allegedly resulted in the retaliatory action: an incident report asserting that a fellow deputy had used excessive force, and a letter from his attorney about the department's failure to prevent a murder. The first statement was found not to be protected speech because it was prepared as part of Lauck's duties as a deputy sheriff. The letter also was not protected speech. Even assuming that the speech was not part of Lauck's official duties and on a matter of public concern, the claim failed because of a lack of evidence of causation: Lauck's transfer was not ordered until seven months after the letter, and Lauck received a positive performance appraisal and a merit salary increase between the time of the letter and his transfer.

The court also dismissed Lauck's due process and contract claims. There was no breach of a contractual obligation, and Lauck had no "legitimate claim of entitlement" to his position, necessary to support a due process claim. Lauck also claimed a due process violation in a constructive-discharge context. Constructive discharge occurred when a reasonable person in the employee's position would view the working conditions as intolerable to the point that he or she would feel compelled to resign. To establish a valid due-process constructive-discharge claim, the former employee had to show that a property right was violated; that the employer knew or intended that intolerable conditions were imposed on the employee; and the employee was denied the necessary procedure. Lauck could not establish any of these elements. There was no evidence from which a juror could infer that a reasonable person would find working conditions in the Civil Process Division to be intolerable; Lauck did not suggest that the sheriff knew that the working conditions would be intolerable to a reasonable person; and Lauck did not demonstrate, or even suggest, that he was not provided with an adequate hearing. The court affirmed the grant of summary judgment in favor of the defendants. *Lauck v. Campbell County*, No. 09-8085, 2010 WL 5061041(10th Cir. Dec. 13, 2010).

Title VII and Discrimination

Brian Grigsby worked as an Air Traffic Controller for the Federal Aviation Administration (FAA). During his original training with the FAA in its Indianapolis office, he became aware of his Native American heritage. He educated himself about his roots, and claimed that this led to a number of hostile encounters with his coworkers, where they referred to him as "Chief," "Running Planes Together," and "Metal Rain." Grigsby requested and was granted a transfer to another facility, in Terre Haute, Indiana, and worked there for eight years. After learning that there would be a reduction in force at that location, Grigsby applied for several positions with the FAA in Indianapolis. The FAA's human resources department rated Grigsby as "qualified" for many posts and interviewed him, but he was not selected by the hiring official. Grigsby claimed that when he mentioned his Native American heritage at a meeting with the assistant air traffic manager at the Indianapolis Center, the manager's demeanor turned sour and the meeting abruptly ended. Grigsby brought a discrimination claim under Title VII of the Civil Rights Act of 1964 against the Department of Transportation (DOT). The district court granted the DOT's motion for summary judgment.

To establish discrimination sufficient to survive a motion for summary judgment, two methods of proof were available—direct or indirect. Under the direct method, a plaintiff had to offer direct evidence that acknowledged a discriminatory animus on the part of the employer or circumstantial evidence which established discriminatory motive. In this case, Grigsby's only showing was the encounter with the manager who, he claimed, ended the interview abruptly when he mentioned his Native American origin. The court noted that this evidence did not "point directly to a discriminatory reason for the employer's action."

Using the indirect method, a plaintiff had to establish a prima facie case by showing that he was a member of protected class; that he applied for and was qualified for an open position and was rejected; and that the position was filled by a person not in the protected class who had similar or lesser qualifications. An inference of discrimination then arose that the employer could rebut by offering a non-discriminatory, legitimate reason for the personnel action. The FAA asserted that it did not select Grigsby because he could not "maintain operational currency at the Indianapolis Center at the start of his employment and because he lacked familiarity with the Center's upgraded technology." The court held that Grigsby was not qualified for the positions. Although he did have a "Full Performance Level" certification, he did not have "Certified Professional Controller" status, which was required for the new job openings. Further, even if Grigsby was qualified, he failed to show that the positions were awarded to applicants who had similar or lesser qualifications than he did, as all the successful applicants were Certified Professional Controllers, familiar with the technology and automation in place in Indianapolis. The court, for purposes of argument, took the analysis further and held that, even had Grigsby established a prima facie case, he could not overcome the FAA's legitimate reason for failing to select him. The U.S. Court of Appeals for the Seventh Circuit upheld the lower court's grant of summary judgment in favor of the DOT. *Grigsby v. LaHood*, No. 10-1072, 2010 WL 4923568 (7th Cir. Dec. 06, 2010).

Pledge of Allegiance

New Hampshire's School Patriot Act required that public schools authorize a period, during the school day, for students to voluntarily participate in the recital of the Pledge of Allegiance. The only obligation for non-participants was that they respect the rights of the students who chose to participate. The Freedom from Religion Foundation (FFRF) brought an action against a public school district, claiming that the rights of FFRF members' children were violated when the district implemented the New Hampshire law. The district court dismissed all of FFRF's federal claims and issued a final judgment in favor of the school district. FFRF appealed. The issue on appeal was whether the law violated the Establishment Clause, the Free Exercise Clause, the Equal Protection Clause, and the Due Process Clause of the U.S. Constitution.

continued on page 37

Inside Canada

cont'd. from page 28

regulation in Canada for the purposes of conservation.

The progressively ambitious nature of the ALSA could be a model for other jurisdictions seeking to promote land use conservation. However, the ALSA lacks clarity in several key areas, hindering its effectiveness. Most significantly, it fails to clearly define key terms, such as "market based instruments" or "Stewardship Units." It fails to address critical details regarding Conservation Tools—for example, the ALSA leaves the following details to be included in supporting regulations:

- the restrictions imposed by Conservation Directives, how Directives are to be enforced, what constitutes loss or injury and how compensation is to be calculated;
- how Exchange, and Conservation Offset Programs are to be established, managed, and monitored;
- how Stewardship Units are to be created, classified, authenticated or distributed;
- the terms and conditions of use of TDC Scheme units are unclear, as are how these units can be sold, assigned, or otherwise disposed of; and
- how the Exchange is to function is unclear (for example, the TDC Schemes).

(Brownlee, LLP's *Alberta Land Stewardship Act: Maximizing your Municipality's Impact,* 2010). These gaps in the details seriously impair the ability of local governments to make use of the Conservation Tools. To the extent that municipalities wish to adopt conservation measures, such as a Conservation Offset Programs, in municipal or inter-municipal plans, the tools may become ineffective if they are inconsistent with regulations adopted under the ALSA at a later date.

Further, the development of Regional Plans for five of the seven Regions has not begun, and it is unclear when all seven Regional Plans will be completed. As mentioned, compliance with Regional Plans is mandatory, and, given the costs associated with developing and amending municipal and inter-municipal plans, many municipalities may avoid adopting new land use regulations until their Regional Plan is completed. This could result in outdated land use regulations being used, stagnating development or increasing inter-municipal disputes over development in fringe areas.

Accordingly, any government, provincial or local, seeking to employ similar conservation tools or planning regimes to those under ALSA should address these uncertainties by, for example, developing the supporting regulations concurrently with its conservation legislation, or providing for the greater involvement of municipalities and inter-municipal negotiations in plan development. ML

Ordinances

cont'd. from page 29

and 5) it excessively entangles the government in religious affairs.[7] In the *Detroit* case, the Sixth Circuit ruled that none of the five ways applied to Detroit's exterior beautification program. So, will the Ark Encounter theme park withstand an Establishment Clause legal challenge? The law itself and its purpose are arguably neutral. It is a financial incentive used to stimulate the economy through tourism-related projects, including those with cultural, historical, recreation, and entertainment value. The real question is whether the tax incentives have a primary effect of advancing religion. As the Sixth Circuit stated in the *Detroit* case, "a program may have the primary effect of advancing religion if the recipient divert[s] secular aid to further its religious mission."[8] With respect to this, the court in *Detroit* stated "most of the aid the churches received—cosmetic repairs to walls, doors, awnings and parking lots, as well as limited landscaping—does not have dual uses capable of diversion from a secular to a religious purpose. . . . [U]nlike a teacher, a sign-language interpreter, or even an overhead projector —all of which conceivably can be used to communicate secular and religious messages—a brick, gutter or bush (unless burning) cannot be co-opted to convey a religious message."[9]

It will be harder for Kentucky to pass this test. The Ark Encounter's marketing website states that "[t]hrough construction of a massive full-scale Noah's Ark, the Ark Encounter will present . . . a reminder about the Bible's account of the Ark" and "[t]he Ark Encounter will be an immersive, historically-themed experience . . . . [I]t is not an amusement park."[10] Governor Beshear states that "[b]ringing new jobs to Kentucky is my top priority, and with the estimated 900 jobs this project will create, I am happy about the economic impact this project will have on the Northern Kentucky region."[11] The difficult part will be reconciling Kentucky's announced purpose of job creation and economic development with the effect of the government's involvement with the Ark Encounter. The scenario might be set for the perfect storm. ML

Cases

cont'd. from page 35

The U.S. Court of Appeals for the First Circuit turned to several analytical measures to determine whether the law violated the Establishment Clause – the three-part analysis in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the "endorsement" analysis in Justice O'Connor's concurrence in *Lynch v. Donnelly*, 465 U.S. 668 (1984), and the "coercion" analysis of *Lee v. Weisman*, 505 U.S. 577 (1992). Under *Lemon*, a court was to consider whether the statute had a secular legislative purpose, whether its principal or primary effect was one that neither advanced nor inhibited religion, and whether it fostered excessive entanglement with religion. Here, "by design," the recitation of the Pledge was "meant to further the policy of teaching our country's history to the elementary and secondary pupils of the state," and its primary effect was not the advancement of religion, but the "advancement of patriotism through a pledge to the flag as a symbol of the nation." The statute also did not endorse, favor or promote religion, and, in context, the Pledge's words "under God" did not convey a message of endorsement.

The court next held that the Pledge did not violate the Free

continued on page 38

Exercise Clause, based on its previous ruling that public schools were not obligated to shield students from ideas which potentially were "religiously offensive, particularly when the school impose[d] no requirement that the student agree with or affirm these ideas, or even participate in discussions about them." *Parker v. Hurley*, 514 F.3d 87, 103 (1st Cir. 2008). FFRF's Equal Protection claim failed because the statute applied equally to those who believed in God and those who did not, "giving adherents of all persuasions the right to participate or not participate in reciting the pledge, for any or not reason." The First Circuit affirmed the judgment of the lower court granting summary judgment in favor of the school district. *Freedom From Religion Foundation v. Hanover Sch. Dist.*, 626 F.3d 1 (1st Cir. 2010).

Search and Seizure

Stop and Frisk – Reasonable Suspicion

Members of a police department gang unit were investigating a stabbing in the vicinity involving a gang member. Attempting to forestall any attempt at retaliation for the stabbing, the unit set up surveillance of the area around a high school. The school had a history of gang-related incidents and some of the involved gang members were students there. Close to the end of the school day, the officers saw a group of Hispanic youths (some older than school age) standing under a tree across the street from the school, having a discussion and occasionally looking at the school. Edith Hernandez-Mendez came close to the group. One of the males joined her, spoke with her, and she left to sit apart from the group, nearby. When officers went to confront the group, they scattered. The group members were detained and frisked for weapons. The officers also located Hernandez-Mendez nearby. She told Officer Webster that she had just come from the doctor, that she did not know anybody in the group, and did not produce a photo ID. Webster asked her if she had photo identification in her purse. As he asked, he reached out to take possession of the purse; Hernandez-Mendez simultaneously said "no" and pulled away. However, Webster had felt a solid, heavy object in the purse that he recognized as the barrel of a semiautomatic pistol. This turned out to be a Smith & Wesson 9mm semiautomatic pistol with unchambered ammunition. Hernandez-Mendez was arrested. Officer Webster relied on his knowledge of Hispanic gangs in the area, his experience in responding to gang-related incidents at the school, and his observations during the surveillance to find reasonable suspicion to stop the group. He was aware that female gang members were often responsible for holding weapons or other contraband for male gang members in order to minimize the potential for discovery by police, who were perceived to be more likely to frisk the males.

Hernandez-Mendez moved to suppress the evidence on the basis that the objective facts known to the officers were too tenuous to support a finding of reasonable suspicion — specifically, that her detention did not take place in a high-crime area or among known criminals, and arguing that the police relied solely on the actions and behavior of the males in the group to justify stopping her. The district court found her guilty of possession of a firearm by an alien and possession of a firearm in a school zone.

On appeal, the U.S. Court of Appeals for the Fourth Circuit affirmed. A *Terry* stop was permitted as a brief, investigatory stop of a person when a police officer observed unusual conduct which led him "reasonably to conclude in light of his experience that criminal activity may be afoot." Reasonable suspicion in this case was "justified by the officer's articulation of objective facts which provided information probative of a likelihood of criminal activity. Moreover, he obtained much of the information through his own observations, which, when coupled with his accumulated experience and relevant background knowledge, formed the basis for a reasonable suspicion that Hernandez-Mendez was engaged in (or was about to become engaged in) criminal activity." Addressing the claim that reliance on the acts of others could not contribute to a finding of individualized suspicion, the court found this "misse[d] the mark." The relevant question was whether the officers reasonably inferred that Hernandez-Mendez was "potentially a knowing and willing participant" in whatever incipient criminal activity the group of males may have been contemplating. The objective facts justified Hernandez-Mendez's detention and those that emerged after she had been detained — including her evasiveness — provided a reasonable suspicion justifying a frisk for weapons. Lastly, during a permissible frisk, if a police officer "feels an object whose contour or mass makes its identity immediately apparent" as contraband, it may be lawfully seized. *U.S. v. Hernandez-Mendez*, 626 F.3d 203 (4th Cir. 2010).

Excessive Force – Taser

Nickolos Cyrus suffered from bipolar disorder and schizophrenia, and was known to the local police because of his past psychotic (but not criminal) episodes. He was reported missing by his family early one morning. In a state of delusion, Cyrus had wandered onto the property of another resident, who called the police. Lieutenant Czarnecki responded, and asked Cyrus to come towards the police car so they could talk. When Cyrus started to walk away, towards the house, Czarnecki fired his Taser to stop him. Cyrus fell, and when he tried to get up, he was tased again. He remained face-down on the ground. A second officer arrived, and Cyrus was tased several more times to get him to comply with the officers' orders to show his hands. After Cyrus was handcuffed, he was turned onto his back and officers discovered that he was not breathing. He died shortly after. His parents sued the officers and their employer, the Town of Mukwonago, in a 42 U.S.C. §1983 suit, alleging the use of excessive force in violation of the Fourth Amendment. The district court granted summary judgment