a nuisance action against them. The defendants did not deny they were not in compliance with the local requirements, but argued that these were preempted by state law, or, in the alternative, violated the purpose of the 2003 law requiring the "consistent application" of Proposition 215 among the counties.

The California Court of Appeal, Second Appellate District, disagreed. The first proposition of the defendants, that the local law was totally preempted under California law, was quickly dismissed. The California Constitution provided that a locality "may make and enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict with its general laws." In this case, while there were two substantive state laws regarding MMD regulation, the state law expressly stated that "[n]othing in this [state law] shall prevent a city or other local governing body from adopting or enforcing laws consistent with this article."

On the next argument, that the local law was incompatible with the state law enacted to "promote uniform and consistent application of [Proposition 215]," and that localities could only enact laws with the same limitations as those set by state law, the court likewise disagreed. The California Legislature included an express statement in the 2003 MMD law that "[n]othing in this section shall prohibit a [county] from adopting ordinances or policies that further restrict the location or establishment of a [MMD]." The defendants also claimed that the permit application fee for a conditional use permit was unreasonable. However, the court found no evidence that the County charged a higher fee to MMDs than it did to other businesses, or that the fee was unreasonable.

Similarly, there was no evidence that the County's zoning restrictions made it impossible for a MMD to exist in the County without being in violation of the distance requirement, or exist only in a remote and unreasonably inconvenient location. The County provided evidence showing commercial zones where MMDs could locate, and these zones contained liquor stores, bars, car washes, pet-grooming businesses, and theaters. This evidence refuted the claim that MMDs were zoned with a purpose of relegating them to remote and commercially infeasible areas.

Finally, the defendants contended that the County's MMD laws violated the equal protection clause of the California Constitution by not allowing MMDs to operate in the same zones as pharmacies. The California Constitution's equal protection clauses contemplated that entities "similarly situated with respect to the legitimate purpose of the laws receive like treatment." In this case, however, the court ruled that MMDs and pharmacies were not similarly situated because marijuana remained illegal under federal law. Accordingly, the court affirmed the lower court's order granting the County's motion for a preliminary injunction. *County of Los Angeles v. Hill*, 192 Cal. App. 4th 861 (Cal. Ct. App. 2011).

## *First Amendment*

### Retaliation for Speech: Non-Employee Contractor

Richard Clairmont was employed by Sound Mental Health (SMH), a private company that provided treatment and counseling for domestic violence perpetrators as an independent contractor for the Seattle Municipal Court. It was included as a "certified treatment provider" in a list distributed, by the Seattle Municipal Court, to pretrial and convicted defendants. Clairmont was subpoenaed to testify as an expert witness in a hearing on behalf of a defendant enrolled in a treatment program with a different organization. Shortly after, Clairmont was fired due to his testimony. He was informed by SMH that public employees from the City of Seattle Domestic Violence Probation Officers Unit (Unit) were present when he testified and found that the content of his testimony led to an irrevocable loss of "trust in the integrity of the program." The Unit responded with a stop of all referrals, beginning immediately. SMH said it had no option but to terminate Clairmont.

Clairmont filed suit against SMH and the Unit Manager under Section 1983, alleging that he was terminated by SMH in violation of his First Amendment right to free speech. The district court analyzed the issue as if Clairmont himself was a public employee. It concluded that his testimony was not protected speech because it was not on a matter of public concern, and was of such "minimal value" that it was outweighed by the Unit's interests in addressing victim safety and civil liability. It also granted qualified immunity to the Manager.

The U.S. Court of Appeals for the Ninth Circuit reversed and remanded, first addressing the Manager's contention that she could not have violated Clairmont's First Amendment rights because she did not have any governmental authority over him (she could not hire or fire him). The court disagreed, stating that the "factual record could reasonably support a finding that the [Manager] threatened SMH with the possibility that the Unit would stop referring defendants to SMH unless SMH fired him." The court next addressed whether Clairmont should be considered as a public employee or a private citizen. "An independent contractor who provides services to the government is generally treated like a public employee for purposes of determining whether the contractor has alleged a violation of First Amendment rights." *Bd. of Cnty. Comm'rs.v. Umbehr*, 518 U.S. 668, 673-74 (1996). Despite the fact that Clairmont was not directly the City's independent contractor, given the nature of the relationship between the municipal court and SMH, the nature of the services provided by SMH, and Clairmont's role in the provision of such services, the Ninth Circuit concluded that his relationship with the Municipal Court was analogous to that of an employee and employer.

The court analyzed the speech under the balancing test in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), and found in favor of the plaintiff. Clairmont's testimony revolved around "ways in which treatment programs treat charged and convicted domestic violence offenders, which ultimately implicate[d] the Municipal Court's attempts ...to protect victims of domestic violence — unquestionably a matter of public concern." Lastly, the court affirmed the denial of qualified immunity to the Manager. Although there was no preexisting case law that was "closely analogous" for

the purpose of showing that Clairmont's right was clearly established, a "reasonable person in [the Manager's] position" would know that it would be "unlawful to retaliate against an employee for having testified in a criminal proceeding pursuant to a subpoena." The court reversed the district court's grant of summary judgment to the Manager and remanded for trial. *Clairmont v. Sound Mental Health*, 632 F.3d 1091 (9th Cir. 2011)

## *Freedom of Information*

### Personal Computers and Open Records

Like many people, York Township Commissioner Kenneth M. Silberstein had a personal computer. In June 2009, pursuant to the open records law, Stacey MacNeal made a request to York Township to provide, among other things, any and all electronic communications or written correspondence between Commissioner Silberstein and the citizens of York Township or any legal counsel (other than the Township Solicitor) regarding a specified project. The municipality produced only documents that were on computers in the possession and control of the township. It also declined to produced communications involving any attorney, relying on attorney-client privilege. The legislation defined a "public record" as a record of "a Commonwealth or local agency," and another section indicated that "[a] record in the possession of a ... local agency shall be presumed to be a public record."

MacNeal appealed. The Office of Open Records (OOR) concluded that the communications on Commissioner Silberstein's personal computer were "public records," and that York Township failed to provide any evidence that such records were exempt from disclosure. Commissioner Silberstein appealed this order to the trial court, which reversed. It held that the OOR erred in finding that the records on a personal computer were public records because they were records of a public officer and, therefore, within the control of the agency. The Commissioner, it noted, had no authority to act alone on behalf of York Township, nor did he have any obligation to keep records of (let alone make public) every conversation, note, e-mail, or telephone call in which he discussed matters pertaining to the municipality.

On further appeal, MacNeal argued that records in the sole physical possession of elected public officials fell within the scope of the open records law because it was Township policy to let Commissioners use their personal computers to conduct York Township business. As a result, he claimed the public documents located in the Commissioners' personal e-mail accounts and their computers were in the possession, custody and control of the local agency and subject to disclosure.

In a ruling of first impression for the Commonwealth Court of Pennsylvania, that court ruled that e-mail communication or other written correspondence that was solely contained on a Township Commissioner's personal computer did not constitute public records. The Commissioner was an individual public official with no authority to act alone on behalf of the Township, and, unless later ratified, adopted or confirmed, his personal communications "would not be a documentation of a transaction or activity of York Township, as the local agency, nor would the record have been created, received or retained pursuant to law or in connection with a transaction, business or activity of York Township." *In re Silberstein*, 11 A.3d 629 (Pa. Commw. Ct. 2011).

## *Personnel & Employment*

### Telecommuting, Accommodation, and "Stipend"

Lesann McEnroe was a Human Resources employee of Microsoft. She alleged that she had a disability rendering her unable "to work at or travel to the Microsoft campus" or to attend any work-related functions, based on her agoraphobia, major depression, post-traumatic stress disorder, panic disorder, irritable bowel syndrome, and "a host of similar conditions." Microsoft permitted her to work from home, full-time, for several years, in an accommodation that appeared to meet McEnroe's requirements. McEnroe had been submitting reimbursement requests related to her living expenses (utilities, trash, home-cleaning) which were not covered by the employer's policies but had been approved in error. In 2009, McEnroe was told that the expenses were not covered by the flexible work arrangement policy and would not be reimbursed in the future.

McEnroe brought a failure to accommodate and discrimination lawsuit against Microsoft pursuant to state law and the Americans With Disabilities Act. She alleged that Microsoft failed to consider her for several other, higher-level positions, and that it failed to accommodate her alleged disability because it would not provide her a with $4,000 annual "home office stipend" to cover part of her household living expenses. The employer maintained that the positions identified by McEnroe required an employee who was present in its Redmond, Washington office, and who was able to travel and to meet with others in person (often on an impromptu basis). Previously, McEnroe had confirmed with her second-level manager that she was not able to move to Redmond and that she had to telework due to a disability. McEnroe indicated the same thing on some of the applications for the positions ("[d]ue to my disability, I am unable to travel or work on campus as you note.").

The U.S. District Court granted the employer's motion for summary judgment. The employee could not establish that an exclusive teleworking arrangement would have been a reasonable accommodation for the positions sought because in-person attendance was an essential function of all of the positions. McEnroe's "subjective belief as to what a job's essential functions" were was not evidence, and it was undisputed that she was not qualified for the positions because she "could not or would not" work onsite in Redmond. The "teleworking stipend" claim also failed: her personal expenses, such as sewer, gas, or home-cleaning service bills, were not reimbursable under the employer's policy. "While monetary payments of ordinary household expenses unconnected to performance of the requirements of employment may be desirable, they are not required as an accommodation of Plaintiff's perceived disability. Under the circumstances of this case, Plaintiff is basically requesting what would be an increase in salary beyond that required by her ongoing employment relationship."

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