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."

continued on page 37

"this long running dispute [to] be brought to an end." The ruling is *Calgary (City) v. Alberta (Human Rights and Citizenship Commission)*, 2011 ABCA 65 (Alta. C.A., Feb. 24, 2011). M

Cases

cont'd. from page 35

Apart from McEnroe's "bare speculation, the record [was] devoid of any evidence of discriminatory intent." *McEnroe v. Microsoft Corp.*, No. CV-09-5053-LRS, 2010 WL 4806864 (E.D. Wash. Nov. 18, 2010).

Search and Seizure

Traffic Stop, Search and Detention

Kesner Liberal, an African-American, was the designated driver for two friends. Officer Estrada, believing that Liberal was operating a car with illegally tinted windows, turned on his lights, but not his siren. Liberal was not sure whether he was being asked to pull over, but made a right turn at the next light, and immediately made another left into an unlit parking lot, parked his car and turned off his headlights. Liberal asked why he had been pulled over; Estrada ordered everyone out of the car, accused Liberal of trying to flee, and called for assistance. Six officers arrived. They grabbed Liberal, pushed him against the car and handcuffed him (he remained handcuffed for about 30 minutes). They asked Liberal if they could search the car, and he said yes. Officers searched the car thoroughly. Estrada continued to yell at Liberal about attempting to flee. One officer turned on the audio-recorder and read Liberal his rights. Officers also administered a sobriety test and determined Liberal was not intoxicated. Liberal and his passengers were allowed to leave. Liberal was never charged. He testified that the car's front and passenger-side windows were not tinted and were rolled down at the time of the incident.

Liberal sued, alleging violations of his Fourth Amendment and due process rights. The district court denied the officers qualified immunity for the traffic stop because, construing the facts in the plaintiff's favor, there was neither probable cause for the stop nor a reasonable suspicion of illegal activity. Estrada's determination that the car windows were tinted did not qualify as a "reasonable mistake." The officers appealed the denial of summary judgment on qualified immunity grounds.

The U.S. Court of Appeals for the Ninth Circuit affirmed the denial of qualified immunity for the officers. Estrada violated Liberal's clearly established constitutional right to be free from unreasonable seizures by initiating the traffic stop without a reasonable suspicion that Liberal was engaged in illegal activity. An officer's mistake of fact would not render a stop illegal, if the objective facts known to the officer gave rise to a reasonable suspicion of criminal activity. Here, however, while Estrada's determination that the windows were illegally tinted was a mistake of fact, it was not a reasonable mistake. Estrada would not have been able to see the car windows at all, as Liberal testified that these were rolled down. There was no reasonable basis for the stop because Liberal had violated no traffic laws, and "did not engage in headlong flight upon seeing Officer Estrada. Thus, even if Officer Estrada reasonably suspected that Plaintiff was avoiding him, such noncooperation, without more, does not support a suspicion that Plaintiff was engaged in criminal activity."

Because the traffic stop was unjustified, the ensuing frisk, search of the car, and 45-minute detention of the occupants were also unlawful. Excessive force was used against Liberal after he had complied with Estrada's requests: Liberal did not pose an immediate threat to anyone, and the background search revealed nothing that would have provided a reason to use force. The search of the car was also unconstitutional as Liberal had been coerced into providing his consent: he was already in custody, seven officers were present and had control of the vehicle, and an incomplete Miranda warning had been given. *Liberal v. Estrada*, 632 F.3d 1064 (9th Cir. 2011). M

CORRECTION

In the last issue, the photo caption on page 31 neglected to mention John "Kelly" Addy. Our sincere apologies.

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