IMLA

THE MUNICIPAL LAWYER MAGAZINE

JANUARY/FEBRUARY 2012

THE JOURNAL OF LOCAL GOVERNMENT LAW

Title VII and the Workplace Romance

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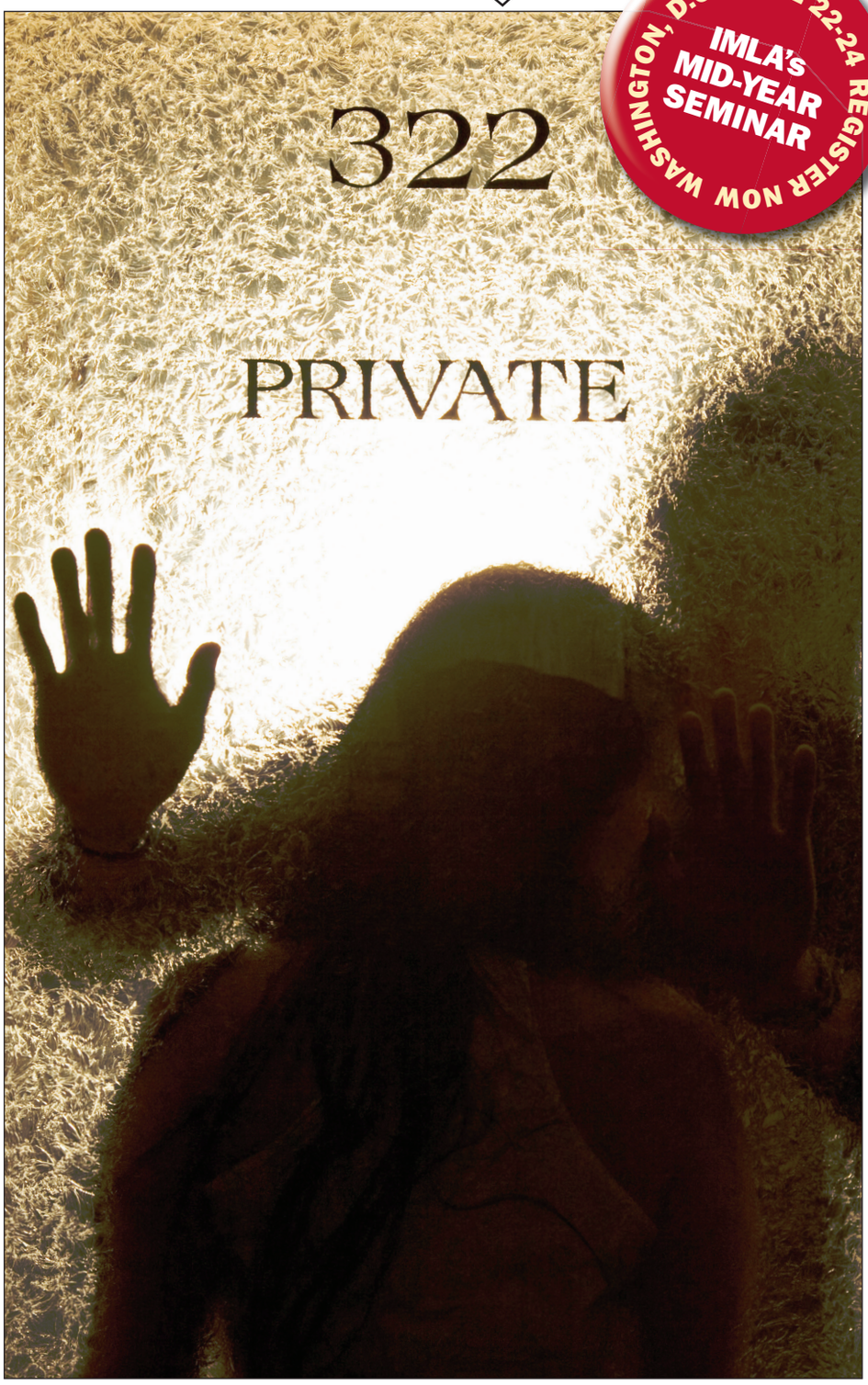

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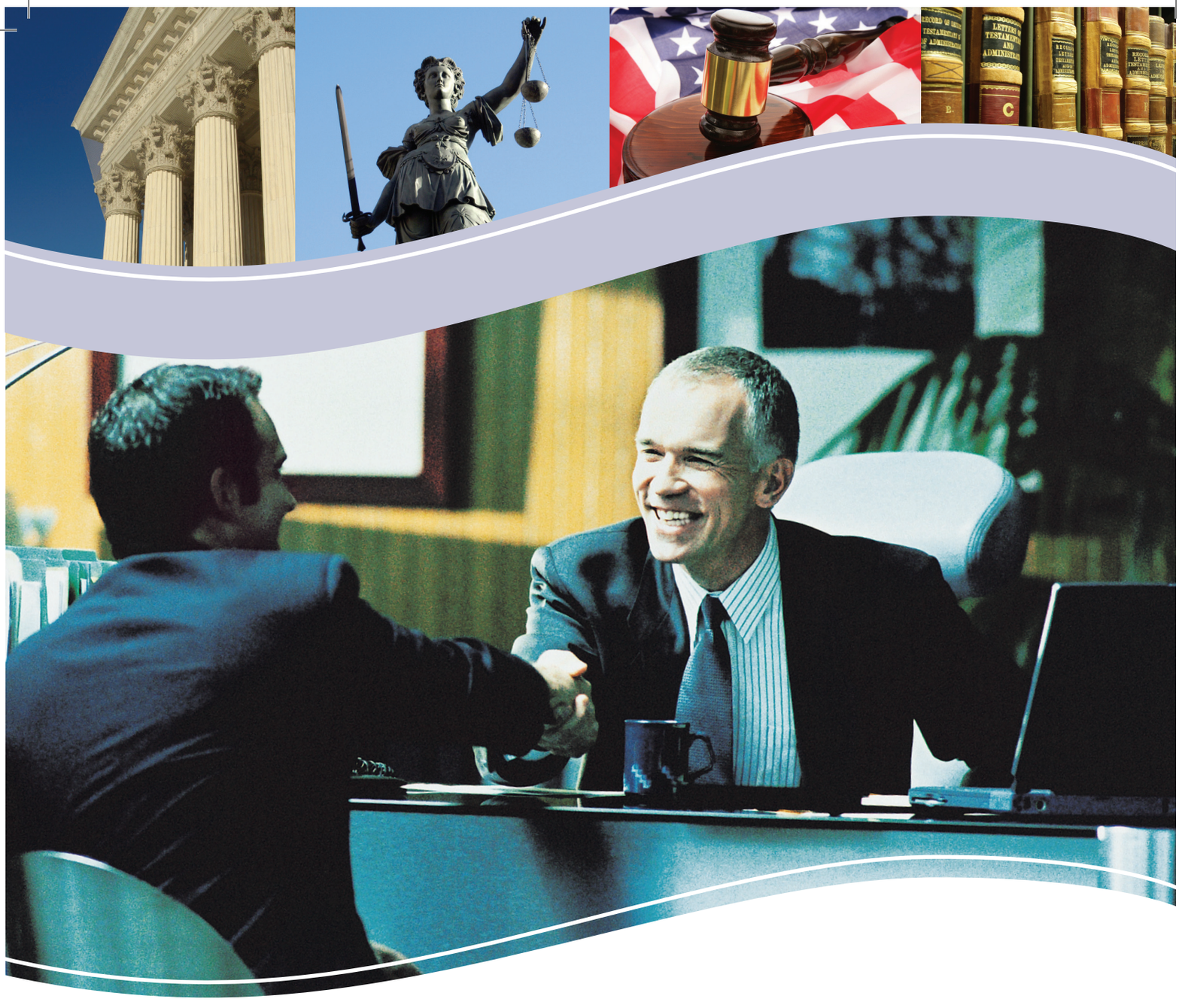

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Municipal Lawyer

EXECUTIVE EDITOR
Charles W. Thompson, Jr.

EDITOR
Sophia M. Stadnyk

ART DIRECTION & PRODUCTION
Trujillo Design
trujillodesign@yahoo.com

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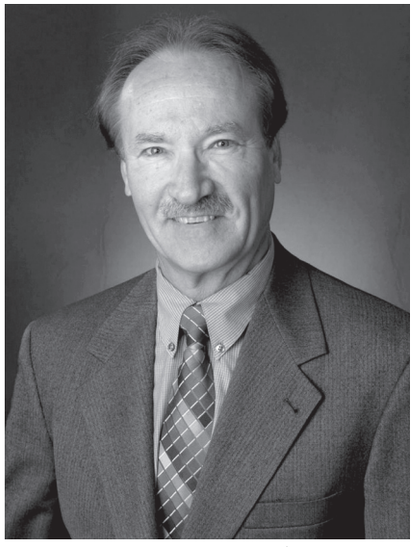

By Jay Doegey, IMLA President

When I began my legal career, as a new Assistant City Attorney in Corpus Christi, Texas, the then City Attorney, Bruce Aycock, frequently talked about the National Institute of Municipal Law Officers (NIMLO) and what a marvelous resource it was for city attorneys. A few years later, in 1984, Bruce allowed me to attend my first NIMLO annual conference, held in the City of Fort Worth. I was pleased by the quality of the program, but I was struck by the age and lack of diversity of the attendees. Once I became a regular attendee, it also appeared to me that the organization was clique-ish: the officers, Board, and committees seemed to be a small circle of members who appeared to control everything. However, to my surprise, in the early 1990s I was appointed to the Strategic Plan Committee. While serving on that Committee, I began to learn a lot more about this organization and its members, and I started participating actively in some of the Sections. Eventually, I became the Chair of the Ethics Section, and in 2003 (on my third try), I was selected to the IMLA Board of Directors.

Over the years, NIMLO evolved into the International Municipal Lawyers Association (IMLA), especially after it held its 1992 conference in Edmonton, Alberta. This was the first time in recent years that its annual conference was held in another country.

IMLA's leaders have been responsive to the wishes of the membership and continued to stress making the organization even more inclusive. Committees, Sections and (most recently) the manner of selection of the Board of Directors were realigned to encourage more member participation.

The organization that Charles Rhyne founded in 1935 was becoming more diverse as America and the legal profession changed. Its membership became much more diverse in age, gender, ethnicity, and nationality. More complex organizational strategies were undertaken by its Executive Directors (Benjamin Brown, Henry Underhill, and Chuck Thompson), and its Presidents. IMLA's leaders have been responsive to the wishes of the membership and continued to stress making the organization even more inclusive. Committees, Sections and (most recently) the manner of selection of the Board of Directors were realigned to encourage even more member participation. Term limits for Board membership were established: it no longer required a decade of Board membership to succeed to the presidency.

We Want You to Participate

Last September, on becoming IMLA's new President and addressing the membership, I said that I wanted to continue to encourage relatively new members to become even more involved in IMLA by serving on our committees. I also sought to aggressively recruit our Canadian members to serve on these committees as well. Our committees are now hard at work trying to send a clear message –*"This is your organization. Please volunteer to serve. Your participation is valuable."*

Your Participation is Valuable

Here are some things you can do that can provide immense value from your IMLA membership and participation, for yourself and others:

- If you are interested in learning or speaking about particular municipal law topics, let IMLA know when you fill out your Conference or Seminar evaluations (or just send us an e-mail). Volunteer to be a speaker. Volunteer to be on the Program Planning Committee. Join a Section. Write an article for the *Municipal Lawyer* magazine.
- If you want to recognize a member of your municipal law office, a lawyer in another law office, or if you are a client and want to recognize an outside attorney that does a great job in handling your city's cases, nominate that person for an IMLA award through IMLA's Awards Committee.
- If you are interested in municipal law advocacy, volunteer to write an *amicus* brief. Recommend a worthy case for consideration to the IMLA Legal Advocacy Committee. Volunteer to be on the Legal Advocacy Committee. Write an article for the *Municipal Lawyer* on noteworthy cases. Join IMLA's Litigation Section.
- If you want to motivate and challenge yourself or an assistant city attorney in your office, or you want to increase professionalism and credibility to your office in the eyes of your governing body and community, apply for IMLA Local Government Fellows certification.

- If you want to be selected to serve on the IMLA Board of Directors, do several of the above: volunteer to be a Section Chair, a State Chair or Regional Vice President, and especially, become an IMLA Local Government Fellow. Take advantage of all of the networking opportunities these offer. (See my article on the value of networking in the November/December 2011 issue of *Municipal Lawyer*.)

It's your IMLA. It's only by participating that you can truly reap the valuable benefits that IMLA membership offers. Your Board officers and Board members (listed on page 3), as well as the IMLA staff (including Executive Director Chuck Thompson) look forward to hearing from you, and hopefully seeing and talking to you at the upcoming IMLA Mid-Year Seminar in Washington, D.C., April 22-24, and at IMLA's Annual Conference in Austin, Texas, October 21-24. ML

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IMLA MEMBER RECEIVES PRO BONO AWARD



The South Carolina Bar awarded its 2012 Pro Bono Award to IMLA member **Bradford T. Cunningham**, among others, for his contributions to meeting the civil legal needs of citizens who cannot afford the services of an attorney. Mr. Cunningham, the attorney for the Town of Lexington, has been a pro bono volunteer since 2004, averaging six or more pro bono cases per year. As attorney for the Town of Lexington, he also accepts pro bono cases on a walk-in basis, drafting wills and powers of attorney and handling real estate and probate issues. The award recipients were recognized at the Bar Foundation Gala on Saturday, January 21, 2012. In addition to the award, Mr. Cunningham received $500 from the state bar, which he donated to the Lexington Police Department's "Adopt-A-Cop" Program. (see photo, right). The Town's Mayor, Randy Halfacre, also presented Mr. Cunningham with a proclamation recognizing him for his outstanding service as an employee and to the Lexington Community. Congratulations!

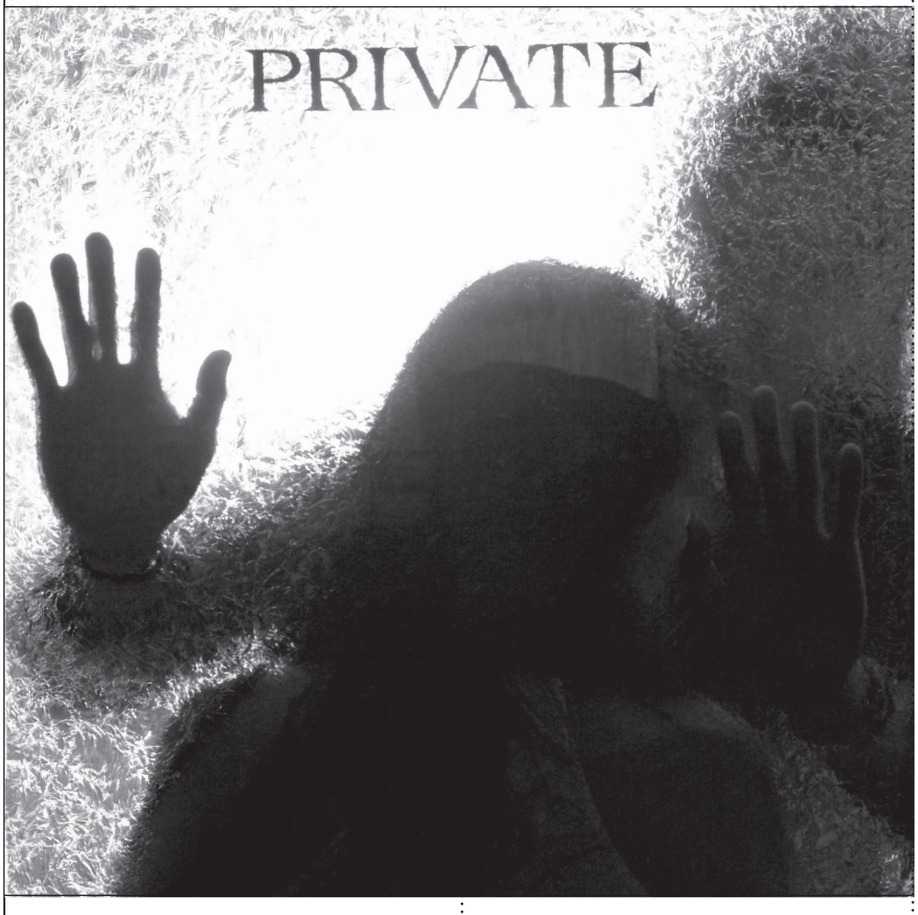


Photo/Jennifer Dowden



Title VII and the Workplace Romance

by John J. Davis



When the boss plays favorites by promoting his lover, raising her salary, or showering her with benefits not afforded to other employees, the entire office suffers. Management's clear message in such cases is that diligence, hard work, and leadership qualities do not always pay, and that career advancement depends on whom you're sleeping with. Employee morale, teamwork, loyalty, and even productivity are all adversely affected by sexual favoritism in the workplace. But while preferential treatment based on sex may be bad for business, is it unlawful? Is sexual favoritism a form of sex discrimination prohibited under federal law? The answer is generally no—isolated instances of sexual favoritism do not ordinarily violate Title VII of the 1964 Civil Rights Act. Still, it's the exceptions to this rule that employers must watch out for.

Title VII

Title VII forbids an employer from discriminating against an individual with respect to compensation, terms, conditions, or privileges of employment "because of such individual's . . . sex."[1] As the United States Supreme Court recognized in *Meritor Savings Bank, FSB v. Vinson*,[2] sexual harassment is a type of sex discrimination. "[W]hen a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."[3] Analytically, courts have identified two forms of sexual harassment — quid pro quo harassment, and the sexually hostile work environment.[4] Quid pro quo sexual harassment occurs when a supervisor gives some type of economic benefit to an employee in exchange for sex; or, conversely, takes an adverse employment action against an employee who refuses to submit to his (or her) sexual advances.[5]

A sexually hostile work environment is one where the harassment is so severe or pervasive that it "alter[s] the conditions of [the plaintiff's] employment and create[s] an abusive working environment."[6] As defined by the Equal Employment Opportunity Commission (EEOC), Title VII prohibits sexual conduct that "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[7]

When a boss coerces a subordinate to participate in a sexual relationship (or punishes her for refusing to do so), the subordinate becomes the victim of quid pro quo sexual harassment. Her recovery rests on proof that she was subjected to unwelcome sexual advances.[8] But if a boss bestows special benefits upon a subordinate as a result of a voluntary and consensual sexual relationship, it's another story. *Welcome* sexual advances are typically not actionable.[9] Still, sexual favoritism (a/k/a "paramour favoritism") can infect an entire workplace and negatively impact other workers. When one employee receives preferential treatment due solely to her status as the boss's lover, co-workers legitimately feel resentful and cheated since such favorable (and disparate) treatment is not based on professional qualifications or merit; career advancement, instead, is based on a system viewed as biased, unethical and unfair.

Almost universally, courts have held that any disadvantage co-workers may feel due to a paramour's romantic relationship with the boss is not actionable for the simple reason that such discrimination is not "because of ...sex" within the meaning of Title VII. Instead, it is "because of" a personal relationship:

> Title VII does not...prevent employers from favoring employees because of personal relationships. Whether the employer grants employment perks to an employee because she is a protégé, an old friend, a close relative or a love interest, that special treatment is permissible as long as it is not based on an impermissible classification.[10]

In *DeCintio v. Westchester County Med. Ctr.*,[11] the U.S. Court of Appeals for the Second Circuit rejected the claims of male plaintiffs who alleged they were discriminated against on the basis of sex, in violation of Title VII, when their supervisor disqualified them from promotion in favor of a female with whom the supervisor was having a romantic relationship. The plaintiffs, reasoned the court, were not prejudiced because of their status as men; rather, they were discriminated against because their supervisor preferred his paramour,[12] and other female applicants for promotion faced the same predicament. No one but the paramour could be considered for the appointment due to her special relationship with the supervisor.[13] In reversing a judgment entered in favor of the plaintiffs, the Second Circuit refused to expand the term "sex," for Title VII purposes, to include "sexual liaisons" and "sexual attractions."[14]

The Seventh Circuit reached the same result in *Preston v. Wisconsin Health Fund*,[15] ruling that a male plaintiff could not recover for sex discrimination under Title VII for being terminated and replaced by a woman with whom the CEO was having an affair. Writing for the court, Judge Posner put the point bluntly:

> A male executive's romantically motivated favoritism toward a female subordinate is not sex discrimination even when it disadvantages a male competitor of the woman. Such favoritism is not based on a belief that women are better workers, or otherwise deserve to be treated better, than men; indeed it is entirely consistent with the opposite opinion....Neither in purpose nor in consequence can favoritism resulting from a personal relationship be equated to sex discrimination.[16]

Other circuits have similarly rejected the notion that workplace favoritism based on a personal relationship will support a claim for sex discrimination under Title VII.[17]

In 1990, the EEOC adopted its "Policy Guidance on Employer Liability under Title VII for Sexual Favoritism."[18] While this is not binding authority, it nonetheless constitutes a "body of experience and informed judgment to which courts and litigants may properly resort for guidance."[19] The Policy Guidance endorses the *DeCintio* rationale, discouraging recovery in *isolated* instances of paramour favoritism:

Almost universally, courts have held that any disadvantage co-workers may feel due to a paramour's romantic relationship with the boss is not actionable for the simple reason that such discrimination is not "because of ...sex" within the meaning of Title VII.

> It is the Commission's position that Title VII does not prohibit isolated instances of preferential treatment based upon consensual romantic relationships. An isolated instance of favoritism toward a "paramour" (or a spouse, or a friend) may be unfair, but it does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their genders.[20]

Exceptions to the Rule

At the same time, the EEOC cautioned that, in certain circumstances, recovery may still be appropriate—either by the "favored" employee and/or by the disadvantaged co-workers.[21] Thus, while the general rule is that disparate treatment based on sexual favoritism will not support a claim for discrimination under Title VII, employers should be aware of at least three exceptions to this rule that may expose them to liability. The EEOC identified two such exceptions in its Policy Guidance; the third arises out of romantic relationships that turn bad.

The first exception involves the "implied" quid pro quo scenario. If a targeted employee voluntarily yields to a supervisor's sexual advances and receives job benefits in return, the employee may be unable to recover for sexual harassment, but co-workers may have viable claims. Thus, when a willing woman receives a promotion, men and women who were qualified for the position but did not receive it may have standing to challenge the favoritism on the basis that they were discriminated against, arguing that the furnishing of sexual favors was an implied condition of receiving the benefit. Those not benefited were those who declined to grant such favors or who were not given that opportunity. In either case, the un-benefited employees were treated differently on the basis of sex.

In *Toscano v. Nimmo*,[22] the female plaintiff was qualified, but not selected, for a position in a Veterans Administration Hospital in Delaware. Instead, the hospital's administrative chief appointed a woman with whom he was having an affair. The plaintiff filed suit under Title VII, claiming she was discriminated against because the administrative chief conditioned his selection on the receipt of sexual favors (that in order for a woman to be selected, it was necessary to grant sexual favors, a condition not imposed on men). Citing the EEOC guidelines,

continued on page 8



John J. Davis is a founding partner in the Boston law firm of Pierce, Davis & Perritano, LLP. He is a graduate of Tufts University (cum laude) and Boston University School of Law. Mr. Davis is licensed to practice in the state and federal courts of Massachusetts and Rhode Island, and the United States Supreme Court. He concentrates in the defense of municipal liability, school liability, employment, law enforcement and civil rights actions. He is a frequent speaker and author on municipal law issues.

Workplace Romance *continued from page 7*

the district court agreed:

> Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.[23]

In short, for the plaintiff and others similarly qualified, the granting of sexual favors was an implied condition of the job. In *Priest v. Rotary*,[24] the court held that a waitress, given less favorable work assignments than a waitress who was sleeping with the restaurant manager, had stated a viable claim for sex discrimination under Title VII.[25] The plaintiff also established a claim by demonstrating that female employees who tolerated the manager's sexual advances (*e.g.*, suggestive comments, inappropriate touching) were likewise given preferential assignments.[26] Again, the clear and demeaning message to staff was that granting sexual favors (or at least tolerating sexual misconduct by the supervisor) was an implied condition of employment. When managers communicate that, to get ahead in the workplace, women must engage in sexual conduct, or that sexual solicitations are a prerequisite to their fair treatment, this can be a form of "implied" quid pro quo sexual harassment.[27]

The second exception to the general no-liability rule arises when the granting of sexual favors is considered to be widespread within a workplace. According to the EEOC Policy Guidance, an isolated instance of sexual favoritism will not be considered sexual harassment, but *multiple* relationships can create a sexually hostile work environment. This is true even if the objectionable conduct is not directed at the plaintiff, and regardless of whether those afforded preferential treatment willingly bestowed their sexual favors. As the EEOC warned, widespread favoritism conveys the message "that the managers view women as 'sexual playthings,' thereby creating an atmosphere that is demeaning to women."[28] For example, in *Broderick v. Ruder*,[29] a female staff attorney employed at the Securities and Exchange Commission (SEC) complained about a "pattern" of sexual favoritism within her division. The SEC denied any widespread sexual favoritism by its supervisory personnel, admitting only to a series of "social/sexual interactions between and among employees" that Title VII, so the SEC argued, was never intended to regulate.[30] The district court disagreed. The evidence at trial established that conduct of a sexual nature "was so pervasive" within the plaintiff's division that it could "reasonably be said that such conduct created a hostile or offensive work environment which affected the motivation and work performance of those who found such conduct repugnant and offensive."[31] The plaintiff was forced, in effect, to work in an environment where managers routinely bestowed preferential treatment upon employees who submitted to their sexual advances, and as a result, the plaintiff was entitled to recover under Title VII (even if those who engaged in such consensual sexual relations were not).[32]

The California Supreme Court addressed the issue of widespread sexual favoritism in the landmark case, *Miller v. Dep't of Corrections*.[33] Noting that it was "not the relationship, but its effect on the workplace" that was relevant, the court acknowledged that isolated instances of favoritism towards a paramour might not constitute a sexually hostile environment.[34] However, the working environment at Valley State Prison for Women in Chowchilla, California, involved far more than isolated instances: the warden accorded unwarranted favorable treatment to numerous subordinate employees with whom he was having sexual affairs. Two female correctional officers not targeted by the warden sought recovery for sexual harassment under the California Fair Employment and Housing Act (the State equivalent of Title VII). The trial court allowed the defendants' motion for summary judgment, but the California Supreme Court reversed.

> Certainly, the presence of mere office gossip is insufficient to establish the existence of widespread sexual favoritism, but the evidence of such favoritism in the present case includes admissions by the participants concerning the nature of the relationships, boasting by the favored women, eyewitness accounts of incidents of public fondling, repeated promotion despite lack of qualifications, and [the warden's] admission he could not control [one of his paramours] because of his sexual relationship with her...[35]

Such evidence created at least a triable issue of fact on whether the warden's conduct constituted sexual favoritism that was sufficiently widespread to create a hostile work environment.[36]

Not all courts agree, however, that widespread sexual favoritism is actionable by all disadvantaged employees, regardless of gender. Thus, in *Krasner v. HSH Nordbank AG*,[37] the district court dismissed a Title VII claim brought by a male employee who alleged that his supervisors promoted a "demeaning view of women in the workplace" which the plaintiff found "objectionable" and which denied him "the opportunity to work in an employment setting free of unlawful harassment,"[38] noting:

> Krasner's concern for a woman's right to be free of workplace discrimination, and offense taken upon being surrounded by conduct believed to impinge on that right, admirable as it may be, does not make Krasner himself a victim of gender-based discrimination within the scope of Title VII's protections.[39]

Absent any allegation that sexual favoritism toward compliant females hindered the advancement opportunities, Krasner failed to state a claim for relief under Title VII. He simply identified no causal connection between his gender and any hostility he allegedly faced.

The third exception to Title VII and

isolated instances of sexual favoritism liability arises out of the "jilted lover" scenario. All bets are off once the relationship sours. Not surprisingly, many of them do: while "hell hath no fury like a woman [or man] scorned," a jilted supervisor comes in a very close second.

Romantic relationships (as any teenager knows) do not always terminate by mutual agreement. Breaking-up is often a unilateral decision, and if the jiltee is a supervisor and the jilter his subordinate, workplace havoc frequently ensues. The supervisor may continue to woo the employee in an effort to "win back" affection, or retaliate by firing the former lover (or take other less "serious" adverse employment actions). The point is that, if the jilted supervisor does anything other than accept the new status quo and thereafter treat the ex-paramour fairly and appropriately, he may expose himself and the employer to Title VII liability.

Several courts have wrestled with the "jilted lover" problem without reaching uniform results. In *Huebschen v. Dep't of Health and Soc. Servs.*,[40] the Seventh Circuit rejected an equal protection claim brought by a male employee against his female supervisor, based on allegations that the supervisor demoted him following his cessation of a consensual sexual relationship (his claim was based on the supervisor's alleged discrimination against him because of his membership in a protected class—*i.e.*, males). The court reasoned that any discrimination was merely "coincidental" to the plaintiff's gender:

> When the consensual romance between [the employee and supervisor] ended ... [the supervisor] did indeed react spitefully towards [the employee] by recommending that he be demoted at the end of the probationary period. But [the supervisor's] motivation in doing so was not that [the employee] was male, but that he was a former lover who jilted her.[41]

Embracing this analysis, an Illinois court subsequently denied recovery to a high school administrator who brought a Title VII suit for sex discrimination against her former lover, a high school principal.[42] After the plaintiff ended the relationship, she was demoted to a lower-paying teaching position. The court was wholly unsympathetic to her plight, finding that an employee who opts to become involved in an intimate affair with her employer "removes an element of her employment relationship from the workplace, and in the realm of private affairs people do have the right to react to rejection, jealousy and other emotions which Title VII says have no place in the employment setting."[43]

...if the jilted supervisor does anything other than accept the new status quo and thereafter treat the ex-paramour fairly and appropriately, he may expose himself and the employer to Title VII liability.

Where some courts see nothing but hurt feelings and bruised egos, others see unlawful sex discrimination: in *Forrest v. Brinker Int'l Payroll Co., LP*,[44] the First Circuit held that one's status as a former paramour did not bar recovery for sexual harassment under Title VII. To interpret harassment by a jilted lover not as gender discrimination, but as discrimination based on a failed relationship, was a "flawed" proposition; the harassment, stated the court, was still "based upon sex."[45] In *Ammons-Lewis v. Metro. Water Reclamation Dist.*,[46] the Seventh Circuit, in an apparent attempt to ameliorate its earlier *Huebschen* decision, agreed that the plaintiff's prior sexual relationship with her alleged harasser was "by no means dispositive of her claim."[47] It was, however, relevant to whether the complained-of conduct was unwelcome, resulted in a workplace that plaintiff subjectively experienced as hostile, or occurred because of the plaintiff's sex.[48]

Conclusion

For many reasons, workplace romances spell nothing but trouble for employers —and, not surprisingly, such trouble is multiplied severalfold when the relationship is between a supervisor and a subordinate. Beyond the obvious pitfalls inherent in coercive behavior and the implicit or explicit promises of reward in exchange for sexual favors, the business of an employer suffers when the boss gives preferential treatment to a staff member simply because they share a sex life, and not because the staffer is better-educated, more intelligent, or has greater work experience. Employees not afforded such preference become resentful and discouraged, and employee morale and performance correspondingly decline. This negative impact on business can explode when employees affected by a workplace romance assert claims of unlawful sex discrimination. While such claims may find no traction when the relationship is isolated and involves only consenting adults, the risks of "implied" quid pro quo sexual harassment, widespread sexual favoritism, and unpredictable reactions by jilted lovers may keep managers and employers up at night. Employment policies prohibiting fraternization in the workplace may be of some benefit, but regular anti-discrimination training and a good employment practices liability insurance policy should also be considered. Because workplace romances can never be effectively eliminated, wise employers ought to prepare themselves to deal with the anticipated (and frequently unanticipated) consequences.

Notes

1. 42 U.S.C. § 2000e-2(a) (1982).
2. 477 U.S. 57 (1986).
3. *Id.* at 64.
4. Lipsett v. Univ. of Puerto Rico, 864 F.2d 881, 897-98 (1st Cir. 1988).
5. Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982).
6. *Id.* at 904.
7. 29 CFR § 1604.11(a)(3). *See* Harris v. Forklift Sys., Inc., 510 U.S.

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Drug and Alcohol Testing of Municipal Employees

by C. Christine Fillmore



How far may employers go to guarantee a drug-free and alcohol-free workplace? The answer, which may come as an unwelcome surprise to many local government officials, depends upon whether the employer is a private organization or a governmental entity, who is being tested, and how the tests are performed.

"Drug-Free" Workplaces

Many people are familiar with the federal Drug-Free Workplace Act of 1988.[1] This law requires all organizations, contracting directly with the federal government in the amount of $100,000 or more, and all organizations receiving federal grants in any amount, to maintain a drug-free workplace. In carrying this out, employers are required to publish and give a policy statement to all employees, informing them that the unlawful possession or use of a controlled substance is prohibited in the workplace, and specifying the actions that will be taken against employees who violate the policy. Employers must also establish a drug-free awareness program to educate employees about the dangers of drug abuse in the workplace, the policy of maintaining a drug-free workplace, any available drug counseling, rehabilitation, and employee assistance programs, and the penalties that may be imposed on employees who violated the policies. However, while penalties or participation in a rehabilitation program must be imposed upon an employee convicted of a criminal drug offense in the workplace, this law neither requires nor authorizes random drug-testing of employees.

Public Employers

Most employers would agree that maintaining a workplace free of drug and alcohol abuse is a worthy goal, and many would also agree that random or widespread drug and alcohol testing would be a useful tool in this endeavor. States and municipalities may have an even stronger desire to do this than some private businesses, given the fact that their employees conduct the public's business. Such employees need to exercise judgment and integrity: they discharge many public functions, such as law enforcement, firefighting, and teaching, and the public needs to have confidence and trust in them. Who wouldn't want to uphold these standards in the governmental workplace?

The idea makes a lot of sense, and has been implemented in some fairly high-profile ways across the country. The State of Georgia passed a law in 1990 requiring all candidates for certain state-elected positions to certify that they had passed a drug test within the 30 days before they filed to run for office.[2] The Governor of Florida signed an executive order on March, 22, 2011, requiring random drug-testing for all current State employees and applicants for State jobs.[3]

However, in 1997, the United States Supreme Court struck down the Georgia law in *Chandler v. Miller*.[4] Beginning on the day it was signed, Florida Executive Order 11-58 was deemed illegal and unenforceable by the Florida American Civil Liberties Union (ACLU) and many legal scholars.[5] In May 2011, the ACLU of Florida filed a lawsuit to block implementation of the drug-testing program on behalf of the American Federation of State, County and Municipal Employees (AFSCME) Council 79, which represents 50,000 state employees, and an additional 200,000 county and municipal employees, in Florida.[6] Florida's Governor suspended the program two weeks later for all but Corrections Department employees, pending the outcome of the case.

The problem? A little document called the United States Constitution.

Searches and Seizures

The Fourth Amendment to the U.S. Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...."[7] This guarantees the privacy, dignity, and security of people against certain arbitrary and invasive acts of the government, even when the government acts as an employer.[8] Unlike private employers, which are not subject to this limitation, municipalities and other public employers must be concerned about the Fourth Amendment because, as political subdivisions of the state, municipalities are "state actors" under the Constitution.

At its core, the Amendment protects a person's reasonable expectation of privacy and security against unreasonable searches and seizures. Not all searches and seizures are considered unconstitutional, only those that are "unreasonable."[9] In the ordinary criminal context, this means that the government must have a warrant before either searching or seizing. When there is no warrant, the government must have probable cause, meaning there is some individualized suspicion of illegal activity by that person, requiring expedient action instead of waiting to obtain a warrant. The determination of whether a search or seizure is unconstitutional depends upon all of the facts and circumstances involved. A court will balance the intrusion upon the individual's privacy interest against the degree to which the search or seizure is needed to promote a legitimate governmental interest.[10]

The U.S. Supreme Court has solidly decided that drug and alcohol testing are forms of "searches" under the Fourth Amendment.[11] This means that a municipality may only test its employees for drug and alcohol use in a way that is not "unreasonable" pursuant to the Fourth Amendment. The constitutional prohibition against random, suspicionless testing applies to new applicants and new hires, as well as current employees.[12]

However, although there are significant limitations on what a municipality may do, there are still certain categories of employees and specific situations for which drug and alcohol testing is acceptable and will not violate the Constitution. The key is that the testing program must adhere closely to the guidelines established by the courts, it must be narrowly tailored to protect the public's safety needs, and must be properly designed and administered. While the seminal cases establishing the limits of drug and alcohol testing of government employees were decided in 1989, the recent attempt to test all state employees in Florida illustrates that it may be time for a refresher course in the basics.

The U.S. Supreme Court has solidly decided that drug and alcohol testing are forms of "searches" under the Fourth Amendment. This means that a municipality may only test its employees for drug and alcohol use in a way that is not "unreasonable."

What *Can* Municipalities Do?

Court decisions from around the country do not reflect a universal agreement on which categories of employees may be tested, but some general conclusions may be drawn.

Commercial Driver's License (CDL) Testing. Under the federal Omnibus Transportation Employee Testing Act of 1991,[13] people who operate commercial motor vehicles (namely, those with a total gross vehicle weight of 26,001 pounds or more, or which carry 16 or more people including the driver, or which are used to transport hazardous materials) are required to have a commercial driver's license. Federal regulations not only prohibit the operation of any commercial motor vehicle while using drugs or alcohol, but also require employers, including municipalities, to perform drug and alcohol testing of these employees in certain situations. The purpose of such testing is "to help prevent accidents and injuries resulting from the misuse of alcohol or use of controlled substances by drivers of commercial motor vehicles."[14]

Testing is required in the following situations: (a) the first time a driver reports to work for the employer, (b) optional pre-employment testing after a conditional offer of employment is made, if all prospective employees are tested in exactly the same manner, (c) post-accident testing, (d) testing upon a reasonable suspicion of drug and/or alcohol use (based on specific, contemporaneous, articulable observations of the person's appearance, behavior, speech or body odors), and (e) return-to-duty testing after a violation.[15]

In addition, CDL drivers are required to submit to random testing for drug and alcohol use.[16] The regulations provide detailed instructions for the selection of employees for testing, the frequency of testing, and the manner in which tests are to be conducted. Great emphasis is placed on fairness, accuracy, and protection of the privacy rights of the person being tested.

There is also an option for states to exempt certain drivers from the testing requirements and the CDL licensing requirements.[17] For example, the State of New Hampshire has chosen to exempt fire service personnel who drive emergency vehicles assigned

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C. Christine Fillmore has been a staff attorney with the New Hampshire Local Government Center (LGC) in Concord, NH since 2005, advising and training local government officials in member municipalities, and writing for LGC handbooks and *Town and City* Magazine. Her prior legal experience includes seven years with the Concord, NH law firm of Rath, Young and Pignatelli in environmental law, commercial transactions and land use. Christine got her B.A. (*cum laude*) from Tufts University and her J.D. (*magna cum laude*) from Boston College Law School.

Drug and Alcohol Testing *continued from page 11*

or registered to a department or fire service organization in pursuit of fire service purposes.[18] This means that the random testing otherwise applicable to CDL drivers does not apply to New Hampshire firefighters who operate emergency or fire service vehicles. New York has followed a similar path, exempting police, fire, and ambulance drivers operating official vehicles during an emergency operation, or in the performance of official duties, or during activities related to executing emergency governmental functions.[19] To find if your state has exempted these or other categories of drivers, check the commercial driver licensing section of your state laws or the agency rules. The exemption is often found in the definition of "commercial motor vehicle."

Reasonable Suspicion Testing. Under the Fourth Amendment, even a search which may be performed without a warrant must be based, in most cases, on probable cause to believe that the person to be searched has violated the law.[20] In this context, a governmental employer must have some individualized suspicion that drug or alcohol use is taking place. While there is no single national standard for what constitutes "reasonable suspicion" in this situation, it may be said to exist, generally speaking, when an employer has specific, objective facts, and reasonable inferences drawn from those facts, that suggest an employee is using drugs, or is under the influence of alcohol or drugs, while on the job. These facts might include things like a direct observation of drug or alcohol use, apparent intoxication, abnormal or erratic behavior, and reports from reliable and credible sources that drug or alcohol use is happening on the job.

Random Testing. It should be clear at this point that governmental employers may not ordinarily test their employees for drug or alcohol use without a specific reason for doing so. Federal courts have struck down purely random testing programs. One city which tried to implement a testing program for all employees argued that it had good reasons for testing all job applicants: drug abuse had an adverse impact on job performance, and children had to be protected from those who used drugs or who could influence children to use them. While sympathetic to the city's concern, the U.S. Court of Appeals for the Ninth Circuit still ruled that the testing program was unconstitutional.[21]

While the desire to maintain a drug-free and alcohol-free workplace is understandable, it is not enough to override the Fourth Amendment's constitutional guarantee of freedom from unreasonable searches.

However, the U.S. Supreme Court has recognized that the traditional "probable cause" standard is not very useful when applied to routine administrative functions, especially where the government seeks to prevent the development of hazardous conditions *before* they occur, or to detect violations that are unlikely to generate articulable grounds for searching any particular place or person.[22] As a result, employees who serve in "safety-sensitive positions" may, in certain situations, be required to undergo random drug and alcohol testing. A variety of courts have recognized that, while such employees have a privacy right that will be invaded by such tests, the government has a stronger interest in protecting the safety of the public, which justifies the use of random testing. Employees who participate in an occupation that is regulated heavily to ensure safety, or which is fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences, are deemed to have a reduced expectation of privacy with respect to drug and alcohol testing.[23]

As the Supreme Court explained in *Nat'l Treasury Employees Union v. Von Raab* (discussing the rules for U.S. Customs officials and employees):

> Unlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms. Because successful performance of their duties depends uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from the Service personal information that bears directly on their fitness ... The Government's compelling interests in preventing the promotion of drug users to positions where they might endanger the integrity of our Nation's borders or the life of the citizenry outweigh the privacy interests of those who seek promotion to these positions, who enjoy a diminished expectation of privacy by virtue of the special, and obvious, physical and ethical demands of those positions.[24]

It bears noting, however, that the *Von Raab* decision was not unanimous. Justice Scalia wrote a vigorous dissent (in which he was joined by Justice Stevens and, by reference, Justices Marshall and Brennan), distinguishing this case from others where the Court found random searches to be reasonable on the basis that there was no history or evidence presented that drug use among Customs officials was an issue. "[N]either frequency of use nor connection to harm is demonstrated or even likely. In my view the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use,"[25] pointed out the dissent, adding that,

> ...in extending approval of drug testing to that category consisting of employees who carry firearms, the Court exposes vast numbers of public employees to this needless indignity. Logically, of course, if those who carry guns can be treated in this fashion, so can all others whose work, if performed under the influence of drugs, may endanger others —automobile drivers, opera-

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> tors of other potentially dangerous equipment, construction workers, [and] school crossing guards.[26]

This approach continues to be the view of some conservative constitutional scholars. Although today's climate of heightened border security would likely result in a similar decision, insofar as border officials are concerned, to that made two decades ago by the *Von Raab* Court, it would be interesting to see what today's Court would do with a different set of facts—for example, a challenge to a program to randomly drug-test dispatch officers (who do not carry firearms but who convey critical information in emergencies) or ambulance drivers (who transport the injured at a time of maximum vulnerability).

Nonetheless, it is clear that the current law permits municipalities to perform random testing of employees who serve in safety-sensitive positions. Employees who may fall into this category include police officers and others required to carry firearms or involved with drug crimes; emergency medical technicians; firefighters; transit employees; and bus drivers.[27] All of these categories involve employees who carry weapons, are required to make split-second decisions that may have significant safety repercussions, or who use equipment that can turn deadly if misused.

However, testing of these employees must still be reasonable and narrowly tailored to respect the individual's dignity, while providing an effective deterrent to drug and alcohol use. This means that the employees must be given meaningful advance notice of the testing program, and information about which drugs are the subject of testing and how the testing will work, to reduce to a minimum any "unsettling show of authority."[28]

The individual's privacy must also be respected, to the extent that this is reasonable. For example, an employee required to provide a urine sample should be permitted to produce the sample behind a partition or in a bathroom stall with a same-gender monitor within listening distance.[29] The guidelines for federal CDL drug-testing include protections of employee privacy,[30] and may be a useful model for employers to follow when implementing their own testing program

Conclusion

While the desire to maintain a drug-free and alcohol-free workplace is understandable, it is not enough to override the Fourth Amendment's constitutional guarantee of freedom from unreasonable searches. As state actors, municipalities may only test their employees for drug or alcohol use in a manner that complies with this guarantee. The boundaries of acceptable testing are not always clear. Well-meaning municipal officials may want to institute testing programs without a clear understanding of the constitutional limitations. It is up to us, as municipal attorneys, to educate and assist our clients regarding the impact of drug and alcohol testing of local employees on those employees' Fourth Amendment rights.

Notes

1. 41 U.S.C. § 701 *et. seq.* (2011).
2. Ga. Code Ann. § 21-2-140 (1990).
3. Fla. Exec. Order No. 11-58 (Mar. 22, 2011).
4. 520 U.S. 305 (1997).
5. *See e.g.*, Press Release, ACLUFL, *ACLU of Florida Responds To Gov. Scott's Executive Order Mandating Drug Testing of State Employees* (Mar. 23, 2011).
6. Press Release, ACLUFL, *ACLU and State Workers' Union File Suit in Federal Court to Block Governor's Order Requiring Drug Testing of State Employees* (June 01, 2011) at http://www.aclufl.org/news_events/?action=viewRelease&emailAlertID=3929. The Press Release includes a link to the ACLU's complaint.
7. U.S. Const. amend. IV.
8. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 613 (1989); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989).
9. *Skinner*, 489 U.S. at 619.
10. Samson v. California, 547 U.S. 843, 848 (2006).
11. *See*, *e.g.*, *Skinner*, 489 U.S. 602 (1989) (blood and urine testing for drug and alcohol use); *Von Raab*, 489 U.S. 656 (1989) (urine testing for drug use); Schmerber v. California, 384 U.S. 757 (1966) (blood testing for alcohol); California v. 617 Trombetta, 467 U.S. 479 (1984) (breathalyzer tests).
12. Baron v. City of Hollywood, 93 F. Supp. 2d 1337 (S.D. Fla. 2000) (City's desire to foster public integrity was an insufficient rationale for drug-testing of all job applicants).
13. 49 U.S.C. § 31301 *et seq.* (2012).
14. 49 C.F.R. § 382.101 (2012).
15. 49 C.F.R. Part 382, Subpart C (2012).
16. 49 C.F.R. § 382.503(a) (2012).
17. 49 C.F.R. § 103(d); 49 C.F.R. § 383.3(d) (2012).
18. N.H. Admin. Rule Saf-C § 1801.02(a)(1) (2011).
19. N.Y. Veh. & Traf. Law § 501-a (4)(b) (2011).
20. Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 667 (1989).
21. Lanier v. City of Woodburn, 518 F.3d 1147 (9th Cir. 2008).
22. *Von Raab*, 489 U.S. at 668.
23. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 630 (1989); *Von Raab*, 489 U.S. at 668; Keaveney v. Town of Brookline, 937 F.Supp. 975, 987 (D. Mass. 1996).
24. 489 U.S. at 672, 679.
25. *Id.* at 681.
26. *Id.* at 685.
27. *See*, *e.g.*, *Skinner*, 489 U.S. 602 (railway workers); *Von Raab*, 489 U.S. 656 (customs service officials who carry firearms and/or handle drug interdiction); Penny v. Kennedy, 915 F.2d 1065 (6th Cir. 1990) (firefighters and police officers); O'Connor v. Police Comm'r of Boston, 557 N.E.2d 1146 (Mass. 1990) (police officer trainees); Keaveney v. Town of Brookline, 937 F. Supp. 975 (D. Mass. 1990) (town employees driving commercial vehicles); Piroglu v. Coleman, 25 F.3d 1098 (D.C. Cir. 1994) (emergency medical technicians).
28. Delaware v. Prouse, 440 U.S. 648, 657 (1979) (quoted in *Von Raab*, 489 U.S. at 672); Smith County Educ. Ass'n v. Smith County Bd. of Educ., Docket No. 08-0076 (M.D. Tenn. Feb. 14, 2011).
29. *Von Raab*, 489 U.S. at 661.
30. 49 C.F.R. Part 40 (2012) (incorporated by reference into CDL testing program by 49 C.F.R. § 382.105) (2012). ML

Zoning By-laws: Human Rights and *Charter* Considerations Respecting the Regulation of the Use of Land

by Signe Leisk



Since the Supreme Court of Canada's 1979 decision in *Bell v. Her Majesty the Queen*,[1] municipalities have grappled with the issue of regulating the use of land and not the user. *Bell* is often cited for the principle that a municipality cannot "people zone," and, while no one disputes this premise, the difficulty arises where the use of land, by particular groups or for short durations, causes or is perceived to cause, external impacts of incompatible land uses which zoning is meant to avoid. These concerns often arise as a result of the shared use of dwellings by students in and around campuses, a concentration of social service uses, or short-term rentals in resort communities. The case law across Canada has been inconsistent, making it difficult for municipalities to effectively draft or enforce their by-laws. The courts have also made it clear that human rights codes and the *Canadian Charter of Rights and Freedoms*[2] must be considered in enacting zoning by-laws that may impact particular groups of persons.

A review of the cases across Canada demonstrates that such zoning by-laws are increasingly scrutinized by tribunals and the courts. In enacting such laws, a municipality needs to ensure that its by-law is passed for a proper planning purpose, and that there is sufficient information to support the reasonableness of the law in light of human rights codes and to justify any potential infringement of rights pursuant to s. 1 of the *Charter*.[3]

The Discriminatory Nature of Zoning

Any discussion of human rights and *Charter* considerations in zoning needs to begin from the perspective that zoning by-laws are, by their very nature, discriminatory. Establishing a particular land use zone creates a distinction—uses that will be permitted within the zone and those that will not. Such distinctions will have varying impacts on land owners and particular user groups.

In considering the appropriateness of a zoning by-law's distinctions, the overriding consideration should be its purpose. Generally, the purpose of the zoning power is to prevent nuisances and the physical interference with land by ensuring that adjacent land uses are compatible. In evaluating a zoning by-law, the first step should be to consider the purpose behind its provisions and whether this comports with legitimate land-use planning objectives. While this may seem a basic principle, this analysis has not always been undertaken by the courts.

Bell's "User v. Use"

In *Bell*, the applicable zoning by-law restricted the occupancy of a "dwelling unit" in certain zones to a single individual or a "family," defined by reference to consanguinity, marriage, and adoption.[4] Douglas Bell lived with two individuals who were not related to him by blood, marriage, or adoption, and was convicted of a violation of the by-law. In striking down the restriction, the Supreme Court of Canada held, in a 3-2 decision, that the "legislature never intended to give authority to make such rules and the device of zoning by reference to the relationship of occupants rather than the use of the building is one which is *ultra vires* of the municipality under the *Planning Act*."[5]

In support, the majority of the Court noted the prohibitive effect of the by-law in precluding the sharing of accommodation by adult persons unrelated by blood or marriage, mentioning college students as one of the many examples.[6] What the Court did not do was assess the municipal purpose in so restricting the allowable use of a dwelling unit. Although no one argues with the Court's basic premise—zoning the use of land rather than

its users—this lack of analysis means the decision provides insufficient guidance. Many cases that have followed *Bell* simply refer to the "user vs. use" distinction on the face of the by-law, without further elaboration.

However, municipalities can discourage or encourage uses without reference to "users" by framing restrictions in terms of unit size, number of rooms per unit, minimum lot size, and frontage. Merely looking at the words of a zoning by-law may not be sufficient, absent a consideration of the zoning regulation's purpose. A good example is zoning for retirement residences or retirement communities. Applying *Bell* on its face, any provision restricting the use of land to those over a particular age would be considered zoning the "user." However, there may be proper planning reasons for such a distinction, including the need to assess a demand for parks and schools.

The Subsequent Application of *Bell*

Following *Bell*, the Ontario Superior considered the validity of a zoning by-law that contained a definition of "family" in *Smith v. Township of Tiny*.[7] The definition in this case was broader than that in *Bell*, and included persons living together who were not related.[8] The court found that a restriction based upon a definition of "family" which incorporated most types of arrangements usual for people living together as a simple housekeeping unit was neither unreasonable nor discriminatory, nor did it constitute zoning based on the relationship of the occupants. The by-law was therefore upheld. The British Columbia Court of Appeal followed this reasoning in similar circumstances in the case of *Faminow v. North Vancouver (District)*.[9]

In the 2006 British Columbia Court of Appeal case, *Greater Victoria School District No. 61 v. Oak Bay (District)*,[10] the court considered a by-law that restricted the use of land to "civic use," defined as "a use providing for public functions under the auspices of a government body."[11] Citing *Bell*, the applicant asserted that the by-law was discriminatory because it drew a distinction between users. The court agreed, finding that the distinction between public and non-public use of land amounted to a distinction based on the "user," and severed the discriminatory portion of the by-law.

In Ontario, the decision in *Bell* has been considered several times by the Ontario Municipal Board, which hears appeals of zoning by-laws and other planning instruments across Ontario. In *Haydon Youth Services v. Kearney (Town)*,[12] the Board considered a by-law governing a facility that functioned as a group home for young offenders and youths with behavioural problems. After residents lobbied the city council, the by-law was amended to exclude young offenders, and to reduce the number of permitted residents from ten to four. On appeal, the Board held that the actions taken by the council were reasonable given the size and nature of the community and the level of services that the community had available. In considering the issue of "people zoning," the Board reiterated that zoning was, by its nature, discriminatory and, since planning was for people, "certain basic services must be available to serve the needs of those people, however you define them."[13]

Consideration of potential "people zoning" has often arisen respecting by-laws regulating tourist accommodation: *Canmore Property Management Inc v. Canmore (Town)*,[14] *Whistler (Resort Municipality) v. Miller*,[15] and *Whistler (Resort Municipality) v. Wright*.[16] In all of these cases, the by-laws zoned the buildings for long-term, residential use in the style of traditional single-family accommodation, though with broad definitions of what constituted a single "family." In each case, the courts rejected the applicants' arguments, finding, in line with *Smith*, that the by-laws regulated the use of land and not the users. Most recently, the Ontario Municipal Board decision of *Re Rosen*[17] upheld an interim control by-law that prohibited short-term accommodation use in a resort community, the Town of Blue Mountains. The by-law was challenged as "people zoning" that discriminated on the basis of income and place of origin, contrary to the Ontario *Human Rights Code*[18] and the *Charter*. The Board confirmed that it was bound by the *Code* and the *Charter*, but stated that several cases and many statutes distinguished between transient living and permanent accommodation, and that the municipality had acted within its authority in distinguishing between short-term accommodations and permanent dwellings. The proposed zoning by-law was held by the Board to be a "legitimate exercise of authority to zone for differing levels of use intensity and differing needs for municipal services."[19]

Another Ontario case that considered *Bell* is *Neighbourhoods of Windfields Ltd. Partnership v. Death*.[20] The City of Oshawa and a developer brought an application against homeowners who rented dwellings to post-secondary students, claiming that the use of the dwellings was not use as a "single housekeeping establishment," and contrary to the City's by-law.[21] The court ruled that the proper approach to interpreting a zoning by-law was one that took into account the words used, the intent of the council, and the purpose and scheme of the by-law as a whole. A single housekeeping establishment "would generally approximate a typical family group of one or two adult persons, together with minor or adult children or a similar social unit either by relationship or some other common bond for living together as a housekeeping establishment," but not short-term, temporary sleeping quarters and shared-facilities rentals by students.[22] The court considered prior case law, as well as the Ontario *Plan-*

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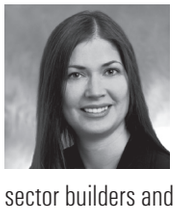

Signe Leisk is head of the Municipal, Planning & Environmental Group and co-chair of the Real Estate & Development Group at Cassels Brock. Her practice encompasses all aspects of municipal, land use planning and environmental law, including expropriations and proceedings under the *Building Code Act*. She has extensive experience representing both private sector builders and developers, as well as municipalities and public institutions, appearing regularly before the OMB and the courts. Signe was awarded the inaugural Precedent Setter Award by *Precedent Magazine* for excellence and leadership in her practice.

Zoning By-laws *continued from page 15*

ning Act (which prohibits zoning by-laws from distinguishing "persons who are related and persons who are unrelated in respect of the occupancy or use of a building"[23]). It concluded that it was lawful to zone so that the use of premises was "in accord with that which would typically occur in 'single family dwellings' provided the definition of 'family' [was] broad enough to include some unrelated persons."[24] Dismissing the appeal, the Ontario Court of Appeal held that the *Planning Act* prohibition did not prevent the court from considering, as a relevant factor, how the renters related amongst themselves.[25]

While this case seemingly broadened the ability of municipalities to consider the relationship between occupants in enforcing zoning by-laws (although arguably, not in passing such by-laws) it raises concerns as to *how* by-law enforcement officers or zoning examiners will evaluate the "relationship" between the occupants to determine whether a zoning by-law is being complied with.

Human Rights & *Charter* Considerations

Although the *Code* and the *Charter* were not argued in *Windfields*, the Ontario Human Rights Commission sought intervener status upon the application for leave to appeal to the Supreme Court of Canada, on the basis that the case concerned, at its core, access to housing, and that the effect of the decision was to limit housing choices for students. Although leave to appeal was not granted, the Commission continues to monitor zoning by-laws across Ontario, warning that zoning definitions that restrict the occupants of housing can have the effect of discriminating against *Code*-protected groups.

In *Alcoholism Foundation of Manitoba* v. *City of Winnipeg*,[26] the Manitoba Court of Appeal considered a *Charter* challenge to a group home by-law which required the disabled, the aged, and victims of drug or alcohol abuse to apply for permission to live together as a group or family. Although the by-law was found to be consistent with provincial legislation and the municipal zoning power, it was found to be contrary to s.15 of the *Charter*.[27] While a municipality had the right to protect "the neighbourhood integrity of its various districts," the court held that the by-law was an unjustified, differential treatment of disadvantaged groups,[28] and the City failed to present any evidence justifying this infringement under s. 1 of the *Charter*. The court held that the by-law amounted to objectionable and discriminatory "people zoning"—directly linking this concept and the *Charter*.[29]

Municipalities can discourage or encourage uses without reference to "users" by framing restrictions in terms of unit size, number of rooms per unit, minimum lot size, and frontage.

Subsequently, a British Columbia court heard a *Charter* challenge to a zoning by-law that restricted, in single-family residential areas, the use of secondary suites to only persons related to the homeowner: *Tenants' Rights Action Coalition* v. *Delta (Corporation)*.[30] The applicants challenged the by-law as unauthorized discrimination (in the municipal sense) and contrary to the *Charter*. Referring to the *Smith* case (a restriction on use based on a definition of "family" did not constitute discrimination), the court noted that *Smith* predated subsequent developments in human rights legislation and the *Charter*. However, as the court found the bylaw constituted unlawful discrimination in the municipal law sense (i.e., not authorized by the enabling statute), it declined to consider the *Charter* arguments.[31]

In *Congrégation des témoins de Jéhovah de St.Jérôme-Lafontaine* v. *Lafontaine (Village)*,[32] the Supreme Court of Canada considered whether the municipality's decision not to amend its zoning by-law to allow a religious group to build a place of worship infringed the right to freedom of religion guaranteed by the *Charter*. The municipality had repeatedly, without reasons, rejected rezoning requests from a congregation of Jehovah's Witnesses to allow it to build on different properties. The majority decision focused on a municipality's duty of procedural fairness and held that this duty had been breached, sending the application back to the municipality for reconsideration. As a result, the majority did not consider the constitutional questions, although the three of the four dissenting judges did. They agreed that a violation of the *Charter* had not been established, but their reasons provide some guidance on the application of the *Charter* to zoning by-laws. The dissent reasoned that a municipality was required to be neutral in matters of religion, and its by-laws had to be structured in such a way as to avoid placing unnecessary obstacles in the way of the exercise of religious freedoms.[33] For example, where there was no land available in a zone that permitted a place of worship, a municipality's refusal to amend its zoning by-law would constitute an infringement of an applicant's freedom of religion. The infringement would not result from the existence of the zoning by-law, but from "the refusal to adapt it to evolving community needs in a situation in which no land was available in the zone set aside for the establishment of places of worship."[34] What is most surprising about this analysis is the lack of discussion of land use planning issues.

In *Kitchener (City) Official Plan Amendment No. 58*,[35] the Ontario Municipal Board issued an interim decision in an appeal against an official plan amendment and zoning by-law amendment enacted by the City of Kitchener for its Cedar Hill area. Almost 20% of Cedar Hill's residents were persons with disabilities or persons in receipt of public assistance. The City was concerned about the area's over-concentration of single-person, low-income households, residential care facilities, and social/

supportive housing, and sought to decentralize these facilities and encourage a greater neighbourhood mix. The Board held that, before the City could enact measures in its official plan and zoning by-law to restrict housing for persons with disabilities or on public assistance, it would need to supply the relevant planning analysis, including a consideration of "people zoning" and human rights and *Charter* dimensions. The Board emphasized that *Bell* was not confined to consideration of "relationships" but with all "personal qualification of this type or other personal characteristics or qualities."[36] While the Board was not satisfied that there was a sufficient assessment or rationale to demonstrate that being in a "single-person, low-income household" (the characteristics targeted by the enactments) was not "people zoning," it gave the City and Region more time to address this issue.

The Board considered the purpose of the amendments to limit the number of neighbourhood residents who fell within certain identifiable groups. The *Human Rights Code* would appear to prohibit a by-law or planning instrument that had a discriminatory effect, subject to the defence of "reasonableness and bona fide under the circumstances."[37] The Board stated that a municipality which sought to justify the imposition of a discriminatory standard might be expected to establish that it had made real and meaningful efforts to accommodate the needs of persons adversely affected by that standard, or had explored less discriminatory approaches to achieving the objective.[38]

Lessons Learned

Courts across Canada have made it clear that any consideration of a zoning by-law that impacts particular groups in a community will need to address the applicable human rights codes and the *Charter*. What can be gleaned from the case law is that any municipality considering the enactment of such a by-law should consider its provisions from three separate, although related, perspectives: Is the zoning regulation being passed for a proper planning purpose, taking into consideration the purpose of zoning by-laws to prevent nuisances, and to address planning concerns (such as density, servicing, and parking)? If the by-law may impact certain *Code*-protected groups, is the by-law reasonable and bona fide in the circumstances? If the by-law may infringe a right guaranteed by the *Charter*, has there been sufficient analysis to support the infringement under s. 1 of the *Charter*? While the treatment of a by-law by the courts may be less than predictable, in this way a municipality can ensure that an adequate evidentiary basis exists to support its zoning by-law in the event of challenge.

Notes

1. [1979] 2 S.C.R. 212 (Can.).
2. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, c. 11 (U.K.) (hereinafter "*Charter*").
3. Section 1 guarantees the rights and freedoms set out in the *Charter* "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." *Id.*
4. [1979] 2 S.C.R. at 215.
5. *Id.* at 223.
6. *Id.* at 221, citing the reasons of Estey, C.J.H.C., in the Ontario Divisional Court.
7. 1980 CarwellOnt 489, 12 M.P.L.R. 141; *aff'd* 29 O.R. (2d) 661 (Ont. H. Ct. J.); leave to appeal refused (1980), 29 O.R. (2d) 661n (Ont. C.A.).
8. "Family" was defined as "one or more human beings related by blood or marriage, or common law marriage or a group of not more than three human beings who need not be related by blood or marriage, living together as a single housekeeping unit," and included "not more than two roomers or boarders." 27 O.R. (2d) 690, 691-92.
9. 1988 CarswellBC 78, 24 B.C.L.R. (2d) 49 (B.C.C.A.).
10. 2006 CarswellBC 91, 2006 BCCA 28 (B.C.C.A.).
11. 2006 BCCA 28 at para. 2.
12. 1997 CarswellOnt 5666, 36 O.M.B.R. 124 (O.M.B.).
13. *Id.* at para. 17.
14. 2000 CarswellAlta 1066, 273 A.R. 63 (Alta. Q.B.).
15. 2001 CarswellBC 80, 2001 BCSC 100 (B.C.S.C.); leave to appeal dismissed, 2002 CarswellBC 1558 (B.C.C.A.).
16. 2003 CarswellBC 1907, 2003 BCSC 1192 (B.C.S.C.).
17. 2011 CarswellOnt 5300 (O.M.B.).
18. R.S.O. 1990, c. H.19.
19. 2011 CarswellOnt 5300 at para. 25 (O.M.B.).
20. 2008 CarswellOnt 5025, 48 M.P.L.R. (4th) 183 (Ont. Sup. Ct. J.); *aff'd* 2009 ONCA 277 (Ont. C.A.); leave to appeal to S.C.C. dismissed, [2009] S.C.C.A. No. 253 (S.C.C.).
21. The zoning bylaw specifically addressed "lodging house" and "lodging unit" uses and these were prohibited in the R1 zone at issue.
22. 2008 CarswellOnt 5025 at para. 59.
23. R.S.O. 1990, c. P.13, s. 35(2).
24. 2008 CarswellOnt 5025 at para. 61.
25. *The Neighbourhoods of Windfields Limited Partnership v. Death*, 2009 ONCA 277 (Ont. C.A.) ("In particular, we reject the submission that s. 35(2) of the *Planning Act* which prohibits 'distinguishing persons who are related and persons who are unrelated in respect of the occupancy or use of a building' barred the application judge from considering as a relevant factor how the renters related amongst themselves when determining whether they constituted a 'single housekeeping establishment'"). *Id.* at para. 4.
26. (1990), 69 D.L.R. (4th) 697 (Man. C.A.).
27. Section 15.(1) reads: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."
28. (1990), 69 D.L.R. (4th) at para. 41.
29. *Id.* at para. 48.
30. (1997), 151 D.L.R. (4th) 729 (B.C.C.A.).
31. *Id.* at paras. 54, 62, 63.
32. [2004] 2 S.C.R. 650 (Can.).
33. *Id.* at para. 71 (dissenting opinion of Mr. Justice LeBel, joined by Justices Bastarache and Deschamps).
34. *Id.* at para. 75.
35. [2010] O.M.B.D. No. 666 (O. M. B.).
36. *Id.* at para. 119.
37. *Id.* at para. 144.
38. *Id.* ML



GASB Seeks Comments on Financial Reporting Proposal

by Sophia M. Stadnyk, Senior Associate Counsel

On November 29, 2011, the Governmental Accounting Standards Board (GASB) approved a proposal, *Preliminary Views, Economic Condition Reporting: Financial Projections*. Among other things, this would require State and local governments to present five-year projections of cash inflows, cash outflows, and financial obligations, to be submitted as supplemental information with these entities' regular financial reports.

According to the GASB website,[1] the *Preliminary Views* document outlines the initial proposals for "how governments would provide forward-looking information to users in the form of financial projections" over a five-year period, based on the Board's view that five components of information are "necessary to assist users in assessing a governmental entity's fiscal sustainability." These five elements are:

- Projections of total cash inflows and major individual cash inflows, in dollars and as a percentage of total cash inflows, with explanations of the known causes of fluctuations in cash inflows.
- Projections of the total cash outflows and major individual cash outflows, in dollars and as a percentage of total cash outflows, with explanations of the known causes of fluctuations in cash outflows.
- Projections of total financial obligations and major individual financial obligations, including bonds, pensions, other post-employment benefits, and long-term contracts, with explanations of the known causes of fluctuations in financial obligations.
- Projections of annual debt-service payments (principal and interest).
- A narrative discussion of major existing intergovernmental service interdependencies and their nature.[2]

Accordingly, the proposal recommends this information be included as required supplementary information (RSI) to all governmental entities' annual financial reports, with the goal of enabling users of such reports to evaluate that government's financial health in a more comprehensive way, and to make an assessment of that entity's financial viability or fiscal sustainability.

In support of this proposal, the GASB notes that "projections of inflows and outflows of resources are essential to assessing *interperiod equity*—a government's ability to meet annual spending needs with current-period resources, rather than pushing costs off to the future or consuming accumulated resources," and projections of financial obligations (like bonds or unfunded pension liabilities) "reflect the future financial impact of a government's past decisions and help users to evaluate a government's capacity to meet those financial demands as they come due."[3] In addition, the Board recommends that "a cautionary notice... precede the financial projections and related narrative discussion to place the information into context," to inform readers that "projections do not represent a forecast or prediction of likely outcomes."[4]

The GASB is now seeking public input on the views expressed in the *Preliminary Views* before considering its next steps, and is asking users to "let us know if we got it right, or if additional information, or modifications to the information, are needed to allow you to make your assessments of a government's fiscal sustainability."[5] The *Preliminary Views, Economic Condition Reporting: Financial Projections* document may be downloaded free from the GASB website, www.gasb.org. The comment deadline is March 16, 2012. The website advises that comments may be submitted by e-mail (director@gasb.org) or by regular mail. Additional information about responding to the document and participating in public hearings scheduled for March and April 2012 can be found on the GASB website.

Notes

1. *The User's Perspective, The GASB's Preliminary Views on Financial Projections* (December 2011) at http://tinyurl.com/78vml47.
2. *Id.* According to the website, two Board members hold an alternative view and do not believe that reporting financial projections is essential and, therefore, is not appropriate for inclusion in RSI.
3. *Id.*
4. *Id.*
5. *Id.*

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2012 MID-YEAR SEMINAR
WASHINGTON DC
APRIL 22-24, 2012

2012 ANNUAL CONFERENCE
AUSTIN, TX
OCTOBER 21-24, 2012

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WASHINGTON, DC
APRIL 14-16, 2013

MEETING NEW CHALLENGES IN LOCAL GOVERNMENT LAW: *IMLA's 2012 Mid-Year Seminar*

Join IMLA from April 22 to 24, 2012 for the Mid-Year Seminar at the Omni Shoreham Hotel in Washington, D.C. See below for our Seminar Program, hotel information, and some special offers from IMLA!

NEW! IMLA now offers a special discount for individuals attending an IMLA event for the first time and for entry-level attorneys (between one and five years of practice). If you come within one of these categories, you are eligible to register for the Seminar for just $150. This year's Seminar is highlighted by our partnership with the World Jurist Association (WJA), which will be hosting their programming (Law and Technology: Innovation in the Digital Age) concurrently with IMLA's event. For an additional $100 (separate registration required), IMLA Mid-Year Seminar attendees can also attend the WJA sessions.



SATURDAY, APRIL 21, 2012

IMLA Board of Directors Meeting
9:00 am – Noon

State League Counsel and Municipal Attorneys Association Department Meeting
Time TBA

SUNDAY, APRIL 22, 2012

IMLA and World Jurist Association (WJA) Registration
8:00 am – 5:00 pm

IMLA Personnel Section Workshop
8:45 am – 10:15 am

Daniel D. Crean
Executive Director
NH Municipal Association
Pembroke, NH
and
Lisa Soronen
Executive Director
State and Local Legal Center
Washington, DC

Telecommunications Section Workshop
8:45 am – 10:15 am

D Block Legislation Status/Results
BTOP Grant Status of 700 MHz Grants
Gerard Lavery Lederer
Best Best & Krieger
Washington, DC

FCC Waiver Grants/PSST Status for 700 MHz LTE Systems
James Hobson
Best Best & Krieger
Washington, DC

USF/E-Rate/Life-Line Developments for Local Governments
Nicholas Miller
Best Best & Krieger
Washington, DC

The Cable - Verizon Spectrum Deal: Its Impact on Local Government
Michael Ruger
Senior Director, Government Affairs
Comcast Cable Communications, LLC
Philadelphia, Pennsylvania

Ethics Section Workshop
10:30 am - 11:30 am

Online Privacy Policies' Impact on Municipal Law Practice; and Ethical Considerations in Metadata Mining - Conflicting Standards
Pete Haskel
Executive Assistant City Attorney, Dallas, TX

University Cities Working Group Meeting
10:30 am - 11:30 am

IMLA/WJA Joint Welcoming Reception
6:00 pm - 8:00 pm

MONDAY, APRIL 23, 2012

Opening Ceremonies
8:30 am - 8:45 am

WJA Programming
8:45 am - 5:00 pm

Work Session I - No Rest and Relaxation: The New R&R (Responsibilities & Requirements) of Issuing Municipal Securities
8:45 am - 10:15 am

SEC / MSRB
Robert W. Doty
President, AGFS
Sacramento, CA
and
Lynnette Kelly
Executive Director
Municipal Securities Rulemaking Board
Alexandria, VA

Mary N. Simpkins
Senior Special Counsel, Office of Municipal Securities
Division of Trading and Markets U.S. Securities and Exchange Commission
Washington, DC

Alexandra "Sandy" MacLennan
Squire Sanders (US) LLP
Tampa, FL

Work Session II - Land Use ABCs: Blight, Crisis Management, and Development
8:45 am - 10:15 am

Urban Blight
Benjamin S. Goldman
Hand Arendall, LLC, Birmingham, AL

San Bruno Rising from the Ashes — How Local Government Galvanizes and Responds is Crucial to Recovery When Crises Happen
Steve Myers and
Britt K. Strottman
Myers Nave
Oakland, CA

Development Regulations of Coastal Property
Julian Grant
Assistant Attorney General
Austin, Texas Office of the Attorney General

IMLA /WJA Joint Coffee Break
10:15 am - 10:30 am

Work Session III-What's New in Telecommunications and the FCC
10:30 am - Noon

The "New" FCC Relationship with Local Governments and City of Arlington Appeal

AC & FCC Outreach to Local Governments
Steve Klitzman & Gregory Vadas
Consumer and Governmental Affairs Bureau FCC
Washington, DC

NOI, Description of the Work, Proceeding and IMLA's role in the FCC
Joseph Van Eaton
Best Best & Krieger
Washington, DC

The 5th Circuit's Cell Tower Shot Clock Decision and What It Means for FCC Intrusion into Local Land Use and Other Local Government Authority
Tillman L. Lay
Spiegel & McDiarmid LLP
Washington, DC

Work Session IV-Bread and Circuses: Financing Sport Arenas
10:30 am - Noon

William R. Baldiga
Brown Rudnick LLP
Boston, MA

Victor Matheson
Associate Professor
College of the Holy Cross
Worcester, MA

Craig Tindall
City Attorney
Glendale, AZ

Joint Luncheon: IMLA/WJA
12:10 pm - 1:40 pm
Luncheon Speaker

Robert C. (Bob) Springer
(Colonel, USMC, Ret.)
NASA Astronaut (Former)



Work Session V- A Look at Congress: Federal Legislative Updates
1:45 pm - 3:15 pm

Speakers: Representatives from NACo, NLC, GFOA & The U.S. Conference of Mayors

Work Session VI- Local Government Hot Topics
1:45 pm - 3:15 pm

"Swimming with Cats": Regulating and Contracting with Towing Companies
Miles Risley
City Attorney, Wichita Falls, TX

EPA/Water Issues
Shawn D. Hagerty
Best Best & Krieger LLP
San Diego, CA

IMLA/WJA Joint Coffee Break
3:15 pm - 3:30 pm

Work Session VII - The Supreme Court in Review, 2012
3:30 pm - 5:00 pm

Professor Jeffrey Rosen
George Washington University Law School
Washington, DC

Paul D. Clement
Bancroft, PLLC
Washington, DC

Lisa Soronen
Executive Director
State and Local Legal Center
Washington, DC

TUESDAY, APRIL 24, 2012

WJA Programming
8:45 am - 3:00 pm

Work Session VIII - "Shots Fired!" Forensic Reconstruction of Officer-Involved Shootings
8:15 am - 9:15 am

Michael A. Knox
Forensic Consultant
Knox & Associates, LLC
Jacksonville, FL

Work Session IX - The Law and Mother Nature: From Green Buildings to Natural Disasters
9:15 am - 10:15 am

Green Building: Starting to "Show Us the Money"
Timothy Hollister
Town Attorney, Colchester, CT

Disaster Response
Lee Hoffman
Pullman and Comley
Hartford, CT

IMLA/WJA Joint Coffee Break
10:15 am - 10:30 am

Work Session X - Ethics
10:30 am - Noon

DC Ethics Reform
Thorn L. Pozen
Stinson Morrison Hecker LLP
Washington, DC

Andrea G. Bough
Stinson Morrison Hecker LLP
Kansas City, MO

William John Kearns, Jr.
General Counsel
New Jersey League of Municipalities
Willingboro, NJ

Adjournment

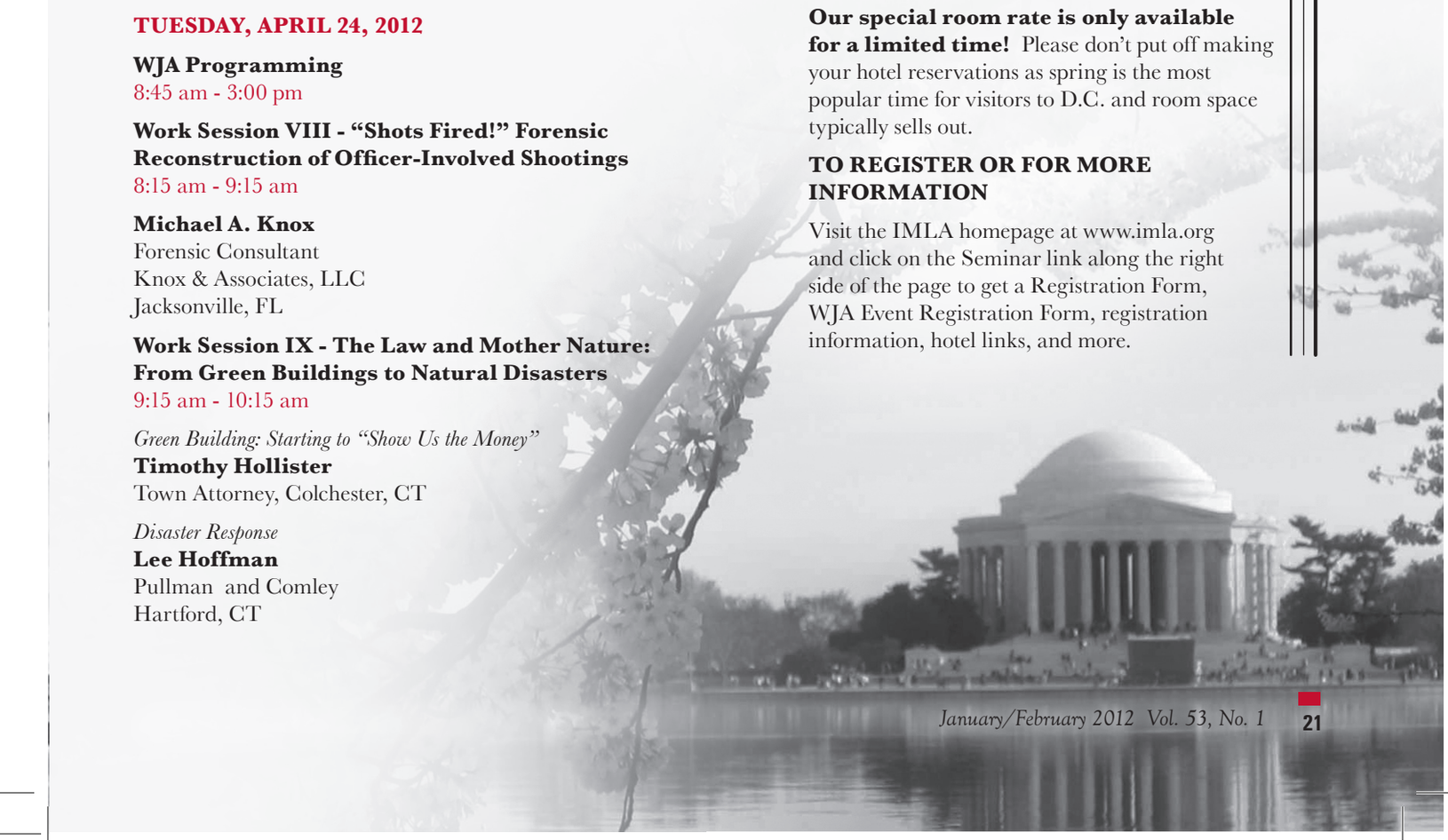
This Program is subject to change.
Please check our website or contact IMLA for updates.

Hotel Information
Our event hotel is the Omni Shoreham Hotel, a first-class facility in Washington, D.C., located at 2500 Calvert Street NW (at Connecticut Ave.). IMLA has secured a block of hotel rooms at a special rate at the Omni Shoreham Hotel. You can book your room using the hotel weblink at the IMLA Seminar webpage.

Our special room rate is only available for a limited time! Please don't put off making your hotel reservations as spring is the most popular time for visitors to D.C. and room space typically sells out.

TO REGISTER OR FOR MORE INFORMATION

Visit the IMLA homepage at www.imla.org and click on the Seminar link along the right side of the page to get a Registration Form, WJA Event Registration Form, registration information, hotel links, and more.



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Registration Fees include: Admission to all sessions, all workshops, seminar materials, Sunday night reception, Monday's luncheon and all coffee breaks (not applicable to guest). **Guest Fees include:** Attendance at the Sunday night reception, Monday's hospitality suite. **Cancellation / Refund Policy**: Cancellations must be received in writing by **March 2, 2012** to qualify for a refund. All cancellations are subject to a $50.00 administrative processing fee. After March 1, 2011 those not attending will receive the event materials in full consideration of registration fees paid. Replacements are always welcome. **Guest Cancellations** are subject to a $25.00 administrative processing fee. All refunds will be remitted 90 days after the event. Send all cancellations in writing to the IMLA Events Department.

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3 or More from Same Office Each person	$275	$300	$350
Judicial	$339	$339	$339
Nonmember	$995	$1,069	$1,098
Guest of Seminar Registrant	$100	$150	$200

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Signature



Qualified Immunity: Reading the Tea Leaves in *Messerschmidt v. Millender*

by Sophia M. Stadnyk, Senior Associate Counsel

> *[N]ow we are asking whether a reasonable police officer who is not a lawyer and certainly is not a judge should have been able to see that this call that was made by a judge was not only wrong but so wrong that ... you couldn't reasonably think that the judge might be correct.* — Justice Alito, in oral argument in *Messerschmidt v. Millender.*

Shelly Kelly sought police protection because her boyfriend, Jerry Ray Bowen, had a violent temper and had physically assaulted her. She told police that he had tried to restrain her from leaving him by shooting at her using a black sawed-off shotgun with a pistol grip. She advised Officer Messerschmidt (a "gang specialist") that Bowen could be found at 2234 E. 120th St., Los Angeles, the home of Bowen's foster mother, Augusta Millender. The officers identified Bowen as gang member with an extensive criminal background, and confirmed that he had, at some point, listed Millender's address as his address. Messerschmidt applied for an arrest warrant for Bowen at the 120th St. address, and for a warrant to search and seize specified property in connection with the assault, namely: all firearms and ammunition, and articles of evidence showing gang membership or affiliation with any gang. He admitted, however, there was no evidence that Bowen's domestic assault on Kelly was in any way gang-related, and the affidavit did not mention Bowen's prior criminal record and felony convictions.

Before Messerschmidt's warrants and affidavit were submitted to the magistrate, they were reviewed by his supervisors (including Sergeant Lawrence), and a deputy district attorney signed the search warrant, indicating that she had reviewed it for probable cause and approved it. Both warrants and the night service were subsequently approved by the magistrate. At 5:00 a.m., the SWAT team broke open Millender's front door to enter and search the house. The occupants were 73-year-old Mrs. Millender, her 47-year-old daughter, Brenda, and Brenda's 20-year-old son. The officers seized Mrs. Millender's personal shotgun and .45 caliber ammunition, and a State of California letter addressed to Bowen, but neither Bowen nor his weapon were found. Messerschmidt and Lawrence did not participate in the search but were present.

The Millenders filed a Section 1983 lawsuit against Los Angeles County, the County Sheriff's Department, and the individual officers. The district court held that the arrest warrant was facially valid, and granted the defendants' motion for summary judgment on this issue and on the issue of the search warrant, with the exception of the warrant's authorization to search for and seize all firearms, and all firearm- and gang-related items. This portion of the warrant, the court held, was overbroad. The individual officers were not entitled to qualified immunity because their actions were not objectively reasonable.

The qualified immunity test in the Fourth Amendment context was based on *United States v. Leon*, 468 U.S. 897, 920, 923 (1984), and *Malley v. Briggs*, 475 U.S. 335, 345 (1986), where the Supreme Court ruled that qualified immunity was lost only when "a reasonably well-trained officer in [the defendant officer's] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." Officers could not claim that they had acted reasonably by seeking a warrant merely because a neutral magistrate approved their application; rather, officers were required to exercise their own reasonable professional judgment.

On appeal, a divided U.S. Court of Appeals for the Ninth Circuit (en banc) affirmed the denial of qualified immunity, finding that "the challenged sections of the [search] warrant were 'so lacking in indicia of probable cause as to render official belief in its existence unreasonable.'" The affidavit did not provide any evidence to indicate that Bowen owned or used other firearms, that such firearms were contraband or evidence of a crime, or that such firearms were likely to be present at the Millender residence. Accordingly, "regardless of Bowen's history or the inherent dangerousness of firearms," there was no basis for concluding there was probable cause to search for or seize the "generic class of firearms and firearm-related materials" listed in the warrant, and probable cause did not exist to seize all items of those particular types. Similarly, in the absence of any link between gang-related materials and a crime, the warrant authorizing the search and seizure of all gang-related evidence was likewise invalid. Based on *Malley*, the officers were not entitled to qualified immunity because it was obvious that neither the affidavit nor the warrant established probable cause that the broad categories (all firearms, firearm-related material, and gang-related material) described in the warrant were contraband or evidence of a crime. The affidavit indicated exactly which item was the evidence of a crime (the black, sawed-off shotgun with a pistol grip), and reasonable officers would know they could not undertake a general, exploratory search for other items without additional probable cause. The fact that others signed off on the warrant made no difference because the

continued on page 36

"Take Your Hands Off the Monkey!" Administrative Search Warrants and Local Code Enforcement

by Thomas M. Carpenter



A couple purchases a macaque. The monkey is cute, but the city's code prohibits keeping exotic animals, including monkeys, as pets. On learning of this code violation, the local animal services officer finds the monkey caged in a garage and attempts to seize it. The monkey "goes bananas," and its owner intervenes and carries the screaming monkey into the house. When the police officers, called in to keep the peace, refuse to enter the house, the animal services officer does so and seizes the monkey. The animal services officer reasons that his actions are proper because the local government bans keeping monkeys as pets, and because macaques carry a meningoencephalitis virus that may pose a major public health hazard. Even so, the search of the home and the seizure of the monkey are illegal.[1]

Local governments have clear authority to protect the public health, safety, and welfare through the exercise of their police powers. This authority is manifested by way of municipal codes, such as building codes that permit periodic inspections of rental housing and other residential structures, commercial buildings and businesses, and other establishments. These inspections can be conducted with consent, but what happens when consent is denied?[2] If the purpose of the entry is to inspect for evidence of a specific violation (e.g., defective or non-compliant plumbing), the municipality may lack the facts to establish probable cause to believe that a specific code violation will be found at that particular address. For the administrative search, however, this lack of evidence of a specific violation does not defeat the issuance of a search warrant.[3] If municipal code provisions are to be enforced, it is important to know how these administrative searches operate, and what legal issues should be considered before such a warrant is sought.

Background

Warrantless searches are generally unreasonable, and this caveat applies to commercial premises as well as to residences.[4] To meet constitutional muster, an ordinance which permits such inspections must meet three criteria: (1) it must further a substantial governmental interest; (2) the inspection must be required to serve or meet that interest; and (3) the terms of the inspection program must be clear enough to substitute for a warrant by limiting the scope of the search and the discretion of the officer.[5]

The seminal United States Supreme Court cases on administrative search warrants are *Camara v. Municipal Court of San Francisco*,[6] and a companion case handed down the same day, *See v. City of Seattle*.[7] In *Camara*, the Court (noting that, like most regulatory laws, "fire, health, and housing codes" were enforced by criminal processes and the discovery of a violation by the inspector could lead to a criminal complaint[8]) held that a warrantless search of residential property for code violations contravened Fourth Amendment protections of legitimate privacy interests.[9] The Court began with the premise that the "basic purpose of [the Fourth Amendment] is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."[10] After deciding that a search warrant was needed for code enforcement inspections, the Court focused upon the probable-cause element of the Fourth Amendment and its application in such a situation.[11] In determining whether a particular inspection was reasonable, the need for the inspection was to be weighed in terms of the government interests involved and the

goals of code enforcement (including the need to prevent "even the unintentional development of conditions which are hazardous to public health and safety"[12]). The warrant requirement was one way to ensure that the occupant was aware that the inspection would include a search of the premises and of the scope of the search, and that the inspector was operating under the proper authority.[13] Probable cause existed "if reasonable legislative or administrative standards for conducting an area inspection [were] satisfied with respect to a particular dwelling."[14] Using this reasoning, the Court balanced the government's need for building code compliance with the individual's need that any residential intrusion be kept to a minimum and permitted (in the absence of consent) only after review by an independent magistrate. The Court found the strong governmental interest in enforcing administrative or legislative standards for inspection satisfied the probable-cause element for issuance of a warrant.[15] In *See*, these principles were extended to commercial property.

Basic Guidelines

The fundamental point, though, is that any administrative search must be reasonable.[16] In the administrative search context, the U.S. Supreme Court has held that:

> [where] a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, ... [w]e have concluded ... that the appropriate standard for administrative searches is not probable cause in its traditional meaning. Instead, an administrative warrant can be obtained if there is a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied....[17]

The first guideline, then, is to ensure that the legislative or administrative scheme which leads to the administrative search is reasonable.[18] To do so, the scope, subject, and frequency of the searches it permits must be reasonable.[19] For example, an ordinance which does not focus upon safety and health violations but requires compliance with *all* code provisions is unreasonable, because there is no such limit in its scope.[20] A search which significantly exceeds the scope of what is required is unreasonable. The U.S. Court of Appeals for the Seventh Circuit articulated the following reasonableness standard for administrative searches in relation to the places to be searched: "the object determines the reasonable scope of the search, and all searches, to pass muster under the Fourth Amendment, must be reasonable. If you are going to look for an adult elephant, searching for it in a chest of drawers is not reasonable."[21]

If municipal code provisions are to be enforced, it is important to know how administrative searches operate, and what legal issues should be considered before such a warrant is sought.

Clearly, though, looking in closets will be appropriate in certain circumstances. For example, if an electrical panel is located in a closet, then a code officer certainly may look there to assess compliance with an electrical code. Still, in this situation, the application for the administrative search warrant should note that one of the things to be reviewed is the electrical panel, and that this is not always attached to the outside of a structure. While this notation will not permit a search of the occupant's chest of drawers, it certainly provides protection for a search of areas of the house that are not clearly in view.

The purpose of the search must also be legitimate. If the primary reason for a search is to find evidence of a crime, then the exceptions permitted for administrative searches will not apply.[22] When 20 police officers and SWAT-team members participate in an administrative inspection or search, the courts are likely to find the "administrative" or regulatory nature of the operation to be pretextual.[23] The frequency of administrative searches can also be a basis for declaring them to be unreasonable. In one situation, a federal appeals court condemned a police officer's conduct where allegedly administrative inspections were performed numerous times without any justification as to the number of inspections.[24]

Warrants

Respecting the application for an administrative search warrant, the process is the same as that for a regular search warrant. The affiant should demonstrate the reason for the search, the scope of the search, and, if applicable, some indication as to why the search is one of several requested. The reasons should relate to the administrative or legislative scheme that is the basis for the exercise of the municipal police power. In addition, the reasons should indicate that the opposing party refused to consent to a search. The scope of the search will be determined by the reason: for example, if the reason is suspected plumbing code violations, there is likely no need to include a search in closets for a fuse box. Finally, if the search is one of several that have occurred recently, the application should note why previous searches were necessary (and successful, or not), and demonstrate why this particular search is necessary. One search may yield the probable cause for another, but the request may not be pretextual.

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Thomas M. Carpenter has been the City Attorney for Little Rock, Arkansas for 21 years, and has been in the office since 1984. He is an IMLA Fellow in Municipal Law, and has twice received the IMLA Award for National Public Service, once as a City Attorney, and once as an Assistant City Attorney.

"Take Your Hands Off the Monkey!" *continued from page 25*

This point is particularly important in residential searches. While *Camara*, *See*, and their progeny permit this type of search, it is possible the courts will change their view once any suggestion of a trend towards pretextual searches appears. As Justice White warned in *Camara*, "[b]ecause of the nature of the municipal programs under consideration ...these conclusions must be the beginning, not the end, of our inquiry."[25] It is possible that Justice White was only referring to the analytical framework in *Camara*, but his words are also a clear warning for local governments because that framework mandates a consideration of reasonableness. In other words, what was reasonable based on the facts of *Camara* may be deemed unreasonable in a subsequent case if the natural limitations on administrative searches are not followed.

What happens, then, if a code enforcement officer finds evidence of a crime? If the administrative search is not pretextual, nothing prohibits the information the enforcement officer finds in plain view to be the probable cause for issuance of a criminal warrant. For example, if, in checking the electrical outlets, the inspector proceeds into a room where a controlled substance is in plain view, the affidavit of the code enforcement officer can properly be used to obtain a regular search warrant. Of course, there may be a concern that before this warrant can be issued and executed, the property owner will destroy the evidence, but this can be addressed by the law enforcement officers, if present, requiring the occupants to leave or stay outside the structure until a search warrant can be obtained.[26]

It is also important to realize that an administrative inspection can turn into a criminal search in other circumstances (absent the evidence of a crime in plain view). A time difference between the inspection and a seizure may be a key factor: a fire marshal, for example, has the authority to do an initial review of a fire scene for arson, but if the marshal returns at a later time to obtain evidence of a crime, a search warrant may be required.[27]

Other Issues

A periodic review of an inspection scheme and the associated ordinances is important to guard against a scheme that is flawed for being too broad, or that fails to comply with recent changes in the law.

A local government must train its code officers respecting administrative searches: an administrative search cannot be a pretext for a criminal evidence search.

What happens if there is a reasonable legislative or administrative inspection program in place, but the program is never really followed? This will not defeat the legality of an administrative search warrant. This argument is likely to arise as a challenge to the assertion of public health and safety concerns when an inspection under an ordinance is not carried out in a timely manner. Although this argument may have political ramifications, its legal significance is limited. All the complaint tends to show is that the inspection scheme was imperfect in how it was implemented, but not that it was unreasonable in what it sought to achieve.[28]

A local government must train its code officers respecting administrative searches: an administrative search cannot be a pretext for a criminal evidence search. The failure to train officers can lead to municipal liability for an invasion of privacy because it suggests deliberate indifference to the rights of the individuals that code officers or inspectors come into contact with. One practical suggestion is to make sure there is cooperation between law enforcement officials and their code enforcement counterparts. Code enforcement officers are required to limit the scope of a search, and law enforcement officers must understand there are good reasons for doing so. The training discussions, then, should extend to both code enforcement and law enforcement personnel, even if the training sessions are held separately. It is clear that code inspectors are likely to face situations where there will be law enforcement assistance, or where law enforcement officials ask for their assistance. The failure to make a proper choice on how to proceed may lead to a violation of an individual's Fourth Amendment rights. Such wrong choices may frequently cause a violation of Fourth Amendment rights, and the failure to be aware of this possibility—and the failure to train code enforcement officers accordingly—may subject a municipality to civil rights liability based on a claim of deliberate indifference.[29]

Keep in mind that causes of action for an invalid search and inadequate training may be maintained not only against the local government. The code enforcement officer and the police officer (if any) may be subject to individual liability in a civil rights case if they exceed the scope of their respective authority. In fact, the municipal employees may be subject to punitive damages for a Fourth Amendment violation.[30]

Conclusion

Effective code enforcement requires the judicious use of administrative search warrants as an essential tool. Code enforcement actions are necessary to protect the public health, safety, and welfare. If care is taken with the drafting of code provisions to ensure a proper focus in the scope, then the mere fact that an occupant refuses consent to a search of a structure establishes probable cause for the issuance of a warrant. In the execution of a warrant, it is essential that the scope of the search be consistent with the purpose of the warrant. On occasion, law enforcement officers may be called to assist in maintaining the peace while the search is being conducted. If this happens, care should be taken to prevent the search from being transformed into a criminal search, where a greater particularity is required for the issuance of a search warrant. Otherwise, a pretextual search can lead not only to the exclusion of the evidence obtained in

any later criminal trial, but to municipal liability for a Fourth Amendment violation.

Train code enforcement officers that the administrative search provides an exception to the normal warrant requirements for a search of an individual's property. If consent to a search is withheld, there are means to ensure that any evidence of a code violation is maintained pending a warrant being obtained. To put it another way, someone should have told the animal services officer, featured at the beginning of this article, to "Take your hands off the monkey!"

Notes

1. For a more detailed account of this event, *see* Kelly Young, *LR family sees no evil in having monkey*, Arkansas Democrat-Gazette, Aug. 17, 1999 at B1; Jennifer Liberto, *LR man fined $50, told he can't keep pet monkey*, Arkansas Democrat-Gazette, Aug. 22, 1999 at B5; *Family asks LR to adopt rule allowing them to keep monkey, Pet abused while in care of agency, wife alleges*, Arkansas Democrat-Gazette, Sept. 9, 1999 at B2; Linda Satter, *Seized monkey spurs federal suit, Pair say animal service agents violated their rights against illegal searches*, Arkansas Democrat-Gazette, Mar. 03, 2001 at B2. The monkey never returned to Arkansas; the lawsuit was subsequently non-suited.
2. This article deals with administrative search warrants. There is another exception to the warrant requirement for administrative inspections of pervasively-regulated businesses.
3. Marshall v. Horne Seed Co., Inc., 647 F.2d 96, 100 (10th Cir. 1981) (the judge "is not to give any consideration at all to the reliability of the evidence or the probability of violation"); *see also*, Jones v. Wildgen, 244 Fed. Appx. 859, 863 (10th Cir. 2007).
4. Marshall v. Barlow's Inc., 436 U.S. 307, 312 (1978) (OSHA inspector seeking to enter non-public areas of an electrical and plumbing installation business; no warrant and no consent; Warrant Clause of the Fourth Amendment held to protect commercial buildings as well as private homes).
5. New York v. Burger, 482 U.S. 691, 702-03 (1987) (warrantless search of automobile junkyard, conducted pursuant to New York administrative inspection statute, held not violative of Fourth Amendment); Brower v. Bolingbrook, 735 F. Supp. 768, 776 (N.D. Ill. 1990) (challenge to constitutionality of ordinance that required landlords and property managers to consent to and pay for an inspection whenever they rented to new residential tenants); *see also*, Susan M. McDonough, *Note*, *The Fourth Power? Administrative Searches v. The Fourth Amendment*, 20 New Eng. J. on Crim. & Civ. Confinement 195 (1993).
6. 387 U.S. 523 (1967).
7. 387 U.S. 541 (1967).
8. 387 U.S. at 531.
9. *Id.* at 534.
10. *Id.* at 528.
11. *Id.*
12. *Id.* at 535. The Court added that there was "unanimous agreement among those most familiar with this field that the only effective way to seek universal compliance with the minimum standards required by municipal codes is through routine periodic inspections of all structures." *Id.* at 535-36.
13. *Id.* at 532.
14. *Id.* at 538.
15. *Id.* at 538-40.
16. *Id.* at 536-37.
17. O'Connor v. Ortega, 480 U.S. 709, 723 (1987), citing *New Jersey v. T. L. O.*, 469 U.S. 325, 341 (1985), Marshall v. Barlow's, Inc., 436 U.S. 307, 320 (1978); and *Camara* at 538. Or, as the Court noted in *Camara*, there are a number of factors to justify such a conclusion: periodic inspection programs have a long history of judicial and public acceptance; the public interest demands the prevention of abatement of dangerous conditions; and some safety hazards, such as faulty wiring, may not be determined with an inspection. *See Camara*, 387 U.S. at 537; *see also*, City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000) (confirming a special exception to the warrant requirement for administrative searches).
18. Nothing in *Camara* precludes emergency inspections, even without warrants. *Camara*, 387 U.S. at 539.
19. Brower v. Bolingbrook, 735 F.Supp. 768, 776 (N.D. Ill. 1990).
20. *Id.* at 777 (ordinance at issue not focused on building and safety regulations but instead referred to "all violations of this Chapter or code adopted by this Chapter"; found to go beyond the legitimate interests in enforcing building and safety codes).
21. Platteville Area Apartment Ass'n. v. City of Platteville, 179 F.3d 574, 579 (7th Cir. 1999) (emphasis added).
22. *See* Bruce v. Beary, 498 F.3d 1232, 1239 (11th Cir. 2007). Although the case deals with the warrantless inspection of a regulated business, the court's conclusion that an administrative search cannot be primarily used as a criminal investigatory device is still valid. *See also*, United States v. Knight, 306 F.3d 534, 537 (8th Cir. 2002) (inspection of commercial vehicle by trooper extended to search of trucker's briefcase, without consent: motion to suppress the evidence discovered in briefcase on the ground that trooper exceeded the scope of the regulatory search authorized by law and thus, violated the Fourth Amendment, granted).
23. *Beary*, 498 F.3d at 1244.
24. *See* Turner v. Dammon, 848 F.2d 440, 446 (4th Cir. 1988) (over 100 searches performed by officers at a topless bar: court holds that, where a valid administrative search program authorized warrantless inspection but provided no rules governing the procedure for inspectors to follow, the Fourth Amendment applied, and affirmed the denial of summary judgment as to the two officers who conducted multiple administrative searches); *see also*, Brock v. Gretna Mach. & Ironworks, Inc., 769 F.2d 1110 (5th Cir. 1985).
25. 387 U.S. 523, 534 (1967).
26. *See* Illinois v. McArthur, 531 U.S. 326 (2001) (warrantless seizure; police officers with probable cause to believe defendant had marijuana in his home, prevented him from entering his home while they obtained a search warrant); Clark v. Webster, 384 F. Supp.2d 371, 378 (D. Me. 2005).
27. Michigan v. Tyler, 436 U.S. 499 (1978) (entry to fight a fire required no warrant but searches and seizures that occurred days after the fire had been extinguished were unconstitutional, being detached from the initial exigency and the

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Minimum Maintenance Standards After *Giuliani v. Halton Region*

by Charles M.K. Loopstra, Q.C.

In a recent decision, 2011 ONCA 812 (Ont. C.A. Dec. 21, 2011), the Ontario Court of Appeal has, in a way, clarified the application of Ontario's Minimum Maintenance Standards (MMS) as a statutory defence to actions based on the "non-repair" of a roadway. At the same time, it has created a new hope for plaintiffs' lawyers and significantly weakened the statutory defences available under the MMS regulations.

The appeal resulted from a finding by the trial judge that the municipality was liable to the plaintiff for having failed to keep a roadway free and clear of ice and snow, thereby creating an unreasonable risk of harm to roadway users. This finding was made notwithstanding that the accumulation of snow was two cm at the time of the accident, less than the accumulation specified to trigger the level of service contemplated by s. 4 of the MMS (then O. Reg. 239/02), which required clearing snow within six hours if the accumulation was greater than five cm. The trial judge also held that s. 5 of the MMS did not apply (this required a municipality to treat icy roadways as soon as practicable[1] and within four hours of becoming aware of the icy conditions) because the icy conditions were not caused by freezing rain or ice pellets but by the compaction of the snow by vehicular traffic. Accordingly, the municipality could not rely on the MMS as a defence.

In order to appreciate the impact of the trial and appeal decisions, it is important to note the following facts were not in dispute: snow had fallen to a depth of about two cm over a three-hour period prior to the accident, without any winter maintenance having been performed; proper monitoring of weather forecasts would have enabled an earlier response, by salting the roadway to prevent a buildup of ice and the resulting icy conditions; the municipality failed to inspect the roadway when it ought to have known an inspection was necessary to trigger remedial steps; and the municipality had ample opportunity to schedule a crew to monitor and maintain the roadway.

The Court of Appeal, in a unanimous decision, held:

- s. 44(1) of the *Municipal Act, 2001* only required a municipality to keep the road in a state of repair that was reasonable in the circumstances;
- statutory liability under ss. 44(2), for failing to keep a roadway in a reasonable state of repair, attached to a *specific default*;
- a municipality could avoid liability if it could avail itself of any one of the three defences in ss. 44(3);
- a municipality was not liable for negligently failing to maintain a highway if it complied with the minimum standards that applied to its failure;
- the MMS did not cover all circumstances that could arise in the maintenance of roadways;
- s. 4 of the MMS did not apply to the circumstances of this case because the accumulation was less than five cm, and there was no minimum standard for clearing snow on a class 2 highway (the road at issue) when the accumulated snow was less than five cm;
- s. 5 of the MMS created a minimum standard for icy roadways "after becoming aware that the roadway [was] icy," and the icy condition was not restricted to a cause such as freezing rain or ice pellets, but could include snow having been compacted into ice;
- s. 5 addressed icy roadways after the road had become icy and not before; therefore, it did not address a municipal response to the *anticipation* of icy conditions; and
- the municipality's default in this case was its failure to monitor the weather and deploy resources "so as to avoid the formation of ice," and was not a failure to treat the roadway after becoming aware that it was icy.

Implications

On whether the MMS regulation can still be relied on as an objective standard for municipal levels of service, the simple answer is no. Although it was intended to state the minimum levels of service for municipal highways (depending on the classification of the roadway), it cannot be relied on as a municipal standard for *all* levels of service. The first and most obvious reason why is that it does not cover all circumstances and, as such, offers no defence if a reasonable state of repair is not maintained in situations not covered by the MMS. What was clearly not anticipated was the restrictive manner in which the MMS would be interpreted.

Based on *Giuliani*, it is clear that a municipality cannot rely on the minimum depth standard for snow clearing. It is common knowledge that a minimum amount of snow accumulation on a well-travelled roadway will result in icy conditions in most circumstances. The court has now clearly stated that a municipality has a duty to *prevent* the icy condition if it could be reasonably anticipated. The practical result may well be that municipalities will be required to apply preventative salt and sanding on all roads in anticipation of any forecasted snowfall. This is simply an unreasonable standard and guts the intention of the MMS for practical purposes.

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ORDINANCES

Smoking (Weed), Fast Food Restaurants, and Outdoor Feeding Ordinances

by Sophia M. Stadnyk, Senior Associate Counsel

There have been several emerging new issues in ordinances. Here's a look at some recent decisions on these topical matters.

Outdoor Smoking Ban

The plaintiff in *Gallagher v. City of Clayton*, No. 4:11-CV-392 CAS, 2011 U.S. Dist. LEXIS 141828 (E.D. Mo. Dec. 09, 2011) challenged a Clayton, Missouri ordinance that banned outdoor smoking on all City "grounds, parks, playgrounds ... playing fields, parking lots and parking structures." Gallagher, a resident, claimed that he "'ecstatically enjoy[ed] smoking tobacco products' while in the City's parks," and that the ban denied smokers' substantive due process rights because the health threat of secondhand smoke from outdoor tobacco use was *de minimis*; therefore, the ban failed rational basis review. He also argued the law was arbitrary and capricious because it delegated, to the city manager, the authority to ban outdoor smoking at festivals and events, but failed to provide standards for a determination in such decisions. The court, however, while crediting the plaintiff "for his enthusiastic, novel and, at times, entertaining argument in favor of his smoking rights," found he failed to state a plausible claim for relief, and ruled the defendants were entitled to judgment as a matter of law. The plaintiff could not "plausibly meet his burden of establishing there [was] no rational or conceivable basis to support the smoking ban. The preamble to the Ordinance sufficiently identifie[d] facially legitimate governmental goals and show[ed] the City considered health studies before passing the Ordinance." Even assuming the public health rationale was unpersuasive, the City's interests in the reduction of litter and park aesthetics were legitimate government interests. As for the scope of discretion, the city manager could either ban smoking on the City's streets and sidewalks during fairs and festivals, or not: either way, compliance with the ordinance was "not left to the moment-to-moment judgment of policemen, prosecutors, or juries."

Medical Marijuana Dispensaries

California's Compassionate Use Act of 1996 (CUA), as implemented by the "Medical Marijuana Program" (MMP), was intended to ensure that seriously ill Californians had the right to obtain and use marijuana for medical purposes. The CUA provided a limited defense from prosecution for cultivation and possession of marijuana, but did not create a statutory or constitutional right to obtain marijuana. The plaintiffs ("Inland Empire" and others) operated medical marijuana dispensaries (MMDs) in the City of Riverside. However, because the zoning code prohibited MMDs, the City brought proceedings for injunctive relief to abate the MMDs as a public nuisance. (Under the zoning code, any violation of Riverside's municipal code was deemed a public nuisance.) The trial court granted the motion, rejecting the argument that the local land use restriction was preempted by state law. On appeal, the Court of Appeal of California affirmed, in *City of Riverside v. Inland Empire Patient's Health & Wellness Center*, Inc., 200 Cal. App. 4th 885 (Cal. Ct. App. Nov. 09, 2011).

"We reject the proposition that local governments, such as Riverside, are preempted by the CUA and MMP from enacting zoning ordinances banning MMDs. Riverside's zoning ordinance does not duplicate, contradict, or occupy the field of state law legalizing medical marijuana and MMDs." The zoning code did not "mimic" or duplicate state law and could be reconciled with the CUA and MMP, and neither of the latter "spoke" to local zoning laws. Although section 11362.775 of the MMP exempted an operator of a MMD from liability for nuisance, Inland Empire was being prosecuted for a zoning violation and not "solely on the basis" that it used its premises for operating a MMD.

"Street Feeding" Events

The City of Dallas's Food Establishments Ordinance regulated food establishments, including organizations that fed the homeless. The purpose of the ordinance was "to safeguard public health and provide to consumers food that is safe, unadulterated, and honestly presented." The law had a so-called "Homeless Feeder Defense" that allowed a "church, civic, or other charitable organization" to distribute food to the homeless outside the regulatory structure of the ordinance, provided the organization met certain food-safety criteria (e.g., location approval by the agency, portable toilets, equipment for waste and wastewater, hand-washing facilities for servers, the written consent of the property owner, on-site staff who had attended a City-sponsored food-safety training class, and temperature-controlled food storage). Big Hart Ministries and other religious organizations, which believed their faith required them to go out into the streets to feed and minister to the homeless, challenged these requirements under the Texas Religious Freedom Restoration Act (TRFRA), claiming that the ordinance hampered their ministries, and that local law enforcement had threatened them with tickets, fines, or arrests for their feeding activities. The City, in turn, contended that, regardless of the plaintiffs' beliefs, the plaintiffs had not demonstrated that their religious beliefs compelled them to share food with the homeless in a manner that violated the ordinance, and moved for summary judgment. The court denied the motion.

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Cities Need Love, Too: Obtaining the Equivalent of Individual Constitutional Rights by Invoking Procedural Laws and Rules

by Pete Haskel

Generally, a municipality is not a "person" with the right to assert most individual federal constitution claims or defenses against its own State, or against a person acting under color of state law.[1] Municipalities cannot challenge state actions on federal constitutionality grounds because they are not "persons" within the meaning of the Due Process Clause.[2]

However, a specific federal statute can give a local government standing to assert federal rights, and sometimes, a municipal official can get standing to assert federal constitutional rights against a state or a against an adversary acting under the color of state law.[3,4] In addition, procedural rules often provide litigants with rights equal to those of all other litigants in a proceeding, regardless of the litigant's governmental, corporate, or individual status.[5]

Too often, though, local government lawyers simply assert that their client has due process or equal protection rights that are being violated. I have seen this, in particular, when a city appeals from an adverse state administrative agency determination. Sometimes, municipal counsel gets away with it, perhaps because courts and opposing counsel are so used to constitutional rights assertions that they forget to limit the application of the Bill of Rights to "persons."[6] But when one is called on the carpet for taking this position, the results can be embarrassing.[7]

Instead of citing constitutional provisions, counsel should look, instead, to statutory and regulatory provisions, which will often get us where we need to go. Alternatively, or in addition, consider whether individual officers or employees have federal rights that can be asserted—if you do not mind dragging them into the litigation.

If all else fails, in desperation we can appeal to the court's sense of fundamental fairness, especially if our argument, claim, or defense sounds in equity. The argument can be phrased in terms of the other party's "unclean hands" and the right to fairness and justice for our client. The broad theory is that a party is disentitled to relief through its dishonesty, misrepresentation, illegality, unfairness, or otherwise unconscionable conduct when seeking equitable relief from a court.[8] Note, however, that this doctrine was traditionally confined to cases involving equitable remedies and was not available in claims for damages, although "adjudications in state and federal courts evidence the expansion of unclean hands into matters of legal relief."[9]

Notes

1. "The power of the state and its agencies over municipal corporations within its territory is not restrained by the provisions of the Fourteenth Amendment." Risty v. Chicago, R.I. & P. Ry. Co., 270 U.S. 378, 390 (1926). I am limiting this discussion to federal rights; State laws will determine what, if any, right a municipality might have to assert State constitutional rights or protections

2. City of East St. Louis v. Circuit Court for Twentieth Judicial Circuit, St. Clair County, Ill, 986 F.2d 1142 (7th Cir. 1993); *see* South Macomb Disposal Auth. v. Washington Tp., 790 F.2d 500 (6th Cir. 1986) (municipal corporation was not a "citizen" within the meaning of the 14th Amendment and could not assert denial of privileges and immunities under 42 U.S.C. § 1983). For a detailed discussion, *see* City of Worcester v. Worcester Consol St Ry. Co., 196 U.S. 539, 550-553 (1905) (leaving open possibility that, perhaps, property owned by city in its proprietary capacity might be entitled to Fifth Amendment protection, but otherwise accepting doctrine that for federal constitutional purposes, a city is a mere creature of the state legislature, not eligible for federal constitutional protection).

3. *See* Aguayo v. Richardson, 473 F.2d 1090, 1100-01 (2d Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974) (Friendly, J.) ("The district court held that the City had standing to assert the statutory claims against the federal defendants, as is not here disputed, but that, under *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 40, 53 S. Ct. 431, 77 L.Ed. 1015 (1933), it had no standing to assert constitutional claims. While this may be true with respect to New York City itself, we see no sufficient answer to the argument that *Bd. of Education v. Allen*, 392 U.S. 236, 241 n. 5... (1968), requires a recognition of standing on the part of plaintiff Sugarman to assert constitutional claims. Like the school board members in that case, he is faced with what he deems a conflict between his oath to support the United States Constitution and his duty under state law to carry out the New York projects.").

4. For some time, I have been waiting for the right set of facts to revive a reverse-*Monell* argument. *Monell* held that a city could be eligible to be a civil rights suit defendant as a "person acting under color of state law" within the meaning of 42 U.S.C. § 1983. *Monell v. Dept. of Soc. Services of City of New York*, 436 U.S. 658, 690 (1978). The crux of the language in section 1983 that *Monell* construed was the term "person," defining potential defendants in section 1983 ("Every *person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or *other person* within the jurisdiction thereof to the deprivation of any rights, privileges, or

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Code Enforcement

Human Nature vs. Code Enforcement– Part I: Let the Battle Begin

by David Wesner

I considered using the title "Human Nature *and* Code Enforcement;" however, upon reflection, I think "versus" reflects the reality of what municipal code officials face every day. Municipal attorneys, as well as code officials, know that human nature can be an extremely difficult obstacle when it comes to code enforcement. The myriad personality types that we come across on a regular basis always leave us guessing as to how to reach the desired outcome of compliance in any particular circumstance. Many pre-law undergraduates are encouraged to take philosophy courses; I would suggest, instead, psychology, or even sociology, classes. Philosophical discussions on the law may make for interesting dinner conversation, but they don't help address the reality that is code enforcement. We truly need a good understanding of human nature and behavior if we ever hope to get through to people, and, while such an understanding might not help us achieve the desired goal of compliance, it will help us determine the best course of action as we step into a situation.

The easiest types of individuals to work with are the ones who are merely forgetful or lazy, or who are simply unaware of the code requirements that bring the municipality to their doorstep. You don't need much psychology to recognize such individuals. They are usually very agreeable, polite, and apologetic over creating the situation. Knowing our code enforcement staff to be courteous and fair, the desired goal of compliance can be reached speedily and easily. Strict code enforcement is likely not necessary (and may actually cause the individual to "get their dander up," making compliance more difficult).

A person that's harder to work with is the obstinate and obstructionist type. This type believes that government should never interfere with private citizens and that citizens should be allowed to do whatever they want on their property (until, of course, their neighbor does something undesirable, whereupon they want the municipality to jump on the neighbor with both feet). Since this type is so opposed to government interference, compliance will never be easy. You'll not only face a battle in dealing with this individual, but you may end up battling your elected officials over their belief that the individual can and should correct the problem immediately. In such situations, code enforcement staff will have their work cut out for them, and only steadfast enforcement efforts will likely get the desired result. One situation I dealt with involved a small business owner. His response to me when I got involved was that he did not earn enough from the use of the building, so he wasn't going to do anything. The business, in fact, did very well and he was fully capable of correcting the problem. So, unfortunately, we had to take the hard road to gain compliance.

I think the hardest type to deal with is the individual who has no concept of the societal "norm" when it comes to keeping a house and property clean, livable, and in good repair. Some individuals may want to correct the problem but don't really have the means to get the job done, but most in this category just don't understand that the junk piles around the yard and in the house creates health issues for the neighbors (as well as their own family), and surely don't understand why they can't be allowed to accumulate "stuff." Strict or steadfast enforcement likely won't work because the penalties (paying fines) don't make a difference to someone who does understand that he doesn't have money to pay. Strict enforcement also will not likely change the behavior that led to the problem. If the offender doesn't understand the problem, he certainly won't understand that enforcement is supposed to teach him to keep his house and property clean and orderly.

My experience with one such type is an example of how difficult it may be to achieve compliance. The individual was a "collector" with a pick-up truck and trailer that he drove around town, picking up anything and everything. He'd add these to his "collection," both inside and outside his house. When code enforcement staff met with him, he did not understand why he couldn't do what he was doing. He did not remedy the violations after these conversations and letters from code enforcement staff, so he was ordered to pay a fine and correct the violations. An order for per-day fines was imposed against him subsequently in the hope that that would get him to finally begin correcting the violations. Needless to say, that didn't work, either. At one point, I told him that he could go to jail for not paying the fines and, more importantly, for not correcting the violations. He said he didn't care. When he was released from jail, he advised me that it didn't have any impact on him. I informed the mayor and code enforcement staff that the only way to remedy the situation would be to have the city correct the violations, and I imposed a continuing order that, if the property was not maintained, the city would clean it up. We were not happy about spending municipal funds to maintain a private individual's property, but, in the circumstances, it was the only effective solution for dealing with this individual.

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Cases



by Sophia M. Stadnyk, Senior Associate Counsel

Civil Rights

Councillor's "Retaliation"

Virgil Novotny was a member of the Tripp County Commission, and his neighbor and political ally, Roger Turnquist, was a member of the County's Weed Board. Virgil's nephew, Stephen Novotny, was "openly critical" of the County Commission and had a "long history of hostility" with both of these public officials. As part of this, Stephen wrote letters to the local newspaper and spoke at County Commission meetings. His uncle allegedly approached the local newspaper and ordered it to stop publishing Novotny's letters, telling the editor that if the newspaper continued to publish these letters, the County would use another newspaper for the publication of its legal notices. Novotny also claimed retaliatory enforcement: that members of the County Commission and County Weed Board had heavier weed infestations than Novotny, but weed abatement procedures were only instituted against Novotny. He sued the County, the County commissioners, members of the County's Weed Board, and the County sheriff in a Section 1983 suit, complaining of a deprivation of his First Amendment rights, deprivation of his Fourteenth Amendment rights, and civil conspiracy under 42 U.S.C. § 1985. The district court granted summary judgment in favor of the defendants, dismissing his claims on the basis, among other things, that (1) there was no evidence that the uncle was acting on behalf of the County in threatening to withdraw business from the newspaper, and (2) even if he was, any potential damages claim would belong to the newspaper.

On appeal, the U.S. Court of Appeals for the Eighth Circuit affirmed. To state a claim under Section 1983, a plaintiff was required to allege that the defendant acted under color of state law, and that the alleged conduct deprived the plaintiff of a constitutionally-protected federal right. An individual did not possess a constitutional right to require that a privately owned newspaper publish his letters to the editor, and the publisher had the discretion to determine what content ran on the editorial page. "Accordingly, any potential First Amendment claim arising from Virgil's threats to the newspaper belong[ed] to the newspaper and not to Novotny." Turning to the Fourteenth Amendment claim, Novotny failed to present sufficient evidence to support a prima facie substantive due process claim. Although he asserted "a property right in his chosen profession and business and a right not to have same wrongfully interrupted or interfered with by the actions of Tripp County," he failed to show how his profession was unlawfully interfered with by County officials or how any interference rose to the necessary "shocks the conscience" level. Moreover, he had not presented sufficient evidence to support an equal protection claim: there was no first-hand knowledge as to whether weed ordinances were being unequally enforced. In any event, the enforcement of county weed ordinances was based on "a number of subjective factors within the purview of the county officials' discretionary authority," and was not the result of arbitrary government action. *Novotny v. Tripp County*, 664 F.3d 1173 (8th Cir. 2011).

Prosecutorial Immunity

Howell, a high-school teacher, approached the principal to deny rumors that she had a sexual relationship with a minor student, JS. The principal spoke with JS, who initially agreed with Howell, but later changed his story to say he had sex with Howell several times at her apartment. The school called the police. JS gave police a description of the apartment and its location, and a tattoo and skin graft on Howell's body. Howell continued to deny a sexual relationship or that JS was ever in her apartment, but allowed police to photograph the interior of her apartment, and her tattoos. After confirming the photos matched the descriptions provided by JS, the detective determined to seek an arrest warrant. Howell offered to take a polygraph to clear herself, but this did not occur for reasons that were unclear (Howell claimed that the polygraph exam was called off by Sanders, the Commonwealth's Attorney whose office brought the charges; the record suggested that the exam may have been cancelled by the polygrapher himself). JS significantly changed his testimony at trial, and the jury acquitted Howell. Howell filed a lawsuit against Sanders, claiming violations of 42 U.S.C. § 1983 for false arrest, malicious prosecution, and violations of due process.

The district court held that Sanders's actions were taken in the course of his prosecutorial duties, entitling him to absolute immunity, and, in any event, his actions were not in violation of clear constitutional rights, thereby entitling him to qualified immunity. It reviewed the record and determined that Sanders took action only after the issuance of the arrest warrant, specifically, the decision to execute the arrest warrant without giving Howell the opportunity to take a polygraph. Howell raised three arguments on appeal with respect to the grant of absolute immunity: the arrest warrant was not supported by probable cause; even if there was probable cause, Sanders's acts of commanding Howell's arrest and denying Howell's request to take a polygraph were not related to advocacy and were investigatory; and last, none of Sanders's actions could be considered advocacy because he was not the attorney who prosecuted her case.

On appeal, the U.S. Court of Appeals for the Sixth Circuit af-

firmed, finding none of her arguments had merit. State prosecutors were absolutely immune from civil liability when acting within the scope of their prosecutorial duties. The courts were to use a "functional approach" to determine when a prosecutor was acting within the scope of his duties as a prosecutor, and when he was merely giving legal advice or investigating. The existence or nonexistence of probable cause was "not determinative of whether absolute immunity applie[d]" because the inquiry remained one of function, not probable cause. The decision to stop a polygraph (if in fact that was what happened) seemed "integrally related to the initiation of the criminal proceedings against Howell in the same way ordering her arrest was. At most, the facts suggest that Sanders stopped a polygraph in order to initiate Howell's prosecution, which was well within his role as an advocate." The court likewise rejected the last argument, that a prosecutor who did not try the case was not entitled to absolute immunity for his actions on the case. *Howell v. Sanders*, No. 10-5797, 2012 U.S. App. LEXIS 1903 (6th Cir. Feb. 02, 2012).

Land Use & Planning

Beach Access Policies

In 1968, the Incline Village General Improvement District ("District") acquired property that included four beaches. The land within the District's 1968 boundaries was purchased and improved with proceeds derived from the sale of public bonds, and all payments due on the bonds were made exclusively by owners of the 1968 property. The deed conveying the 1968 property to the District included a restrictive covenant that stated the property would be held by the District "only for the purposes of recreation by, and for the benefit of, property owners and their tenants ... within [the District] as now constituted." It permitted the individual owners of real estate within the 1968 property to enforce the restrictive covenant. Ordinance 7 limited access to the beaches, as required by the restrictive covenant, and by policy, the District designated the beaches as a nonpublic forum, and generally allowed only people who owned or rented real property within the District's 1968 boundaries to access these beaches.

Frank Wright, who was excluded from beach access because he did not live within the 1968 boundaries, argued that this policy was unconstitutional under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, facially and as applied. He alleged that the District routinely ignored the restrictive covenant and opened the beaches to general public access (for example, on the Fourth of July for firework displays). The district court granted the District's summary judgment motion and denied Wright's summary judgment motion, concluding that both Ordinance 7 and the policy were constitutional.

The U.S. Court of Appeals for the Ninth Circuit ruled that the beaches were not a "traditional public forum," and that the restrictions were constitutional. This was not a case where the government attempted to destroy or convert a public-forum park into a nonpublic forum, and the First Amendment did not guarantee access to property simply because it was owned or controlled by the government. Only a limited set of property owners could access the beaches for limited, non-expressive purposes, and the actual use and purposes of the beaches were, and had been, consistently restricted by the covenant, Ordinance 7, and the actual practice of the District. Kiosks and gates surrounded the beaches, proscribing access to anyone not entitled to access.

Because Ordinance 7 and the policy were reasonable in light of the beaches' purpose and were viewpoint neutral, they did not violate the First Amendment. "Moreover, were we to hold that [the District] could not exclude persons from the beaches as required by the restrictive covenant, we would be removing 'one of the essential sticks in the bundle of property rights' belonging to the prior owner of the 1968 property; namely, the right to exclude others." Because the two groups of residents were not alike in all relevant respects (namely, only owners of portions of the 1968 property paid for the purchase and improvement of the beaches), Wright's claim of disparate treatment did not support an equal protection claim. The ordinance and policy survived rational basis review because they were justified by legitimate government interests: complying with the restrictive covenant, and excluding persons who did not pay for the purchase and improvement of the beaches. *Wright v. Incline Vill. Gen. Improvement Dist.*, No. 10-16043, 2011 U.S. App. LEXIS 26086 (9th Cir. Dec. 27, 2011).

Personnel & Employment

"Policymaking" Employee

Larry Davis was appointed as the Senior Humane Officer (SHO) for the City of Anderson in 1988, following his work on the successful campaign of a Democratic mayoral candidate, Lawler. Despite having no relevant prior experience in animal control, Davis accepted. In 2004, Smith, a Republican, took office as mayor, but did not remove Davis. However, during the 2007 Democratic primary election for mayor, Rensil ran against Ockomon, and Davis actively supported Rensil's campaign. Ockomon won. Davis was terminated as soon as Ockomon took office on January 1, 2008. Davis brought a 42 U.S.C. § 1983 suit against Ockomon and other City officials, claiming that he had been terminated from his position in violation of the First and Fourteenth Amendments.

The district court granted the City officials' motion for summary judgment. An individual could be terminated on the basis of political affiliation when the nature of the public official's job made political loyalty a valid qualification for the effective performance of his position. The court first determined that the official job description controlled the analysis of whether Davis could be replaced for political reasons because the job description was reliable. The SHO's duties, as provided for in the job description, could be characterized as "policymaking" and, thus, properly subject to removal on the basis of political affiliation. Due to the broad discretion exercised by the SHO, the court found that Davis was a policymaker, and that his termination was proper.

Davis appealed, arguing that the court erred in relying solely on the job description, and that, in practice, the SHO did not exercise sufficient discretionary authority to be considered a "policymaker."

City officials conceded that Davis was terminated for political reasons, and the only issue on appeal was whether the SHO was a position subject to political termination. The U.S. Court of Appeals for the Seventh Circuit, using the test of whether "the position authorize[d], either directly or indirectly, meaningful input into government decisionmaking on issues where there [was] room for principled disagreement on goals or their implementation," held that the starting point of the inquiry should be the ordinances establishing the SHO position, and not the job description, because, unlike job descriptions, which could have little resemblance to a position's actual duties, an ordinance's terms were not open to contest. "The ordinances give the SHO substantial discretion to flesh out policy by promulgating regulations. While Davis argues that the discretion exercised by the SHO is professional rather than political, this contention is belied by the fact that Davis was a political hire with no technical expertise at the time of his appointment." Here, the City ordinances conferred "sufficient policymaking responsibilities to the SHO such that political loyalty was a valid qualification." The district court's decision was affirmed. *Davis v. Ockomon*, No. 10-2589, 2012 U.S. App. LEXIS 2088 (7th Cir. Feb. 03, 2012).

Practice and Procedure

Access to Litigant's Facebook Account

Lela Tompkins, the plaintiff, claimed she incurred back and other injuries as a result of a slip and fall accident at Detroit Metropolitan Airport. She claimed to be impaired in her ability to work and to enjoy life as a result of these injuries. The defendants included the Airport Authority and Northwest Airlines. Northwest sought to have Tompkins sign authorizations for her medical records and for the release of records from her Facebook account. It alleged that the plaintiff's public postings, as well as some surveillance photographs, showed the relevance of the private postings (the public postings, attached as an exhibit, were photographs showing Tompkins holding a very small dog and smiling, and standing with two other people at a birthday party; the surveillance photos showed her pushing a grocery cart). The plaintiff, however, maintained her objection to the production of her entire Facebook account, including those sections she had designated as private and which she claimed were not available for viewing by the general public.

The request to have the plaintiff sign authorizations to access her Facebook account was denied. Other courts had come to varying conclusions as to the discovery of information posted on social networking sites such as Facebook. Here, the court held that material posted on a 'private' Facebook page, accessible to a selected group of recipients but not available for viewing by the general public, was generally not privileged, nor was it protected by common law or civil law notions of privacy. Nevertheless, the defendant did not have "a generalized right to rummage at will through information that Plaintiff has limited from public view." Rather, consistent with Rule 26(b) and with the caselaw, "there must be a threshold showing that the requested information is reasonably calculated to lead to the discovery of admissible evidence. Otherwise, the Defendant would be allowed to engage in the proverbial fishing expedition, in the hope that there might be something of relevance in Plaintiff's Facebook account."

In this case, the pictures and surveillance relied on were not inconsistent with the plaintiff's claim of injury or with the medical information she provided. She did not claim that she was bed-ridden, or incapable of leaving her house or participating in modest social activities. "If the Plaintiff's public Facebook page contained pictures of her playing golf or riding horseback, Defendant might have a stronger argument for delving into the non-public section of her account. But based on what has been provided to this Court, Defendant has not made a sufficient predicate showing that the material it seeks is reasonably calculated to lead to the discovery of admissible evidence." *Tompkins v. Detroit Metro. Airport*, No. 10-10413, 2012 U.S. Dist. LEXIS 5749 (E.D. Mich. Jan. 18, 2012).

Search and Seizure

Allegedly Defective Warrant

The Santa Maria Police Department (SMPD) was investigating a drive-by shooting in which a young boy was injured. Witnesses recognized the car and the man's voice calling out from the car, and gave investigators a list of gang members believed to be associated with the shooters. The list included Javier Bravo, Jr. Based on this and other information, the officers obtained a warrant that authorized the search of seven individuals suspected of harboring weapons and evidence relating to the drive-by shooting, as well as a search of those persons' residences and vehicles, and a search of any persons or vehicles present at the time of the warrant's execution. Officer Tanore's affidavit listed Javier Jr.'s address as his parents' residence and contained a brief summary of his criminal history, but failed to mention that Javier Jr. had been sentenced, and was over six months into serving, a two-year sentence in state prison for his crimes. (A detective said he *had* checked but was told by the sheriff's office that Javier Jr. was not in custody, but no check of state prison custody had been done).

The Santa Barbara Police Department (SBPD) SWAT team served the warrant on the Bravo residence at 5:30 am by shooting off the front door locks and deploying two "flashbang" grenades outside the back door. Inside were Mr. and Mrs. Bravo and their eight-year-old granddaughter. Mrs. Bravo told officers her son was in jail and that they would find a recent letter from him on the dining room table. The Bravos remained detained in their living room, but at no

point did the officers handcuff, strike, or touch the Bravos.

The Bravos sued the City of Santa Maria, Santa Barbara County, the City of Santa Barbara, and individual officers, alleging their Fourth Amendment rights were violated by the issuance and execution of a search warrant whose application failed to disclose that their son was (and had been) incarcerated in prison and, therefore, not only was not present in the home, but could not have been involved in the drive-by shooting or the storage of weapons used in it. They claimed the search warrant was invalid because it was obtained through the intentional or reckless omission of facts "required to prevent technically true statements in the affidavit from being misleading."

The district court concluded that the omission of Javier Jr.'s custody status was not material to a finding of probable cause and that, in any event, the Bravos presented no evidence to support an inference of intentional or reckless conduct on Officer Tanore's part.

The U.S. Court of Appeals for the Ninth Circuit, on appeal, disagreed on both counts. To determine the materiality of omitted facts, the court considered whether the affidavit, once corrected and supplemented, established probable cause. If probable cause remained after this amendment, then no constitutional error had occurred. Here, once the affidavit was supplemented with the challenged omission (Javier Jr.'s sentence imposed over six months prior to the incident occasioning the warrant, and his consequent incarceration in prison at the time of the shooting and the warrant's execution), it could not establish probable cause for the search and "especially [did] not meet the heightened standard of justification required for nighttime SWAT service."

On whether the Bravos made a substantial showing that Tanore deliberately or recklessly omitted Javier Jr.'s custody status, the court, viewing the evidence and drawing all inferences in the light most favorable to the Bravos, concluded that the district court erred in finding Tanore "negligent at most." The Bravos made the required substantial showing that Tanore may have intentionally or recklessly omitted Javier Jr.'s two-year sentence from his affidavit (Tanore testfied that he reviewed Javier Jr.'s rap sheet in preparing the affidavit, and, though he could not recall with certainty whether he had observed the two-year sentence, acknowledged that he may have. The two-year sentence appeared on the rap sheet "a mere two lines below the 'convicted' disposition"). Because a reasonable jury could conclude that Tanore's failure to mention the jail sentence or to follow up and inquire about Javier Jr.'s custody status amounted to at least reckless disregard for the truth, summary judgment was improperly granted. *Bravo v. City of Santa Maria*, No. 09-55898, 2011 U.S. App. LEXIS 24383 (9th Cir. Dec. 09, 2011).

Use of Deadly Force

Scott Rockwell, 27, lived with his parents in Garland, Texas. Scott suffered from bipolar disorder and schizophrenia, had been diagnosed as suicidal, and had attempted suicide more than once. He had stopped taking his prescribed medication and refused to see a doctor. He was hearing voices and was behaving unpredictably, and his parent believed he was using illegal drugs. One evening, he was in his bedroom, hitting the walls and cursing. He came out and raised his fist as if to strike his mother, and his parents called 911. The dispatcher advised responding officers that Scott, a "potentially dangerous subject" was bipolar, schizophrenic, off his medication, and was pounding the walls of his room. The three officers who responded tried to talk with Scott through his bedroom door, as he had barricaded himself in the room. Another unit was called as Scott continued to hit the walls and threaten the officers. The officers decided to arrest Scott (based on a concern that he would harm his parents or himself) rather than wait to get a mental-health warrant. They decided to break down the door.

Once the door was breached, Scott, holding two eight-inch serrated knives, rushed towards an officer and attacked him with the knives, who responded by firing at Scott with a pepperball gun. Another officer saw the knives and yelled "knives" to warn his fellow officers. Scott turned and ran at another officer, injuring him with the knives. The officers responded with live rounds, and Scott died at the scene of multiple gunshot wounds.

The Rockwells, individually and on behalf of their son's estate, sued the officers for unlawful entry, excessive force, and assault and battery. The court below granted the defendants' motion for summary judgment on all claims (and on the excessive-force claims on the basis of qualified immunity), and the Rockwells appealed.

The U.S. Court of Appeals for the Fifth Circuit affirmed. To prove that the officers violated Scott's Fourth Amendment right to be free from the use of excessive force, the Rockwells had to show (1) an injury, (2) which resulted from the use of force that was clearly excessive to the need, and (3) the excessiveness of which was objectively unreasonable. The reasonableness inquiry was objective, and an officer's use of deadly force was not excessive when the officer, at the moment of the threat that resulted in the use of deadly force, reasonably believed that the suspect posed a threat of serious harm to the officer or to others. Here, Scott, a "relatively large man" known to be unpredictable and potentially violent, charged at the officers holding an eight-inch knife in each hand. The evidence indicated all of the shots were fired after Scott exited his room, when he was engaged in an armed struggle with the officers. "Under the totality of the circumstances, then, it was reasonable for the officers to believe that Scott posed a significant and imminent threat of serious physical harm to one or more of the officers." Further, the officers were entitled to qualified immunity on all of the Rockwells' unlawful-entry claims and the claim for warrantless arrest because the law at the time of the incident was unsettled.

Rockwell v. Brown, No. 10-11053, 2011 U.S. App. LEXIS 24980 (5th Cir. Dec. 15, 2011). ML

Workplace Romance

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17, 21 (1993) (a sexually hostile work environment exists where "the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.").
8. Cram v. Lamson & Sessions Co., 49 F.3d 466, 473 (8th Cir. 1995).
9. *See, e.g.,* Broderick v. Ruder, 685 F. Supp. 1269, 1280 (D.D.C. 1988).
10. Schobert v. Ill. Dep't of Transp., 304 F.3d 725, 733 (7th Cir. 2002).
11. 807 F.2d 304 (2d Cir 1986), *cert. denied*, 484 U.S. 965 (1987).
12. *Id.* at 308.
13. *Id.*
14. *Id.* at 306.
15. 397 F.3d 539 (7th Cir. 2005).
16. *Id.* at 541.
17. *See, e.g.*, Drinkwater v. Union Carbide Corp., 904 F.2d 853, 862 (3d Cir. 1990); Becerra v. Dalton, 94 F.3d 145, 149-50 (4th Cir. 1996); Wilson v. Delta State Univ., 143 Fed. Appx. 611, 614 (5th Cir. 2005); Tenge v. Phillips Modern AG Co., 446 F.3d 903, 907 (8th Cir. 2006); Taken v. Oklahoma Corp. Comm'n, 125 F.3d 1366, 1369-70 (10th Cir. 1997); Womack v. Runyon, 147 F.3d 1298, 1300 (11th Cir. 1998). *But see* King v. Palmer, 778 F.2d 878, 880 (D.C. Cir. 1985) ("unlawful sex discrimination occurs whenever sex is 'for no legitimate reason a substantial factor in the discrimination'") (citations omitted).
18. EEOC Notice No. 915-048 (Jan. 12, 1990), available at http://www.eeoc.gov/policy/docs/sexualfavor.html (hereinafter "Policy Guidance"). Supreme Court Justice Clarence Thomas signed the 1990 Policy Guidance in his capacity as the EEOC Chairman.
19. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) (citing the 1980 EEOC policy guidelines).
20. Policy Guidance, *supra* note 18.
21. *Id.* (favoritism based upon coerced sexual conduct may constitute quid pro quo harassment, and widespread favoritism may constitute hostile environment harassment).
22. 570 F. Supp. 1197 (D. Del. 1983).
23. *Id.* at 1199, quoting 29 C.F.R. § 1604.11(g).
24. 634 F. Supp. 571 (N.D. Cal. 1986).
25. *Id.* at 581.
26. *Id.* at 582.
27. Policy Guidance, *supra* note 18, *but see* Leibovitz v. New York City Transit Auth., 252 F.3d 179, 185 (2d Cir. 2001) (female manager distraught over the sexual harassment of other women in workplace had standing to bring suit under Title VII, but was denied recovery because she did not witness such harassment).
28. Policy Guidance, *supra* note 18.
29. 685 F. Supp. 1269 (D.D.C. 1988).
30. *Id.* at 1280.
31. *Id.* at 1278.
32. *Id.* at 1280. *Cf.*, Drinkwater v. Union Carbide Corp., 904 F.2d 853, 862 (3d Cir. 1990) (co-worker's claim of sexually hostile environment denied absent evidence that boss and paramour "flaunted" their sexual relationship, or that such relationships were "prevalent" in the workplace).
33. 36 Cal. 4th 446 (Cal. 2005).
34. *Id.* at 471-72.
35. *Id.* at 471.
36. *Compare* McGinnis v. Union Pac. Ry., 496 F.3d 868, 874 (8th Cir. 2007) (male dispatcher failed to allege claim for widespread sexual favoritism in the workplace where supervisor had sexual affair with female subordinate, treated women more favorably than men in terms of job opportunities and work shifts, and protected females who violated company rules).
37. 680 F. Supp. 2d 502 (S.D.N.Y. 2010).
38. *Id.* at 514.
39. *Id.* at 515.
40. 716 F.2d 1167 (7th Cir. 1983).
41. *Id.* at 1172.
42. Keppler v. Hinsdale Township High School Dist. 86, 715 F. Supp. 862 (N.D. Ill. 1989).
43. *Id.* at 869. *See also* Succar v. Dade County School Bd., 229 F.3d 1343, 1345 (11th Cir. 2000) (harassment of male teacher by coworker, a female teacher, was motivated by "contempt" following their failed relationship, not by gender).
44. 511 F.3d 225 (1st Cir. 2007).
45. *Id.* at 229.
46. 488 F.3d 739 (7th Cir. 2007).
47. *Id.* at 746.
48. *Id.* at 746-47. *See also* In re C.F. Smith & Assocs., Inc., 235 B.R. 153, 165 (D. Mass. 1999) (former paramour may recover against boss for sexual harassment in wake of soured relationship). ML

"...Hands Off the Monkey!"

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constitutional warrantless entry at the time of the fire).
28. Jones v. Wildgen, 244 Fed. Appx. 859, 864 (10th Cir. 2007).
29. City of Canton v. Harris, 489 U.S. 378, 388 (1989).
30. *See* Elkins v. District of Columbia, 527 F. Supp.2d 36, 47 (D.D.C. 2007) ("Punitive damages, however, are available against the [officers] where their conduct was 'motivated by evil motive or intent, or when it involve[d] reckless or callous indifference to the federally protected rights of others,'" quoting *Smith v. Wade*, 461 U.S. 30, 56 (1983)). ML

Supreme Court

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officers had a responsibility to exercise their own reasonable professional judgment.

The questions in this appeal are whether, under *Malley,* the officers were entitled to qualified immunity where they obtained a facially valid warrant, a district attorney approved the application, no factually on-point case law prohibited the search, and the alleged overbreadth in the warrant did not expand the scope of the search. Second, whether the *Malley/Leon* standards should be reconsidered or clarified in light of the lower courts' inability to apply them in accordance with their purpose of deterring police misconduct, resulting in the imposition of liability on officers for good-faith conduct and the improper exclusion of evidence in criminal cases.

The NRA and the ACLU have filed *amicus* briefs in support of the Millenders. The Court heard oral argument on December 05, 2011, with few clues as to how far it will go in allowing courts to second-guess probable cause determinations in this context. We'll know by June whether the Court will revise the existing standard. ML

Inside Canada

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I have also been advised by municipal operations managers that, in cold windy conditions, it is not advisable to salt a roadway when some snow accumulation will occur due to blowing snow or drifting, since this will actually *create* an icy condition. In such circumstances, based on *Giuliani*, the municipality will have to present evidence that preventative measures were not appropriate and that it did not fail in its duty under s. 44(1), *Municipal Act, 2001*. Unfortunately, the MMS were intended to prevent this very fact-driven type of litigation, and the Court of Appeal has, in effect, encouraged this kind of litigation again given the narrowness of its ruling on the applicability of the MMS.

Does a municipality owe a higher duty of care when it adopts a higher level of service (LOS) than what is prescribed by the MMS? The simple answer is maybe. Strictly speaking, adopting a higher LOS than prescribed does not negate the defences available under s. 44(3) of the *Municipal Act, 2001* and the MMS. However, it is now clear that the alleged default must fall squarely within the saving provision of the MMS. If the municipality adopts a certain maintenance policy and then negligently carries it out, it may be held liable: if the LOS requires the application of a certain mixture to prevent icing, and the road crew uses an improper mixture that *causes* the accident, there may be liability. Thus, the wording of the policy is crucial in determining whether there is a negligent breach. If the municipality adopts standards that exceed the MMS, it would be wise to use words such as "it is the objective of the municipality to attempt to achieve the following LOS," and "due to practical considerations, such levels of service may not be achievable in all circumstances." (The LOS should, at a minimum, meet the requirements of the MMS.)

In view of *Giuliani*, municipalities also are well advised to create LOS with respect to those matters that are now identified as not being covered by the MMS, such as preventative measures to prevent icing. It may be that, due to budgetary and manpower constraints, a policy that only addresses potential icing *after* the commencement of a snowstorm would be considered reasonable in the circumstances. The main lesson from *Giuliani* is that the defendant municipality did nothing to address the icing until the icy condition actually existed.

Many municipalities adopt LOS policies because they contract out certain services, like winter maintenance. In most cases, if the LOS are not maintained by the contractor and liability results, the liability passes to the contractor by means of insurance and indemnification clauses. One issue that has arisen is whether the LOS dictated by contract, to a third-party contractor, creates a higher duty of care to users of the roadway. In *Giuliani*, the Regional Municipality of Halton had contracted out winter maintenance to the Town of Milton for all roads under Regional jurisdiction; Milton was the Region's contractor and was required to indemnify the Region for any liability resulting from the negligent winter patrolling and maintenance of the road in question. In the trial decision, Justice Murray stated:

> The law does not impose a higher standard of care on the contractor, ...the Town of Milton, than on the Regional Municipality. Even if the provisions of the [LOS] agreement...imposed higher standards for road maintenance than do the relevant provisions of the *Municipal Act*, the Town will not be liable to users of the highway by virtue of breach of contract with the Regional Municipality.[2]

Conclusion

Municipalities should now be on guard against simply relying on the MMS for winter patrolling and maintenance, as the courts have sent a strong message that they will find liability when the municipality, given reasonable diligence, could have prevented the unsafe condition, even if it did comply with the MMS, when the cause of the accident is based on a default not covered by the MMS. The courts have also given a narrow interpretation to the application of the MMS in determining what constitutes a default. Municipalities should be seeking amendments to the underlying legislation, as well as the MMS regulations, to ensure that the prescribed LOS in the MMS are all-encompassing and do not create hybrid situations which eviscerate the very reason underlying the enactment of the MMS.

(Charles M.K. Loopstra, J.D., Q.C. is the senior partner of the firm Loopstra Nixon LLP in Toronto, Ontario, which represents numerous municipal clients in public liability defence work and municipal litigation.)

Notes

1. The reference to deploying forces to treat icy roadways "as soon as practicable after becoming aware that the roadway is icy" was repealed by Ont.Reg.23/2010. The former section was still in effect for *Giuliani*, but the Court of Appeal noted the amendment made no difference to the result.
2. 2010 ONSC 4630 at para. 174. **ML**

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Under TRFRA, the court applied a four-part test of (1) whether the government's regulation burdened the plaintiffs' free exercise of religion; (2) whether the burden was substantial; (3) whether the regulations furthered a compelling governmental interest; and (4) whether the regulations were the least restrictive means of furthering that interest. The court found sufficient evidence existed from which a jury could conclude the ordinance substantially burdened the plaintiffs' free exercise of religion, as it hampered their ability to spontaneously share food with homeless people, and to actively seek them out in hard to reach, unpredictable, and ever-changing locations. The case is *Big Hart Ministries Ass'n v. City of Dallas*, No. 3:07-CV-0216-P, 2011 U.S. Dist. LEXIS 128443 (N.D. Tex. Nov. 04, 2011).

Fast Food Outlets Ban

The Village Code of the Village of Victor prohibited what it defined as "Formula Fast-Food Restaurants" (FFFRs) in the Central Business District, on the basis that the ban helped to maintain the unique village character and vitality of the commercial district. FFFRs were defined as facilities with: standardized menus, ingredients, food preparation and/or uniforms; prepared food in a "ready to consume" state; food that was selected from a limited menu, sold for immediate consumption on or off premises, and sold over the counter in disposable

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Ordinances

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containers and wrappers; and where the customer paid before eating. The plaintiff company bought property in the Village that was subject to the ban. One of its potential tenants was a national chain sandwich shop. The company sought to invalidate the ban on the basis that the prohibition of FFFRs was based solely upon ownership and was unlawful, unconstitutional and void, premised on the fundamental rule that zoning dealt with land use and not with the person who owned or occupied the land. The ban, it alleged, was based on the nature or identity of the owner or operator, and not upon the land use itself. The court disagreed: the FFFR ban was not based "simply upon who owns or operates the restaurant. The challenged Code is not 'plainly personal' and does not seek to regulate a specific entity," but was a neutral rule that applied to the entire business district, and addressed conduct that affected the character of the community. *Mead Sq. Commons, LLC v. Village of Victor*, 930 N.Y.S.2d 431, 2011 N.Y. Misc. LEXIS 4630 (N.Y. Sup. Ct. 2011). ML

Second Look

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immunities secured by the Constitution and laws...") (emphasis added). What I, among others, have been awaiting is the right set of facts to determine if a city also can be an injured "other person within the jurisdiction" of the United States for the purpose of being a civil rights plaintiff. In *South Macomb Disposal Authority v. Washington Tp.*, 790 F.2d 500, 503 (6th Cir. 1986), the Sixth Circuit confronted this situation and opined:

> We are of the opinion that in light of *Monell*, it would be a strained analysis to hold, as a matter of statutory construction, that a municipal corporation was a "person" within one clause of section 1983, but not a "person" within another clause of the same statute. Rather, we believe the outcome in this case is dictated by a different body of law, which analyzes whether the appellant, as a municipal corporation, may assert constitutional claims against its creating state, or political subdivisions thereof, and, if so, in what context may it assert such claims. *See, e.g.*, Appling County v. Municipal Electric Authority of Georgia, 621 F.2d 1301, 1308 (5th Cir.) (per curiam), *cert. denied*, 449 U.S. 1015, 101 S.Ct. 574, 66 L.Ed.2d 474 (1980).

In a footnote, the court added that, in *Moor v. County of Alameda*, 411 U.S. 693 (1973), the Supreme Court stated that section 1983 was enacted to provide a new remedy to "private parties," although the Fifth Circuit had concluded that a municipal corporation was not such a "private party" entitled to section 1983 relief. However, after *Monell*, the Sixth Circuit concluded that whether a municipal corporation was or was not a "private party" did not necessarily pose the correct question, and declined to focus on that inquiry. The court resolved the *South Macomb* case on the constitutional grounds that one political subdivision of a state lacked standing to challenge the constitutionality of the acts of another political subdivision of the same state. 790 F.2d at 505. But what if a city sued a business corporation or individual acting under color of state law for a violation of the city's federal constitutional or statutory rights? An aside: What is a "private party" in the sense used by the *South Macomb* court? Is a publicly-traded business corporation a "private party"? What about a city official or employee?

5. *See, e.g.*, Fed. R. Civ. P. 1 (rules "should be construed and administered to secure the just, speedy, and inexpensive determination").

6. Of course, business corporations, unlike municipal corporations, are often considered "persons" for Bill of Rights purposes. The way that corporations sidled their way into constitutional personhood is a pretty frightening tale, but not my subject today. *See* Katie J. Thoennes, *Frankenstein Incorporated: The Rise of Corporate Power and Personhood in the United States*, 28 HAMLINE L. REV. 203 (2005), particularly the discussion of *Santa Clara Cnty. v. Southern Pac. RR Co.*, 118 U.S. 394 (1886), in *Frankenstein* at 209 *et seq.* No discussion on this general topic would be complete without mention of *Citizens United v. Fed. Election Com'n*, 130 S. Ct. 876 (2010). Consider it mentioned.

7. *See, e.g.*, Texas Workers' Comp. Com'n v. City of Bridge City, 900 S.W.2d 411, 414 (Tex. App.-Austin 1995, writ denied).

8. The U.S. Supreme Court articulated the doctrine as follows:

> [T]hat whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.

Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 244–45 (1933) (quoting John Norton Pomeroy, A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA § 397 (4TH ED. 1918)).

9. *See* T. Leigh Anenson, *Limiting Legal Remedies: An Analysis of Unclean Hands*, 99 KY. L. J. 63, 65 (2010-2011). ML

Code Enforcement

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Because human nature is what it is, you may run into situations where you first believe the individual is a particular type, only to find out later he is completely different. In light of that, I believe one of the most beneficial ordinance provisions is one that allows a city to correct violations and charge the costs to the responsible person if he can't (or won't) correct them. Although it's a difficult proposition to spend tax dollars to clean up or otherwise correct violations on private property, the alternative—letting the problem continue or get worse—is not very appealing, and you'll likely have elected officials and neighbors pounding down your door to get the problem corrected.

Good luck in your battles. ML



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