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The Freedom of Information Act and employment contracts: A case review of *Stern v. Wheaton-Warrenville Community Unit School District 200*

By Lisle A. Stalter[1]

It seems that just a couple of years ago there were only a handful of cases discussing the Freedom of Information Act[2] and its exemptions. Now, it appears that decisions under the Act are coming down on a more frequent basis. This past summer, the Illinois Appellate Court, Second District weighed in on the issue of employment contracts and whether they may be obtained through a Freedom of Information Act (FOIA) request in *Stern v. Wheaton-Warrenville Community Unit School District 200*.[3]

There are two main issues in *Stern*. The court was asked to determine: (1) whether the school superintendent's employment contract was *per se* exempt from disclosure under the FOIA; and (2) whether disclosure of the superintendent's contract by the superintendent himself waived the school district's exemption claim. The trial court granted the school district's motion for summary judgment. The appellate court found that there were questions of material fact regarding whether any part of the contract was exempt from disclosure and whether the voluntary disclosure of the contract to others waived the school district's exemption claim. Therefore, the appellate court remanded the case to the trial court for further proceedings.

Background of the Case

In January 2006, Stern submitted a FOIA request to the Wheaton-Warrenville Community Unit School District 200 (the District) for a copy of the employment contract between it and Gary Catalani, the District's superintendent. The District denied the request, claiming the document was contained in the superintendent's personnel file and was therefore *per se* exempt from disclosure. After obtaining "a nonbinding Attorney General opinion" that employment contracts were not exempt from disclosure, Stern submitted a second FOIA request to the District for the superintendent's contract. It was again denied. Stern appealed to the president of the school board, who affirmed the District's denial.

Subsequently, Stern obtained "a second opinion from the Attorney General" stating that employment contracts are not exempt from disclosure under the FOIA and that article VIII, section 1 of the Illinois Constitution of 1970 required disclosure as the contract related to the expenditure of public funds.

Stern filed a complaint, seeking to enjoin the District from refusing to comply with the FOIA request. The complaint stated that although the District refused to provide him with a copy of the contract, a copy of the contract had been provided to others who had requested it. In addition, Stern also cited the Illinois Constitution as a reason the employment contract was not exempt.[4] Discovery commenced; Catalani's deposition was taken. Catalani testified that copies of his employment contract were located in his

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personnel file, his home, and his office. In addition, he noted that various District board members had copies. Catalani also stated that he had personally decided to supply a copy of his contract to the Chicago Tribune and Daily Herald outside the FOIA process (even though a FOIA request for the document had been submitted).[5]

After a period of discovery, the trial court granted the District's motion for summary judgment, holding that Catalani's employment contract was *per se* exempt from disclosure under FOIA because it was part of Catalani's personnel file. The trial court relied on *Copley Press, Inc. v. Board of Education for Peoria School District No. 150*.[6]

The Court's Analysis

The Freedom of Information Act– general application

The court's analysis started with a review of the FOIA, its intent and the applicable provisions. The court's discussion is substantially similar to that of other FOIA cases except for two key points.

First, the court clearly stated that simply because a document is in a personnel file does not make it *per se* exempt from disclosure, as could be concluded from *Copley*.[7] The court then discussed *Reppert v. Southern Illinois University*,[8] which was decided after the trial court's ruling on the summary judgment motion. The court noted that *Reppert* addressed the "apparent conflict" between the personnel file exemption and the provisions contained within the definition of "public record"[9] and section 7(1)(b)(ii), which provides that records which contain information on the public duties of public employees shall not be considered an invasion of personal privacy.[10] After reviewing the pertinent case law, the court declined to follow the *Copley* case "to the extent that the *Copley* court purported to hold that employment contracts are *per se* exempt from disclosure under the FOIA."[11]

Second, after determining that the superintendent's employment contract was not *per se* exempt from FOIA disclosure, the court classified employment contracts as an example of a nonexempt record held within an exempt source.[12] Such circumstances call for an *in camera* inspection of the records to determine if any portion of the contract does not bear on public duties and is exempt as a clearly unwarranted invasion of personal privacy.[13] The court concluded that if no portion of the contract is exempt, it must be disclosed and if any portion is exempt it must be redacted, unless the claim of exemption is waived.[14]

Waiver of FOIA Exemptions

The discussion of whether the personal privacy exemption was waived centered on the impact of Catalani's "personal decision" to disclose the employment contract to two newspapers in response to FOIA requests. Although the appellate court did not actually rule on the waiver issue, it did find that there was a question of fact as to whether Catalani had the authority to waive the FOIA exemption on behalf of the District and remanded the case back to the trial court for further proceedings.[15] While the appellate court provided a discussion of law for the trial court to consider in ruling on the waiver question, there are aspects of the waiver rule that are not addressed.

In its discussion of the waiver issue, the appellate court cited federal case law recognizing that selective disclosure is unfavored and "offensive" for the purposes underlying the FOIA.[16] Further, when considering whether Catalani had the ability to waive the FOIA exemption on behalf of the District, it should be kept in mind that it is his privacy interest that is at the center of the question. Catalani himself stated in his deposition that he considered the employment contract "private information."[17] If he did not think the information in the employment contract was too private to share with two newspapers, an argument by the District that there is a need for privacy protection sits on thin ice. This is particularly true when looking at section 7(1)(b) of the FOIA which provides that the exemption for personal information does not apply when "the disclosure is consented to in writing by the individual subject of the information."[18] Arguably, the disclosure of the information to the two newspapers – one of which was by Catalani himself – could be considered written consent for disclosure of the employment contract thus waiving the exemption provided under the FOIA. This is particularly true in light of the purpose and intent of FOIA, to allow the public to discuss public issues fully and freely, make informed political judgments and monitor government to ensure that it is being conducted in the public interest.[19] If only certain requesters are given documents and others are not, full public discussion cannot occur.

The appellate court did recognize that the waiver determination is not a mechanical rule to be applied, but rather that the circumstances related to disclosure, including the purpose and extent, as well as the confidentiality surrounding the disclosure, must be considered.[20] This is how it should be. However, there is little in the court's analysis to provide guidance when determining when an exemption should be considered waived or, more importantly to the private interest, should not be considered waived. One of the cases relied on by the *Stern* court was *Lieber v. Board of Trustees of Southern Illinois University.21 Lieber* recognized that one of the reasons requested documents (a list of names and addresses of individuals who had contacted the university about freshman housing) should not be exempt under FOIA is that the university routinely made the information available to other groups.[22]

There is one aspect of finding documents not exempt from disclosure that is troubling. Throughout the *Lieber* court's analysis, there is no mention of the potential student's right to keep information private.[23] When it comes to personal privacy issues, the FOIA recognizes it is the person's right to privacy, which is why it requires written consent of the subject of the information to waive the exemption.[24] There has been no discussion of the impact of a determination by a public body that has initially disclosed information but subsequently determines that it should not do so to protect personal privacy interests. A broad reading of the cases would support an argument that once someone's information has been disclosed, an exemption can no longer be asserted. But, practically speaking, every day it becomes more difficult to protect our privacy, including our identity. At some point, the courts will need to take a step back from this line of reasoning and determine whether in particular circumstances even a person's name and address are private information that should not be shared unless that person consents.

The *Lieber* case indicates that a name and address are not the type of private information sought to be protected by the FOIA.[25] In setting forth this position, the *Lieber* court stated that if such a broad definition of personal information was used, the public would have no right to learn names of officials they put in public office or no way to confirm that their doctors are licensed to practice medicine.[26] This is comparing apples and oranges. Public officials' names should be known. In fact, many public officials want their names known at election time. The

licensing status of doctors and attorneys should be verifiable. But, because this information should be available to the public and consumers does not mean that anyone should be able to obtain the name and address of anyone who applied to a university and was accepted (or sought services from a government agency but did not fit clearly within one of the exemptions). This is going too far. At some point, even the FOIA has to recognize that our identities need to be protected. Whether this is best done through case law distinguishing *Lieber* or through a legislative amendment to the FOIA is a question that remains to be answered.

Where does this leave us?

Stern has helped clarify what constitutes an employee's personal information. Although we still do not have a definition of "personal information," it is clear that the courts will find that an employment contract is not *per se* exempt from disclosure under the FOIA.[27] This is the way it should be. However, if this issue arises, some key distinctions between *Stern* and *Reppert* and *Copley* need to be kept in mind. *Stern* and *Reppert* both recognize that employment contracts, although in a personnel file, are not necessarily exempt from the FOIA. *Copley* is distinguishable in that the documents requested, performance evaluations and a letter stating a basis for the superintendent's dismissal, were documents typically kept in a personnel file which were found to be exempt from disclosure but which do not bear on public duties of public employees[28] or the expenditure of public funds.

However, serious consideration should be given to the waiver doctrine as applied to a FOIA request. A requirement of consistency, which does have its benefits, may also have unintended effects, particularly when personal information, unrelated to public employees or officials or the operation of public business, is involved.

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1. Lisle A. Stalter is an Assistant State's Attorney in the Lake County State's Attorney's Office. Any opinions expressed in this article are solely those of the author and not those of the Lake County State's Attorney's Office.

2. 5 ILCS 140/1 *et seq*.

3. 384 Ill. App. 3d 615, 894 N.E.2d 818 (2d Dist. 2008).

4. The court did not address the constitutional issue, as it was not brought as a claim and the court had determined the contract was not exempt under the FOIA. *Stern*, 384 Ill. App. 3d at _____, 894 N.E. 2d at 827.

5. *Stern*, 384 Ill. App. 3d at _____, 894 N.E. 2d at 820-1.

6. *Copley Press, Inc. v. Board of Education for Peoria School District No. 150*, 359 Ill. App. 3d 321, 834 N.E.2d 558 (3d Dist. 2005).

7. In making this determination, the court refused to blindly follow *Copley* which found that a personnel file is *per se* exempt under section 7(1)(b)(ii). *Stern*, 384 Ill. App. 3d at _____, 894 N.E. 2d at 824-5. In response to the District's argument that *Copley* is binding precedent on the Second District, the court noted that *People v. Johnson*, 363 Ill. Ap. 3d 1060, 1071-72, 845 N.E.23d 645 (2005) recognized that a decision of one appellate court is not binding on another appellate court. *Stern*, 384 Ill. App. 3d at _____, 894 N.E. 2d at 824-5.

8. *Reppert v. Southern Illinois University*, 375 Ill. App. 3d 502, 874 N.E.2d 905 (4th Dist. 2007).

9. *Stern*, 384 Ill. App. 3d at _____, 894 N.E. 2d at 824, *citing* 5 ILCS 140/2(c)(vii), (viii).

10. *Stern*, 384 Ill. App. 3d at _____, 894 N.E. 2d at 824, *citing* 5 ILCS 140/7(1)(b).

11. *Stern,* 384 Ill. App. 3d at _____, 894 N.E. 2d at 825, *citing Reppert*, 375 Ill. App. 3d at 507, 874 N.E.2d at 905.

12. *Stern*, 384 Ill. App. 3d at _____, 894 N.E. 2d at 825.

13. *Stern*, 384 Ill. App. 3d at _____, 894 N.E. 2d at 825.

14. *Stern*, 384 Ill. App. 3d at _____, 894 N.E. 2d at 825.

15. *Stern*, 384 Ill. App. 3d at _____, 894 N.E. 2d at 826.

16. *Stern*, 384 Ill. App. 3d at _____, 894 N.E. 2d at 826, *citing State of North Dakota ex rel. Olson v. Andrus*, 581 F.2d 177, 182 (8th Cir. 1978). *Lieber v. Bd. of Trustees of Southern Ill. Univ.*, 176 Ill. 2d 401, 413, 680 N.E.2d 372, 379 also cited to the *State of North Dakota* case in its discussion of waiver.

17. *Stern*, 384 Ill. App. 3d at _____, 894 N.E. 2d at 820.

18. 5 ILCS 140/7(1)(b).

19. 5 ILCS 140/1.

20. *Stern*, 384 Ill. App. 3d at _____, 894 N.E. 2d at 826.

21. *Stern*, 384 Ill. App. 3d at _____, 894 N.E. 2d at 826, *citing Lieber*, 176 Ill. 2d 401, 680 N.E.2d 374.

22. *Stern*, 384 Ill. App. 3d at _____, 894 N.E. 2d at 825, *citing Lieber*, 176 Ill. 2d at 412-3, 680 N.E.2d at 379.

23. The court in *Lieber* found that there is no privacy in names and addresses, nor does the student information exemption apply. *See Lieber*, 176 Ill. 2d at 411, 680 N.E.2d at 379.

24. *See* 5 ILCS 140/ 7(1)(b).

25. *Lieber*, 176 Ill. 2d at 412, 680 N.E.2d at 379.

26. *Lieber*, 176 Il. 2d at 412, 680 N.E.2d at 379.

27. Of course, information that is personal or exempt under a provision of the FOIA can be redacted. *See Stern*, 384 Ill. App. 3d at _____, 894 N.E. 2d at 824-5.

28. Of course, the requested documents bear on how the public duties were conducted, but they do not bear on what the public duty itself was.

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Office
Illinois Bar Center
424 S. 2nd Street
Springfield, IL 62701
Phones: (217) 525-1760 OR 800-252-8908

Web site: www.isba.org

Co-Editors
Kathryn A. Kelly
219 S. Dearborn St., Ste. 500
Chicago, IL 60604

Lynn E. Patton
500 S. Second St.
Springfield, IL 62706

Managing Editor/Production
Katie Underwood
kunderwood@isba.org

Will the courts snuff out the Smoke Free Illinois Act?

*By James W. Chipman**

Introduction

A vast majority of new laws quietly take effect without much fanfare or notice from the general public. One notable exception was the new Smoke Free Illinois Act (the Act)[1] that took effect on January 1, 2008. Getting the law passed last year was no easy task. Keeping it on the books may be just as difficult. Less than two months after becoming law, the Illinois House of Representatives proposed four bills that would have exempted private clubs, veterans' organizations, allowed local authorities to issue smoking licenses, and in the most extreme case, would have repealed the entire law. All four proposals were defeated handily. The biggest threat to Illinois' comprehensive indoor smoking ban, however, may not come from the legislature, but from the courts.

As background, in the March 2008 edition of this newsletter, I wrote that the current law had major flaws that needed to be addressed, namely how does a violator under the act appeal or challenge a citation? The Department of Public Health's attempt to clarify the statutory ambiguities failed when the Joint Committee on Administrative Rules (JCAR) in January 2008 voted 9-1 to object to the Department's proposed rulemaking and prohibit its filing with the Secretary of State. The JCAR found that the adoption of the rulemaking would constitute a serious threat to the public interest and welfare because it lacked any process by which an accused violator can argue that no violation occurred, appeal a finding of a violation, or appeal the amount of the imposed fine. An alleged violator's only options are to pay the fine or challenge enforcement action through the circuit court.[2]

The court challenge

On September 30, 2008, Bureau County Associate Judge Cornelius Hollerich essentially made the law unenforceable by ruling that circuit courts have no jurisdiction to handle violations of the Act. The case involved an individual who was ticketed for allegedly lighting up in a city tavern in February 2008.

The defendant bar patron admitted that he smoked, but he claimed it was beyond the statute's required 15 feet zone. The defendant's counsel asked the court to dismiss the action on two grounds: (1) that the new law can not be enforced in a criminal prosecution filed in circuit court; and (2) that the Act is unconstitutional. Counsel found support for these arguments in the Act's language and an old Illinois Supreme Court decision.[3] In 1914, our State's high court heard a case involving a local ordinance that had banned tobacco of any kind in any public place within the City of Zion. City officials argued the ordinance was valid as part of the police power granted municipalities.

The court examined precedent from four different jurisdictions where smoking bans had been enacted and challenged. The court rejected a Massachusetts case that upheld a broad ordinance outlawing smoking and the possession of a lighted pipe or cigar in the streets of Boston, and instead, found a Kentucky case more persuasive. While acknowledging that tobacco can be prohibited in "certain public places, such as street cars, theaters, and like places where large number of persons are crowded together in a small space,"[4] the supreme court held that it is quite another matter to ban "smoking on the open streets and in the parks of a city, where the conditions would counteract any harmful results. The personal liberty of the citizen cannot be interfered with unless the restraint is reasonably necessary to promote the public welfare."[5]

In the end, the court threw out the ordinance stating "it is apparently an attempt on the part of the municipality to regulate and control the habits and practices of the citizen without any reasonable basis for so doing."[6] The court found the private rights of the citizen are paramount and that only an ordinance reasonably necessary to promote the public welfare can be sustained.[7]

The *Zion* case, which is nearly 100 years old, held that smoking can be banned in some public indoor places where a person's movement is confined or limited, like in a theater or in public transportation. But, what about a bar? How far will a court extend "private rights" when it comes to smoking?

The Bureau County circuit court never reached this thorny issue. Instead, Judge Hollerich granted the defendant's first motion to dismiss finding that cases brought under the law should be handled administratively by the Department and not by the courts. "It does appear to the court, based on the filings here, that the Legislature intended for the assessment of the fines to be imposed by an administrative agency. The statute itself does not contain the type of language one would normally find in the criminal code * * * or motor vehicle code."[8] Counsel's second motion challenging the constitutionality of the Act was therefore moot, at least for now. The Bureau County State's Attorney decided not to appeal the order.

The future of the law

A recent poll conducted by the Illinois Coalition Against Tobacco found that Illinois voters overwhelmingly support the Act. Unless the law is amended or rules are promulgated to correct apparent deficiencies in the current language, the courts will be asked to decide whether employees and patrons of any public indoor place deserve protection from the health dangers of secondhand smoke.

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*The author is the Assistant General Counsel of the Illinois Department of Revenue and Secretary of the ISBA's Standing Committee on Government Lawyers. The opinions expressed herein are solely his and not those of the Department.

1. Public Act 95-017, effective January 1, 2008, now codified at 410 ILCS 82/1 et seq.
2. 32 Ill. Reg. 1169 (Statement of Objection and Filing Prohibition to Proposed Rule making, January 25, 2008).
3. *City of Zion v. Behrens*, 262 Ill. 510, 104 N.E. 836 (1914).
4. *City of Zion*, 262 Ill. at 512.
5. Id.
6. *City of Zion*, 262 Ill. at 513.
7. Id.
8. *People v. Alexander*, Docket No. 08-CM-000058 (Circuit Court, Bureau County) (see record of Sept. 30, 2008).

Public sector discipline: September 2008 term of the Illinois Supreme Court

By Rosalyn Kaplan

In re Kelley, Commission No. 07 SH 5, S. Ct. No. M.R. 22452 (September 16, 2008). John Michael Kelley was an Assistant State's Attorney in Sangamon County between 2001 and 2006. During that time, he possessed and used cocaine and marijuana on multiple occasions. Given the fact that Kelley had received intensive treatment for substance abuse, beginning in 2006, the Illinois Supreme Court allowed the Administrator's petition to impose discipline on consent and suspended Kelley for two years and until further order of the Court, but it stayed the suspension after one year by a period of probation.

In re Levine, Commission No. 08 DC 1005, S. Ct. No. M.R. 22599 (September 17, 2008). Stuart Phillip Levine served on the Board of Trustees of the Teachers Retirement System of the State of Illinois and the Illinois Health Facilities Planning Board. He pled guilty to the offenses of mail fraud and money laundering in connection with his use of influence as a member of those Boards to obtain financial benefits for himself, for Antoin Rezko, and their nominees and business associates. The Illinois Supreme Court allowed his motion for disbarment on consent, following the Administrator's submission of a statement of charges against him, and his filing of an affidavit admitting that the evidence described in the statement of charges would clearly and convincingly establish the facts and conclusions of misconduct set forth in that statement.

The full texts of the *Kelley* consent petition and the *Levine* statement of charges, as well as the Supreme Court's final orders, may be accessed through the Attorney Registration and Disciplinary Commission's Web site at www.iardc.org, by selecting "Rules and Decisions."

In-sites

Medicare Resources

This column has covered topics such as finding information about Medicare and researching safety ratings of nursing homes. On a related topic, we recently discovered a new e-newsletter for caregivers of those on Medicare.

The e-newsletter is entitled Ask Medicare. The November/December issue of the newsletter may be found at: <www.cms.hhs.gov/MyHealthMyMedicare/downloads/AskMedicare_nov2008.pdf>.

The current issue includes information about 2009 Part B premiums, Medicare's coverage of flu shots, and the open enrollment period. Of special interest is information from the Administration on Aging for caregiver support including respite services and local resources. Finally, the e-newsletter provides information on ways to prevent falls.

Each topic provides a link for more information, an easy shortcut to find needed information quickly.

Children's Toys and Products

During the holiday season, as you make your gift giving list, you may want to check it twice. One review for completeness, and a second check against the Children's Product Safety Act (430 ILCS 125/1 et seq.) recall list.

Enforced by the Illinois Attorney General, the Children's Product Safety Act requires manufacturers and retailers to provide notice to consumers when products intended for children have been deemed unsafe. Although the public often becomes aware of dangerous children's products when the Consumer Product Safety Commission, a federal agency charged with regulation of this area, investigates and issues a recall, by the time a recall is issued dangerous products are already on store shelves and in consumers' homes. To protect consumers from unsafe products, pursuant to the Act, the Illinois Attorney General requires that Illinois retailers remove dangerous products from store shelves and post recall notices in prominent locations in the store. In addition, Attorney General Lisa Madigan's staff monitors online secondhand markets for recalled children's products.

Additional information about the Act and merchants' responsibilities under it may be found on the Illinois Attorney General's Web site: <http://www.illinoisattorneygeneral.gov/consumers/recall.html> or by calling the Attorney General's recall hotline at 1-888-414-7678. You may also wish to sign up for e-mail notification of new recalls issued by the Consumer Product Safety Commission at: <http://www.cpsc.gov/>.

Summary of recent decisions

*By Edward Schoenbaum**

Election law

***Stevo v. Keith*, No. 08-3218 (October 1, 2008). Appeal, C.D. Ill. Affirmed.**

District court did not err in dismissing for failure to state cause of action, plaintiff's complaint alleging that requirement that he obtain for his independent candidate petition for United States Congress signatures, representing five percent of individuals who voted in prior congressional election, violated his equal protection rights where defendant required less number of signatures in other congressional districts within state. Court rejected plaintiff's claim that 5,000-signature requirement for independent candidates in newly redistricted congressional districts should be applied to all districts since plaintiff's proposal is as arbitrary or more arbitrary than current percentage approach used by defendants.

Labor law

***Harvey Park District v. American Federation of Professionals*, No. 4-07-0862 (4th Dist. September 26, 2008). Affirmed.**

Illinois Labor Relations Board did not exceed its authority when it dismissed complaint filed by park district asserting that union committed improper labor practice when it failed to disclose that collective bargaining agreement reached by union representatives required ratification by entire membership. Ratification by membership is part of constitution of union, which is filed in a public document; parties did not explicitly agree that any agreement reached by representatives would be binding on union; and union did not mislead district into believing that membership ratification was not required.

Line of duty disability

***Jones v. Board of Trustees of the Police Pension Fund of the City of Bloomington*, No. 4-07-0687 (4th Dist. September 15, 2008). Affirmed.**

Decision by police pension board to deny police officer, who suffered disabling back injury after automobile collision, which occurred while he was on routine patrol is clearly erroneous. By driving vehicle while on patrol, officer was required to be alert for, and be prepared to respond to, any emergency; thereby performing an act of duty when he was injured.

Municipal law

***Speedy Gonzalez Landscaping, Inc. v. O.C.A. Construction, Inc.*, No. 1-07-2370 (1st Dist. October 9, 2008). Affirmed.**

Trial court did not err when it granted defendant's motion to dismiss, under section 2-619 of the Code of Civil Procedure, plaintiff's mechanic's lien complaint against the Public Building Commission of Chicago (PBC) for landscaping work that it performed on newly constructed school. Although plaintiff filed suit within 90 days of its notice of lien, it failed to serve a copy of the complaint on the PBC within the time period required by section 23(b) of Mechanic's Lien Act then in effect.

***Petition to Disconnect Certain Territory From the Village of Campton Hills*, Kane County, Illinois, No. 2-08-0349, 2-08-0350, 2-08-0356, 2-08-0357, 2-08-0358 Cons. (2nd Dist. October 15, 2008). Affirmed.**

Provisions of section 7-3-1 of the Illinois Municipal Code, allowing for disconnection of land from newly formed municipality, applies to petitions for detachment of more than one home and does not require that every lot in area sought to be detached touch border of municipality from which detachment is sought. Further, the notice requirement of section 7-3-6.1 applies only to section 7-3-6 petitions. Trial court, by ordering publication of notice, in compliance with section 7-3-2 provided appropriate notice. Further, trial court's finding that disconnection would not cause unreasonable harm to municipality by virtue of loss of tax revenue is not against the manifest weight of the evidence.

Open Meetings Act

***Wyman v. Schweighart*, No. 4-08-0117 (4th Dist. October 9, 2008). Affirmed.**

Trial court did not err when it granted city and its officers summary judgment dismissing plaintiff's Open Meetings Act complaint alleging a violation of the Act when the city council went into closed session to discuss "land acquisition" and "litigation," after conducting unanimous voice vote, without providing notice in agenda that it intended to go into closed session, and allowed persons other than council members and mayor to attend closed session. Record makes it clear that closed meeting involved "pending litigation" and "land acquisition"; there is no prohibition, against allowing non council members into closed meeting; notice of intent to go into closed session is not required on agenda; and unanimous voice vote provides sufficient record of vote to enter into closed session.

Tort Immunity Act

***Smith v. Waukegan Park District*, No. 104960 (September 22, 2008) Appellate and trial courts reversed. (Modified).**

Trial and Appellate Courts erred when they allowed defendant park district's section 2-619 motion to dismiss plaintiff's retaliatory discharge complaint, alleging that it terminated his employment because he filed a worker's compensation claim, based on section 2-109 of Tort Immunity Act. Tort Immunity Act does not protect local governmental entities from retaliatory discharge claims.

***Abruzzo v. City of Park Ridge*, No. 104935 (October 2, 2008). Reversed.**

Limited immunity of Emergency Medical Services Systems Act (EMS Act), rather than total immunity of Tort Immunity Act, applies to complaint by mother for wrongful death of her 15-year-old son, who died as the result of the failure of city's ambulance squad, after responding to call by child's father, to assess, evaluate, treat, or transport his unresponsive son, or even prepare a run sheet. Statutory provisions are inconsistent; therefore, the more specific legislation, the EMS Act, applies.

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*These summaries were prepared by Adrienne W. Albrecht for the ISBA Illinois E-Mail Case Digests, which are free e-mail digests of Illinois Supreme and Appellate Court cases and which are available to ISBA members soon after the decision is released, with a link to the full text of the slip opinion on the Illinois Reporter of Decision's Web site. These summaries have been downloaded and reorganized according to topic by Ed Schoenbaum for Government Lawyers, with permission.

Amendment of the Illinois Human Rights Act

By Eileen M. Geary

Employers, including local governments, are preparing to defend a new type of case in circuit court. Because of a recent amendment to the Illinois Human Rights Act, 775 ILCS 5/1-101 *et seq.*, persons who allege employment discrimination by filing a charge at the Illinois Department of Human Rights (IDHR) can elect to sue in circuit court. *See* Public Act 95-243, effective January 1, 2008. Previously, complainants who brought discrimination charges at the IDHR could have an administrative hearing before an administrative law judge at the Illinois Human Rights Commission. With the new amendment, complainants can choose to have a hearing at the Commission or file a complaint in circuit court.

The IDHR investigates charges of employment discrimination based on, among other things, "race, * * * sex, * * * physical or mental handicap, * * * or sexual orientation[.]" *See generally* 775 ILCS 5/1-102. Generally, the IDHR has 365 days to investigate a charge of discrimination. The IDHR determines whether there is substantial evidence of discrimination or no substantial evidence of discrimination. Prior to the amendment, if the IDHR found no substantial evidence of discrimination, the complainant could seek review of the finding at the agency, and if the agency affirmed the finding, seek recourse in the Illinois Appellate Court. 775 ILCS 5/7A-102. Under Public Act 95-243, however, a complainant can elect to sue in circuit court even if the IDHR finds no substantial evidence of discrimination.

The amendment allows a complainant to bring an action in circuit court if one of three things occurs. First, if the IDHR finds substantial evidence of discrimination, the agency notifies the parties "that the complainant has the right to either commence a civil action in the appropriate circuit court or request that the IDHR file a complaint with the Human Rights Commission on his or her behalf." 775 ILCS 5/7A-102(D)(4). The complainant must file a suit in circuit court within ninety days of receipt of the finding. Id.

Second, if the IDHR finds no substantial evidence, then the complainant can choose to request that the Human Rights Commission review the finding or elect to file a complaint in circuit court. 775 ILCS 5/7A-102(D)(3). "If the complainant chooses to file a request for review with the Commission, he or she may not later commence a civil action in a circuit court. If the complainant chooses to commence a civil action in a circuit court, he or she must do so within 90 days after receipt of the Director's notice." Id. The circuit court in the county where the discrimination allegedly took place is the court in which the action must be brought. 775 ILCS 5/7A-102(F)(2).

Third, if the IDHR fails to complete its investigation within 365 days of the filing of the charge, or a later date agreed to by the parties, the complainant can bring an action in circuit court or file his or her own complaint at the Human Rights Commission. 775 ILCS 5/7A-102(G)(2). In each instance the complainant must decide which forum to pursue—circuit court or the Commission. For instance, if the complainant files a complaint with the Commission, he or she cannot later sue in circuit court.

The amendment is effective for all charges of discrimination filed on or after January 1, 2008. The legislative history of the amendment indicates that the amendment follows the law already in place in 38 other states. *See* Remarks of Rep. Currie, April 17, 2007, House Debate on House Bill No. 1509, (95th Gen. Assem.) at 9-10. The legislative history provides that a complainant determines whether "to go to the commission or to go to court." Id.

The amendments to the Human Rights Act were reviewed in some detail in previous editions of the Illinois Bar Journal. The September 2007 edition of the Journal included an article entitled, "New law allows Human Rights Act plaintiffs to file in circuit court." Also, the January 2008 edition of the Journal included the article, "The New Illinois Right-to-Sue Law for Employment Discrimination."

Employers may not need to wait until January 2009 or after to see employment discrimination suits filed against them. A January 2009 date would allow for the 365 days provided for investigation by the IDHR for a charge of discrimination filed in January 2008, just after the effective date of the new amendment. However, for cases where the IDHR completes its investigation in less than 365 days, the complainants will have their opportunity to seek relief in circuit court even before January 2009.