSARY OF
THE BATTLE OF FT. McHENRY