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Local Government Law

The newsletter of the Illinois State Bar Association's Section on Local Government Law

Successful application of the Family Medical Leave Act: Lessons learned from *McClelland v. CommunityCare HMO, Inc.*

By Lisle A. Stalter

Proper application of Family Medical Leave Act ("FMLA") is frustrating for employers. However, if it is handled properly, claims of FMLA interference or retaliation can be defended. *McClelland v. CommunityCare HMO, Inc.* an unpublished Tenth Circuit opinion and its district court case, provides good guidance on appropriate process and procedure to protect employers on the application of FMLA.

The Background[1]

Teresa McClelland was hired as a billing specialist for CommunityCare HMO, Inc. in 2002. At the time she was hired McClelland received a copy of CommunityCare's FMLA policy. She also received copies of the policy each time she requested FMLA leave. McClelland had received at least 11 copies of the policy during her employment.

Pursuant to the FMLA, CommunityCare's policy provided that an employee was eligible to take up to 12 weeks of leave within a 12-month period and that an employee can request leave when his or her own health condition prevents him or her from performing the essential functions of the job. The policy also provided that if an employee fails to return upon expiration of the FMLA leave, the employee is subject to termination unless he

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Illinois State Appellate Cases

Municipalities 2d Dist.

***The Village of Ringwood v. Foster,* 2013 IL App (2d) 111221 (February 11, 2013) McHenry Co. (BIRKETT) Affirmed**

(Modified upon denial of rehearing 3/21/13). Lienholder of building was entitled to notice of Plaintiff Village's suit for demolition, but lack of notice of suit does not require vacating demolition order and remanding for new trial, where Village sent notice of request for demolition order subsequent to judgment on complaint. Allowing lienholder to raise "objections" on remand allows for possibility that evidentiary record would be reopened to challenge proof in support of demolition, but not so Defendant could present fresh evidence on state of building, and court thus did not err in denying motion to take evidence on current condition of building. (McLAREN and ZENOFF, concurring).

Freedom of Information Act 4th Dist.

***Brown v. Grosskopf,* 2013 IL App (4th) 120402 (February 13, 2013) Livingston Co. (APPLETON) Affirmed**

State's Attorney lacks standing to bring a declaratory judgment lawsuit, seeking determi-

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or she receives an extension. The provisions to request an extension of leave were very specific and required that they must be submitted in writing to the employee's immediate supervisor and the human resources director and provide a medical certification establishing the need for the extension.

In July 2009 McClelland requested nine to twelve weeks of FMLA leave from her employer for left knee replacement surgery that was scheduled for October 6, 2009. Shortly after that, in August McClelland injured her right knee and used 64 hours of leave. Prior to the incidents leading up to this complaint, McClelland had taken FMLA leave on multiple occasions. McClelland knew that if she took leave in August it would reduce the amount of leave she had available following her knee replacement surgery. On September 3rd, CommunityCare's human resource manager sent McClelland a letter advising her that the 64 hours she took in August would be deducted from her available 480 hours of leave. McClelland received the letter and was aware that she only had 416 hours of leave remaining.

Shortly thereafter, on October 5th the day before her scheduled surgery, McClelland had a phone conversation with CommunityCare's human resource manager. She was again advised she only had 416 hours of FMLA leave remaining. It was also recognized that she had originally planned to be out until December 28, 2009. An inquiry was made as to whether any accommodations could be made that would allow her doctor to release her earlier than December 28th.

On November 13, 2009, about five weeks after surgery, CommunityCare sent McClelland a letter stating she only had 184 hours of leave left and that she had to make arrangements to return to work on or before December 16, 2009. It was also noted that she would have been able to take leave until December 28, 2009, as originally planned, if she had not take FMLA leave in August.

On December 1, 2009, McClelland talked with her supervisor. She was encouraged to talk with her doctor about returning to work by the 16th. A couple of days later, McClelland inquired of her supervisor about extending her leave and stated that the earliest she could return to work was January 4, 2010. The supervisor responded informing McClelland how to proceed. McClelland knew that she would be required to provide a medical certification explaining the necessity of the extension and exact return date. On December 3, 2010 (the same day she made the inquiry) McClelland e-mailed the Vice President of Human Resources requesting extended leave. She did not include a medical certification. The Vice President of Human Resources contacted her and asked if there was any way that she could return earlier even with work restrictions. McClelland would not agree to provide a specific return date and would not agree to return until she spoke with her doctor. McClelland did not speak to her doctor until January 11, 2010.

CommunityCare sent McClelland a letter on December 8, 2009 informing her that her request for extension of FMLA leave could not be accommodated and her employment would be terminated if she could not return to work on December 16, 2009. She was also offered the opportunity to reapply for employment with CommunityCare for any open position. McClelland's employment was then terminated on December 16th.

McClelland subsequently filed the complaint asserting that she was terminated in violation of FMLA. She did not specify whether she was seeking relief under an FMLA termination or interference theory. The district court granted summary judgment for CommunityCare. The Tenth Circuit affirmed the district court.

The Decision

In determining whether there was interference with FMLA it must be shown: (1) the employee was entitled to FMLA leave; (2) that some adverse action by the employer interfered with the employee's right to take FMLA leave; and (3) that the employer's action was related to the exercise or attempted exercise of the employee's FMLA rights.[2] And, although the amount of leave an employee is entitled to receive is set by statute, an employer is permitted to select the method of calculating leave: (1) calendar year; (2) any fixed twelve-month "leave-year"; (3) twelve-month period measured forward from date of employee's first FMLA leave; or (4) "rolling" 12-month period measured backward from the date an employee first uses any FMLA leave.[3] CommunityCare used the rolling twelve-month period to calculate available FMLA leave.

The basis of McClelland's argument is that CommunityCare misrepresented to her that she had enough time for her surgery and that this interfered with her rights as she relied on this representation in scheduling her surgery. McClelland tried to argue that after the October 5, 2009 phone conversation she believed she had enough time for her surgery. However McClelland was not able to get over the fact that in September 2009, CommunityCare informed her that she only had 416 hours remaining and she testified at deposition that she understood this. McClelland tried to refute her deposition testimony that she could not remember the October 5th conversation with an affidavit. The court found that this was not sufficient to controvert CommunityCare's written notice and McClelland's deposition testimony that she understood at the time of her surgery she only had 416 hours of FMLA available.

Although McClelland argued that CommunityCare should have extended her leave, this is not statutorily required. This does not establish that CommunityCare took any adverse action that interfered with the right to use leave.

The court also considered the case under retaliation. McClelland asserted that the CommunityCare's reason for terminating her was pretext for retaliation. To establish retaliation, an employee must show: (1) she availed herself of a protected right under FMLA; (2) she was adversely affected by an employment decision; and (3) that there was a causal connection between the two actions.[4] The court found that McClelland met the first two elements and as such the burden shifted to CommunityCare to offer a legitimate reason for her termination.

CommunityCare met this burden. The letter that was sent to McClelland stated it terminated her as she had exhausted her FMLA leave and she was unable to return to work. McClelland testified that she does not dispute that CommunityCare's policy states that an employee is subject to termination if she fails to return to work at the expiration of FMLA leave. Additionally, the court noted that CommunityCare encouraged McClelland to return to work prior to December 16th and offered to provide her with the necessary accommodations to do so. The court found that this was not retaliation.

FMLA allows an employer to terminate

an employee who cannot return after twelve weeks of leave. The failure to return to work at the expiration of FMLA leave was a legitimate non-retaliatory reason for termination. At this point, the burden shifted back to McClelland to show that the termination was pre-textual. McClelland could not meet this burden. The essence of McClelland's argument was that CommunityCare *did not need to* exercise the right to terminate her. This was insufficient to establish pretext to defeat summary judgment.

The Take Away

CommunityCare did a number of things right to be able to have the case resolved at the summary judgment stage in its favor.

Clear Communication

First, CommunityCare clearly communicated the leave policy. There was no question in the case about how leave was calculated. Nor was there a question about what would occur if the employee exhausted her leave and did not return to work. Additionally, the extension request requirements were clearly communicated to the employee. These requirements were both in the policy and communicated by the supervisor.

Regular Communication

When the employee was hired information was provided on the FMLA policy. Additionally, any time an employee requested FMLA leave another copy of the policy was given him. Specifically, as to McClelland, the employer maintained regular communication with her. After her unexpected leave in August (which was after her leave request for surgery which was submitted in July), the employee was advised of the total remaining leave that would be available in October which was the date scheduled for surgery. Even more helpful, this communication was in writing.

Timely Communication

The employer timely communicated with the employee. Just after the employee used FMLA leave in August the employer notified her of the remaining available leave for her October surgery. Additionally, the facts show that when McClelland e-mailed or submitted a request it was handled promptly. Although this was not specifically discussed in the opinion as a basis for the grant of summary judgment, the court was very methodical about setting forth the time frames in the recitation of the facts. It was clear that the employer did not put off or neglect the inquiries of the employee. Additionally, the month before her leave was to exhaust and one week prior to final deadline, the employer sent a written letter providing the return date and reminding the employee that she may be subject to termination if she did not return.

Consistent Communication

In attempting to assert retaliation, the employee urged the court to consider that the employer did not have to terminate her and could have extended her leave request. The court recognized that the statute did not require the employer to extend an employee's leave. Additionally, the FMLA policy provided to the employee was clear that the result of not returning at the exhaustion of FLMA leave is termination. And, this message was specifically and consistently conveyed in the communications with the employee. Although the employee attempted to assert there was confusion about how much leave she had left, and that she would not have had the surgery had she known she would have to return on the 16th, there was no communication from the employer which supported this assertion.

Accommodating Communication

Finally, the facts support that the employer was trying to work with the employee. It offered to accommodate her with fewer work hours or allowing for work restrictions if she would come back by the 16th – the exhaustion date. Although this was not a specific basis for granting the summary judgment in favor of the employer, it goes more to the defense that the termination was not pretext for the use of FMLA. It seemed the court found the employee's actions supported a determination that the employer made a good faith effort of working with the employee to have her come back and not have to terminate her.

Conclusion

As prefaced, administering FMLA leave can be frustrating. However, by providing regular, consistent, clear and timely communication an employer can be in a good position to defend itself against claims of FMLA interference. ■

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1. The facts are taken from the district court opinion *McClelland v. CommunityCare HMO, Inc.*, 2012 WL 681455 (N.D.Okla. Feb. 29, 2012).
2. 2012 WL 681455 at page 7.
3. *Id.*
4. 2012 WL 5951622 at page 6.

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Case update list

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nation of whether State's Attorney's Office is a "public body" within meaning of FOIA. Attorney General's advisory opinion was nonreviewable, nonbinding, and nonfinal, and thus unenforceable. Thus, no ripe action or controversy existed against Attorney General or person making FOIA request for documents. (STEIGMANN and HARRIS, concurring).

Construction Contracts 2d Dist.

***Lake County Grading Company v. The Village of Antioch*, 2013 IL App (2d) 120474 (February 20, 2013) Lake Co. (BURKE) Affirmed**

Company entered into two infrastructure agreements with Defendant Village to make public improvements in residential subdivisions, and company provided surety bonds guaranteeing performance for benefit of Village. Bonds did not guarantee payment to subcontractors. Company defaulted on contract with Village and failed to pay Plaintiff grading company, a subcontractor. Section 1 of Bond Act, and provision in contract, made Plaintiff subcontractor a third-party beneficiary with right to sue on contract. As Village did not require company to procure a payment bond, suit on bond is impossible and statute of limitations of Bond Act does not apply. Plaintiff's breach of contract claims are subject to four-year statute of limitations for construction contracts. (McLAREN and HUDSON, concurring).

Pensions 2d Dist.

***Lambert v. The Downers Grove Fire Department Pension Board*, 2013 IL App (2d) 110824 (February 21, 2013) Du Page Co. (SCHOSTOK) Reversed and remanded**

Fire Department Pension Board's decision, denying line-of-duty disability pension to paramedic/firefighter, was against manifest weight of evidence, as it found that firefighter was not credible based on matters tangential to issues before the Board, and although Board found "credible" the medical evidence indicating disability, it discounted all evidence based on its own findings that claimant was not credible.(JORGENSEN, concurring; McLAREN, dissenting).

Citizen Participation Act 1st Dist.

***Chicago Regional Council of Carpenters v. Jursich*, 2012 IL App (1st) 113279 (February 22, 2013) Cook Co., 6th Div. (HALL) Affirmed**

Court properly denied motion to dismiss Defendants' counterclaim for defamation filed pursuant to Illinois Citizen Participation Act, as Defendants failed to demonstrate affirmatively that counterclaim was retaliatory and thus a SLAPP lawsuit. Court's finding that counterclaim stated a potentially viable cause of action and time and damages evidence do not support inference that it was filed to deter Defendants from exercising their right to free speech or to proceed with suit. (LAMPKIN and REYES, concurring).

Insurance 1st Dist.

***The Village of Crestwood v. Ironshore Specialty Insurance Company,* 2013 IL App (1st) 120112 (February 22, 2013) Cook Co., 5th Div. (McBRIDE) Affirmed**

Village and its mayor filed declaratory judgment action as to three excess public entity general liability insurers owed duties to defend or indemnify against suits that Village knowingly and routinely mixed polluted water into municipal tap water supply to cut municipal expenses. Court properly held that underlying claims fell within absolute pollution exclusion clauses in all insurance contracts. The exclusion itself contains no indication that it is limited to clean-up costs imposed by environmental laws such as CERCLA; exclusion is unqualified and absolute and entirely precludes coverage for bodily injuries or property damage from discharge of pollutants, which is alleged in underlying complaint. (EPSTEIN and PALMER, concurring).

Election Code 1st Dist.

***Cortez v. Municipal Officers Electoral Board for the City of Calumet City*, 2013 IL App (1st) 130442 (February 25, 2013) Cook Co., 6th Div. (GORDON) Affirmed in part and reversed in part**

Circuit court properly reversed decision of Municipal Officers Electoral Board, as to eight candidates for various city offices, and those candidates may remain on the ballot. All candidates in question used short form, rather than long form, notarization language. Although Election Code provides that the long form should be used on the Statement of Candidacy, removing candidates' names from ballot because of that discrepancy is a drastic remedy, and statute contains no language indicating that legislature intended that remedy as a sanction. Board properly declared another candidate's nominating papers invalid in their entirety, because he used statewide candidates' form rather than local candidates' form, and he thus failed to file both required Statement of Economic Interests and a receipt reflecting timely receipt of that Statement. (HALL and REYES, concurring).

Tort Immunity Act 5th Dist.

***Prough v. Madison County*, 2013 IL App (5th) 110146 (February 25, 2013) Madison Co. (WEXSTTEN) Affirmed**

Plaintiff sued Defendants, Sherriff's Department and Dispatcher, failing to provide adequate police protection by retaining his grandson in their custody, for failing to prevent him from murdering his father, and/or for releasing him from custody. Plain language of Tort Immunity Act applies to give Defendants absolute immunity, Defendants, including for willful and wanton misconduct. (WELCH and GOLDENHERSH, concurring).

Whistleblower Act 3d Dist.

***Willms v. OSF Healthcare System*, 2013 IL App (3d) 120450 (February 26, 2013) Peoria Co. (O'BRIEN) Reversed and remanded**

Plaintiff, maintenance director at nursing home, sufficiently alleged that he was terminated in violation of Illinois Whistleblower Act, after he told IDPH inspector that alteration had not been made to sidewalk slope, and that slope violated IDPH regulations for handicap access. Focus of Whistleblower Act is on employee's reasonable belief of violation of regulation, and not on what government agency already knows or could discover. (LYTTON and McDADE, concurring).

Administrative Law 1st Dist.

***Cepero v. Illinois State Board of Investment,* 2013 IL App (1st) 120919 (March 5, 2013) Cook Co., 2d Div. (SIMON) Affirmed**

State Board of Investment's finding that

the possibility of multiple pregnancies resulting from IVF was not unforeseeable was not clearly erroneous. Board's finding that alleged housing emergency, due to lack of sufficient space in Plaintiff's condominium, was not unforeseeable given possibility of multiple births resulting from IVF and small size of Plaintiff's condominium included consideration of proper factors. Board's decision denying Plaitniff's request for a hardship withdrawal from his deferred compensation account was not clearly erroneous. (HARRIS and QUINN, concurring).

Election Code 4th Dist.

***Sandefur v. Cunningham Township Officers Electoral Board*, 2013 IL App (4th) 130127 (March 15, 2013) Champaign Co. (STEIGMANN) Reversed**

Defendant filed objection to nominating petition, challenging candidate's placement on ballot for consolidated general election for township assessor. Section 10-4 of Election Code does not prohibit any person from circulating petitions for a political party in a consolidated primary and later circulating a petition for independent candidate in a consolidated general election. Election Code makes no specific distinction between primary and general elections in odd-numbered years. (KNECHT, concurring; POPE, specially concurring).

Tort Immunity Act 5th Dist.

***Perfetti v. Marion County, Illinois*, 2013 IL App (5th) 110489 (March 7, 2013) Marion Co. (WEXSTTEN) Affirmed**

Plaintiff sued county for negligence and willful and wanton conduct as to "mushy" and "bubbly" roadway condition, which led to his injuries in one-car accident. Court properly granted county's motion for directed verdict per Section 3-102(a) of Tort Immunity Act, at end of jury trial, as Plaintiff failed to prove that county had actual or constructive notice of defective condition of roadway. (WELCH and GOLDENHERSH, concurring).

Election Code 4th Dist.

***Sandefur v. Cunningham Township Officers Electoral Board*, 2013 IL App (4th) 130127 (March 15, 2013) Champaign Co. (STEIGMANN) Reversed**

Defendant filed objection to nominating petition, challenging candidate's placement on ballot for consolidated general election for township assessor. Section 10-4 of Election Code does not prohibit any person from circulating petitions for a political party in a consolidated primary and later circulating a petition for independent candidate in a consolidated general election. Election Code makes no specific distinction between primary and general elections in odd-numbered years. (KNECHT, concurring; POPE, specially concurring).

Res Judicata 2d Dist.

***Ertl v. The City of DeKalb*, 2013 IL App (2d) 110199 (March 19, 2013) De Kalb Co. (BURKE) Reversed**

Trial court was obligated to follow specific directions of appellate court's mandate that Plaintiff should be reinstated as firefighter. Plaintiff, by failing to appeal trial court's omission of a reinstatement order or calling his petition for rule for a hearing, forfeited his attempt to secure his right to reinstatement, and res judicata bars Plaintiff's subsequent suit seeking reinstatement and back wages. (BIRKETT, specially concurring; McLAREN, dissenting.

Employment 2d Dist.

***Soto v. The Board of Fire and Police Commissioners of the City of St. Charles, Illinois*, 2013 IL App (2d) 120677 (March 21, 2013) Kane Co. (JORGENSEN) Reversed and remanded**

Where there could be multiple bases for a Board of Fire and Police Commissioner's decision to not hire an applicant, but no findings are made, remand for the Board to issue findings is appropriate. The court should not identify in the record reasons that could justify the Board's decision where such findings have not been made. The court must determine whether the Board relied on improper factors in making its employment decision, or whether its decision was against the manifest weight of the evidence. (BURKE and HUDSON, concurring).

Res Judicata 1st Dist.

***Dookeran v. The County of Cook*, 2013 IL App (1st) 111095 (March 22, 2013) Cook Co., 6th Div. (HALL) Affirmed**

Res judicata barred Plaintiff physician's claims for retaliatory discharge and breach of contract, as appellate court had previously ruled on administrative review proceedings on identical cause of action (physician's denial of reappointment to hospital staff). Limitations on administrative review do not preclude application of doctrine of res judicata. Denial of leave to appeal by supreme court terminated litigation between parties in prior matter, and thus there was a final judgment on merits by a court of competent jurisdiction. Administrative proceedings afforded Plaintiff a full and fair opportunity to litigate the charges against him, and fundamental fairness did not bar application of res judicata. (GORDON and REYES, concurring).

Landlord Tenant 1st Dist.

***Ranjha v. BJBP Properties, Inc.*, 2013 IL App (1st) 122155 (March 27, 2013) Cook Co., 3rd Div. (STERBA) Reversed and remanded**

Plaintiff filed class action complaint alleging that defendant landlord violated Chicago Residential Landlord Tenant Ordinance by failing to disclose to tenants City Building Code citations as to their apartments and common areas, in 12 months prior to their leases. Termination of the lease and surrender of the premises to the landlord are not required to recover the greater of one month's rent or actual damages when a landlord, after receiving the required statutory written notice, failed to provide tenant with notice of Code violations. (NEVILLE and HYMAN, concurring).

Election Code 1st Dist.

***Lewis v. Orr*, 2013 IL App (1st) 130357 (March 29, 2013) Cook Co., 2d Div. (CONNORS) Reversed**

A primary election need only be held when a write-in candidate files the proper paperwork with both the relevant election authority and election official, in construing together Sections 7-5(d) and 17-16.1 of the Election Code. A write-in candidate who has filed her nominating papers only with the village clerk has not complied with the Code, and thus an election need not be held when only one other candidate has properly filed nominating papers. (QUINN and SIMON, concurring).

Election Code 1st Dist.

***Lenehan v. Township Officers Electoral Board of Schaumbug Township*, 2013 IL App (1st) 130619 (April 3, 2013) Cook Co.,1st Div. (DELORT) Reversed**

Electoral Board and trial court erred by finding that new Township Democratic committeeman, elected by executive board of township Democratic Party, lacked author-

ity to sign certification of nomination of four candidates for April consolidated election. Voters' rights should not be abrogated by a vacancy in an office due to resignation. Election Code allows certificate of nomination to be signed by "presiding officer" of caucus, which may be someone other than the committeeman. Electoral Board's overly strict determination as to who could certify nominees was improper infringement on party's first amendment rights. (ROCHFORD and CUNNINGHAM, concurring).

Election Law 2d Dist.

***Atkinson v. Schelling,* 2013 IL App (2d) 130140 (April 9, 2013) Du Page Co. (McLAREN) Affirmed**

Candidates may invoke doctrine of estoppel where Candidate's Guide directed them to the Village Clerk's office to determine the number of signatures required, and candidates actually relied on the Village Clerk's information as to number of signatures. Although letter from Village Clerk contained a disclaimer, the letter provided precise information needed, and candidates believed that Clerk was a veteran and that she knew what she was doing; thus, their reliance on Clerk's letter was reasonable. (BIRKETT and SPENCE, concurring).

Election Law 1st Dist.

***Lawrence v. Williams*, 2013 IL App (1st) 130757 (April 9, 2013) Cook Co., 3rd Div. (HYMAN) Dismissed**

Requirements of Election Code are jurisdictional and must be followed. By failing to timely file the complete record of proceedings with the clerk of court, Electoral Board failed to satisfy requirement of Sections 10-10 and 10-10.1 of Election Code. Board violated Open Meetings Act by failing to issue signed written decisions in an open meeting with a quorum present. Due to violations of Open Meetings Act and Election Code, no final decision on objections to nomination papers was issued by the Electoral Board, and thus circuit court and appellate courts were without jurisdiction to review Board's actions. (NEVILLE and STERBA, concurring).

Tort Immunity Act 4th Dist.

***Pleasant Hill Cemetery Association v. Morefield,* 2013 IL App (4th) 120645 (April 10, 2013) McLean Co. (APPLETON) Affirmed**

Cemetery Association and its tenant farmer sued township road commissioner for allegedly altering surface flow of water, and thus damaging farmland, by constructing a new farm drainage system which altered natural drainage patterns on farmland. Damaging land by altering flow of surface water is a nuisance, and a nuisance is a tort. Thus, Tort Immunity Act applies. Township was not willful and wanton in deciding that safety of drivers outweighed the risk of disrupting drainage patterns on farmland, as unrebutted affidavit stated that water over the road had been washing away the shoulders and endangering drivers, and thus culverts were installed under road to redirect water flow. (STEIGMANN and KNECHT, concurring).

Search & Seizure 2d Dist.

***City of Highland Park v. Kane*, 2013 IL App (2d) 120788 (April 12, 2013) Lake Co. (JORGENSEN) Reversed and remanded**

An officer need not articulate that a certain traffic violation provided a reason for a traffic stop for the stop to be valid. Where it is undisputed that Defendant failed to signal her turn, even though officer did not include that violation as a basis to stop Defendant, that formed an objective basis for traffic stop. (BURKE and HUDSON, concurring).

Sovereign Immunity 5th Dist.

***Block v. Office of the Illinois Secretary of State*, 2013 IL App (5th) 120157 (April 12, 2013) Jefferson Co. (WELCH) Reversed and remanded**

Complaints alleging violations of the State Officials and Employees Ethics Act can be heard in the circuit courts, rather than in the Court of Claims. The State of Illinois has waived immunity as to claims brought under Section 15-25 of the Ethics Act, and such claims are properly brought in the circuit courts of Illinois. (SPOMER and GOLDENHERSH, concurring).

Retailers' Occupation Tax Act 3d Dist.

***The City of Kankakee v. The Department of Revenue*, 2013 IL App (3d) 120599 (April 15, 2013) Kankakee Co. (O'BRIEN) Affirmed**

Plaintiff City filed complaint seeking review of tax revenue adjustment made against it by Department of Revenue. Court properly granted preliminary injunction in favor of City that prevented tax adjustment, as City demonstrated elements necessary for preliminary injunction. Court properly denied IDOR's request to modify preliminary injunction to cover only the amount of offset based on change in location of retailer to Glendale Heights. City has standing to challenge not only reallocation of tax revenues but also refunds made to taxpayer. City has put forth facts showing that it will be injured if its ales tax revenues were incorrectly adjusted and recouped. (HOLDRIDGE, concurring; McDADE, dissenting).

Employment Discrimination 1st Dist.

***Robinson v. The Village of Oak Park*, 2013 IL App (1st) 121220 (April 16, 2013) Cook Co., 2d Div. (QUINN) Affirmed**

Plaintiff, a Jehovah's Witness, is an employee of Village, and filed claim of religious discrimination with Human Rights Commission. Plaintiff offered no evidence to support inference that employer's action were taken because she did not hold or follow religious beliefs of her supervisors. Employer set forth legitimate business reason for its actions: compliance with seniority rights of all employees under union contract. Evidence in briefing showed that Plaintiff affirmatively rejected reasonable accommodation employer provided, resulting in her layoff. Thus, court properly entered summary judgment for employer. (HARRIS and SIMON, concurring).

Municipalities 4th Dist.

***The City of Decatur, Illinois v. Ballinger,* 2013 IL App (4th) 120456 (April 16, 2013) Macon Co. (TURNER) Affirmed**

Court properly held property owner (who had taken title to property per tax deed) was liable to City for demolition costs for improvements on two pieces of property which had been found unfit for human habitation. Even though owner had entered into contract to sell property, buyers stopped making payments and were discharged in bankruptcy. By being aware of City's nuisance proceeding, owner implicitly agreed to City's work just as a seller under Mechanics Lien Act. "Owner" under Municipal Code is not limited to a person in physical possession and control of the property. (POPE and HOLDER WHITE, concurring).

Disability Benefits

***Summers v. Retirement Board*, 2013 IL App (1st) 121345 (April 18, 2013)**

A police officer, who incurred a disability

injury while performing an assigned duty of lifting and handling police supplies, was not entitled to a duty disability pension because he was not injured while performing an "act of duty" involving a special risk.

Wrongful Death 1st Dist.

***Dunet v. Simmons,* 2013 IL App (1st) 120603 (April 23, 2013) Cook Co., 2d Div. (HARRIS) Affirmed**

Wrongful death action for pedestrian struck and killed as she crossed street at or near intersection. Decedent was not an "intended user" at that intersection, as curb bordering street was painted yellow, and not cut out or sloped for pedestrian access. Decedent being a permitted user of unmarked crosswalk does not automatically make her an intended user. Thus, Plaintiff failed to show that Village owed a duty to Decedent. (CONNORS and SIMON, concurring).

Election Code 1st Dist.

***Akin v. Smith*, 2013 IL App (1st) 130441 (April 25, 2013) Cook Co., 4th Div. (EPSTEIN) Affirmed**

Candidates' statements of candidacy substantially complied with Section 7-10 of the Election Code where notarial jurats did not include the phrase "who is to me personally known". Section 7-10 of Election Code contains both mandatory and directory provisions. Substantial compliance can satisfy mandatory statutory requirements as to statements of candidacy. Minor deviation from Code's notarial jurat language did not invalidate the underlying oath as jurat was otherwise in conformance with statute. (QUINN and FITZGERALD SMITH, concurring).

Negligence 1st Dist.

***Martinelli v. City of Chicago*, 2013 IL App (1st) 113040 (April 25, 2013) Cook Co., 4th Div. (LAVIN) Affirmed**

(Court opinion corrected 5/1/13).Telecommunications employee, working with City workers on water department job, suffered amputation of leg when motorist pinned employee to bumper of truck. Accident occurred during City workers' extended lunch break, when safety provisions (such as barricading large vehicles and flagmen) were absent. Employee sued City for negligence in manner and method of conducting its construction work. City removed several layers of safety which would have prevented the accident, given eminently foreseeable inattentive conduct of motorists. Question of proximate cause is for the jury, and there is no requirement in the law that the defendant anticipate the specific acts of a driver. (EPSTEIN and PUCINSKI, concurring).

Pensions 3d Dist.

***Marconi v. The City of Joliet*, 2013 IL App (3d) 110865 (May 2, 2013) Will Co. (HOLDRIDGE) Reversed and remanded**

Retired firefighters and retired police officer sued City for City's decision to reduce retirement health benefits it promised at time of their retirement. Circuit court should first determine whether case can be decided on nonconstitutional grounds, to determine whether each plaintiff has a vested right to specific health care benefits promised in collective bargaining agreement under which he retired. Court must apply presumption in favor of vesting unless contract language shows that parties did not intend vesting, or if extrinsic evidence shows no such intention, if contract is vague. (LYTTON and O'BRIEN, concurring).

Property Tax 2d Dist.

***The Lake County Board of Review v. Illinois Property Tax Appeal Board*, 2013 IL App (2d) 120429 (May 6, 2013) PTAB (HUDSON) Vacated and remanded**

Property Tax Appeal Board (PTAB) issued a decision finding substantial portions of 180 acres of land owned by private golf club to be open space within meaning of Section 10-155 of Property Tax Code. PTAB should, on remand, consider whether there is some substantial nexus between 8.72 acres of improvements (swimming pool, stables, parking lot, etc). and golf course, such that improvements relate directly to course and facilitate its existence. (BURKE and JORGENSEN, concurring).

Illinois Supreme Court Cases

Municipalities 1st Dist.

***Ferguson v. Patton*, 2013 IL 112488 (March 21, 2013) Cook Co. (KARMEIER) Appellate court reversed in part and vacated in part; circuit court affirmed in part and vacated in part**

Inspector General had no authority under the law to unilaterally retain private counsel to file proceedings in circuit court, to compel city's Law Department to produce unredacted documents as to former city employee being awarded city contract outside of usual competitive process. Thus circuit court properly dismissed Inspector General's cause of action with prejudice. (KILBRIDE, FREEMAN, THOMAS, and GARMAN, concurring).

Ordinances

***People v. Le Mirage, Inc.,* 2013 IL 113482 (April 4, 2013) Cook Co. (KARMEIER) Reversed and remanded**

Stampede at Chicago, resulting in multiple deaths and injuries. Circuit court's prior orders, forbidding occupancy of the second floor of nightclub building in building code violation proceeding, were clear. Jury had access to court transcripts as exhibits, and any ambiguities as to willful disobedience of court orders were for the jury to weigh. A rational jury could have found that club owners were fully aware of what building court's orders prohibited and willfully disobeyed the orders. (KILBRIDE, FREEMAN, THOMAS, GARMAN, BURKE, and THEIS, concurring).

Condominium Law

***Palm v. 2800 Lake Shore Drive Condominium Association*, 2013 IL 110505 (April 25, 2013) Cook Co. (KILBRIDE) Appellate court affirmed**

City of Chicago ordinance allowing condominium unit owners to inspect condominium association financial books and records is a valid exercise of the City's home rule power, and is valid and enforceable. The conflict between the ordinance and the state statutes does not render the ordinance invalid or beyond home rule power. The legislature has not specifically denied the City's exercise of home rule power or required its exercise of that power to be consistent with statutory provisions. Court properly awarded interim attorney fees to prevailing plaintiff, as provided for in ordinance, based on market value of attorney's services. (GARMAN, KARMEIER, and THEIS, concurring; THOMAS, specially concurring; FREEMAN and BURKE, dissenting).

Federal Court of Appeal Cases

7th Circuit

First Amendment

***Kristofek v. Village of Orland Hills*, No. 12-2345 (7th Cir. Mar. 11, 2013); Reversed and Remanded**

Dist. Ct. erred in granting the defen-

dants' motions to dismiss and finding that Kristofek's speech did not involve a matter of public concern, principally because his sole motive was to protect himself from civil and criminal liability. Although Kristofek's *motive* may have been to protect himself, whether his speech was a matter of public concern depends primarily upon its *content*. Kristofek alleged enough to survive a motion to dismiss. A viable First Amendment retaliation claim by a public employee requires, at a minimum, that the speech being retaliated against be constitutionally protected, which means that the speech must involve a matter of "public concern." The Seventh Circuit further found that Kristofek had established a Section 1983 *Monell* claim. His complaint alleged that OHPD Chief Scully had at least *de facto* authority to make hiring and firing decisions, free from review by the Village Board, and that Scully used this authority to enforce a policy of terminating those who complained of favoritism or corruption in the OHPD. Indeed, two other officers involved in the initial arrest of the mayor's son had summarily left the OHPD under suspicious circumstances.

Kristofek, a part-time officer for the Village of Orland Hills Police Department (OHPD), arrested a driver for traffic violations. The driver turned out to be the son of a former mayor of a nearby town. As Kristofek began filling out the arrest paperwork and entering the driver's booking information into the OHPD computer system, he was told to stop what he was doing, give all the paperwork to the deputy chief, and delete any information about the driver. Kristofek believed he had done nothing wrong, so he personally confronted the deputy chief, who responded, "Did you not understand what you were [expletive] told?" Kristofek relented, gave the documents to the deputy chief, and released the driver. Kristofek strongly disagreed with what he believed was political corruption and expressed such concerns to his fellow officers, his supervisors, and eventually to the FBI. When OHPD Chief Thomas Scully found out about this conduct, he fired Kristofek.

Employment Discrimination

***Hall v. City of Chicago,* No. 11-3279 (March 29, 2013) N.D. Ill., E. Div. Reversed and remanded.**

Dist. Ct. erred in granting defendant-employer's motion for summary judgment in Title VII action alleging that plaintiff's supervisor created hostile work environment based on her female gender. Plaintiff presented evidence of both objective and subjective hostile work environment where supervisor: (1) isolated plaintiff from otherwise predominantly male workforce; (2) assigned her only menial jobs; and (3) subjected her to periodic episodes of verbal intimidation that on one occasion, where supervisor indicated that he "ought to slap that woman," suggested that his animus was related to her gender. Fact that each action allegedly taken by supervisor was insufficient by itself to establish hostile work environment did not require different result.

First Amendment

***Hernandez v. Sheahan*, No. 12-1941 (7th Cir. April 1, 2013) N.D. Ill., E. Div. Reversed**

Dist. Ct. erred in denying defendants-prison officials' motion for summary judgment asserting qualified immunity in action alleging that defendants initiated investigation against plaintiff-prison guards and eventually reassigned them after major jailbreak occurred on their watch, where plaintiffs claimed that defendants took said action in retaliation for plaintiffs' political support for rival Sheriff's candidate. Defendants had probable cause to initiate instant investigation given confession by one correctional officer, who identified plaintiffs as having assisted him in allowing prisoners to escape or having advance knowledge of escape. Moreover, Dist. Ct. could not have found existence of material fact with respect to issue as to whether correctional officer's confession was coerced where state court in criminal proceeding involving correctional officer had found that said confession was voluntary.

Section 1983 Action

***Williamson v. Curran*, No. 09-3985 (7th Cir. April 4, 2013) N.D. Ill., E. Div. Affirmed**

Dist. Ct. did not err in dismissing for failure to state cause of action plaintiff's section 1983 action alleging that defendants-police officials arrested her without probable cause on theft of horse charge and arrested her based on nothing more than her status as wife of owner of stables that housed said horse. Plaintiff was arrested pursuant to valid arrest warrant, and while true owner of horse may have lied to arresting officer as to circumstances surrounding plaintiff's possession of horse and as to plaintiff's claim that owner owed her husband money for boarding said horse, arresting officer could have credited owner's statement that plaintiff had taken wrongful possession of said horse. Fact that plaintiff's husband had lien on horse did not require different result. Moreover, arresting officer could have believed that plaintiff was more than bystander in instant dispute over horse where plaintiff responded to officer's inquiries about horse and referred to herself and husband jointly when discussing why she would not return horse without payment of boarding fees.

Section 1983 Action

***Maniscalco v. Simon*, No. 11-2402 (7th Cir. April 5, 2013) N.D. Ill., E. Div. Affirmed**

Dist. Ct. did not err in granting defendants-police officials' motion for summary judgment in section 1983 action alleging that defendants violated plaintiff's 4th Amendment rights by conspiring with fast-food restaurant employees to induce plaintiff to breach peace so as to give defendants pretext to arrest plaintiff. Defendants had probable cause to arrest plaintiff on disorderly conduct charge after obtaining statements from employees of restaurant that plaintiff was verbally abusive with clerk stationed near drive-through window and then grabbed clerk's wrist as if to pull him through drive-through window. Moreover, plaintiff failed to put forth evidence to support claim that defendants conspired with restaurant employees to set up plaintiff. Also, plaintiff could not establish any 4th Amendment violation against defendant-restaurant since vicarious liability under doctrine of respondeat superior is unavailable against private employers sued under section 1983.

Americans with Disabilities Act

***Cloe v. City of Indianapolis*, No. 12-1713 (7th Cir. April 9, 2013) S.D. Ind., Indianapolis Div. Affirmed and reversed in part and remanded**

Dist. Ct. did not err in granting defendant-employer's motion for summary judgment in ADA action alleging that defendant had failed to reasonably accommodate plaintiff-employee's multiple sclerosis condition, and that it terminated her because of said condition and in retaliation for requesting reasonable accommodations. Record showed that once plaintiff informed defendant of her condition and requested closer parking spot and in-office printer, defendant took steps to give plaintiff other parking spots and took

printer away from co-worker to give to plaintiff. Moreover, plaintiff failed to make specific request for proof-reader so as to trigger any obligation on defendant to accommodate such request. Dist. Ct. erred, though, in granting summary judgment on retaliation claim where: (1) plaintiff presented evidence that discipline that formed basis for termination was unwarranted and was issued within one week after supervisors expressed anger at plaintiff for leaving work early for medical appointment; and (2) discipline was issued one month after alleged underlying misconduct had occurred, where other discipline against plaintiff had been issued immediately after misconduct had occurred. Dist. Ct. also erred in granting summary judgment on discriminatory termination claim where discovery was still open in case, and where basis of ruling,

Due Process

***Cromwell v. City of Momence*, No. 12-1541 (7th Cir. April 12, 2013) C.D. Ill. Affirmed**

Dist. Ct. did not err in dismissing for failure to state cause of action plaintiff-police officer's section 1983 action alleging that defendant terminated him from his position without providing plaintiff with due process. Defendant's regulations applicable to police officers did not contain clear promise of continued employment in absence of cause for termination needed to overcome presumption of at-will employment, and fact that regulations did not provide that non-probationary officers (such as plaintiff) could be fired at any time was insufficient to establish that plaintiff had protected contractual right to continued employment for purposes of his due process claim. Moreover, Ct. noted that instant regulations did not preclude defendant from terminating employees for legitimate non-cause reasons that would not subject employee to discipline.

Prisoners

***Smith v. Sangamon County Sheriff's Dept.*, No. 11-1979 (7th Cir. April 19, 2013) C.D. Ill. Affirmed**

Dist. Ct. did not err in granting defendants-jail officials' motion for summary judgment in plaintiff-prisoner's section 1983 action alleging that defendants' approach to classifying inmates for cellblock placement, which failed to separate violent from non-violent inmates, constituted violation of plaintiff's due process rights where plaintiff, as non-violent inmate, was attacked by violent cellmate. Plaintiff failed to present evidence that instant security classification policy, which used multiple factors including prior incarceration history at jail, systematically failed to address obvious risks to inmate safety. Moreover, plaintiff failed to present any evidence that defendants either had notice of particular harm to plaintiff resulting from placement in particular cell or knew that instant classification system exposed plaintiff to any serious risk of harm.

Res Judicata

***Dookeran v. County of Cook, Illinois,* No. 11-3197 (7th Cir. May 3, 2013) N.D. Ill., Div. Affirmed**

Dist. Ct. did not err in granting defendant-employer's motion to dismiss on res judicata grounds plaintiff's Title VII action alleging that defendant's denial of his application for reappointment to defendant's medical staff was based on his race and national origin, where instant dismissal was premised on defendant's failure to include Title VII claim in prior certiorari action that plaintiff had filed in Cook County Circuit Court that also sought appeal from said denial of his application for reappointment to said staff. Both Title VII and certiorari actions satisfied identity of causes of action element of res judicata test where both actions concerned same transaction, and there was no jurisdictional impediment to plaintiff including his Title VII action in his 2006 certiorari action. Fact that prior to Ill. Supreme Ct. decision in Blount, 904 NE2d 1 (2009), several Ill. App. Ct. decisions prohibited plaintiff from bringing Title VII action in circuit court did not require different result. (Dissent filed).

Other Federal Appellate Circuits

First Amendment

***Clatterbuck v. City of Charlottesville*, No. 12-1149 (4th Cir. February 21, 2013)**

The appellants had standing to bring this action under § 1983, challenging the city's anti-solicitation ordinance, because begging is communicative activity within the protection of the First Amendment, and their allegations substantiated their standing to bring this constitutional challenge. The district court's dismissal of the case at the pleadings stage, however, was not justified.

First Amendment - Establishment Clause

***Freedom from Religion Foundation v. City of Warren*, No, 12-1858 (6th Cir. February 25, 2013)**

The city's refusal to remove a nativity scene from its holiday display and to include a sign submitted by the plaintiff to the display did not violate the First Amendment because the city's decision amounted to government speech.

Public Employment - First Amendment

***Ellins v. City of Sierra Madre*, No. 11-55213 (9th Cir. March 22, 2013)**

A police chief was not entitled to summary judgment in a police officer's claim of retaliation for a delay in signing a certificate entitling the officer to a raise after his union activities regarding a no-confidence vote against the chief. The officer established his prima facie case and issues of fact existed as to whether the chief would have withheld her signature in the absence of plaintiff's activities. The city was entitled to summary judgment on the Monell claim because the chief was not the city's final policymaker.

First Amendment - Establishment Clause

***Atheists of Florida v. City of Lakeland*, No. 12-11613 (11th Cir. March 26, 2013).**

The city was entitled to the granting of its motion for summary judgment in plaintiffs' complaint against the city's practice of legislative prayer. The plaintiffs failed to show that the city's policy of inviting persons to pray before meetings resulted in proselytizing or advancing the Christian religion over all others solely because the speakers who were selected included sectarian references in their prayers. Moreover, the city's change of policy to extend invitations to all religious groups mooted any claims of unconstitutionality of the city's previous prayer-selection process.

***Rubin v. City of Lancaster,* No. 11-56318 (9th Cir. March 26, 2013)**

Neither the city's legislative prayer policy nor the prayers themselves violate the Establishment Clause because Supreme Court precedence upholds sectarian, legislative invocations, moreover, the city did not take any steps to affiliate itself with one religious denomination.

Municipal Liability - Discrimination

***Gianfrancesco v. Town of Wrentham*, No. 12-1677 (1st Cir. April 5, 2013)**

A bar owner sued the town for civil-rights violations, claiming that the town maliciously imposed excessive regulatory requirements on his bar and restaurant in retaliation for his opposition to certain town policies. The dismissal of the complaint was proper because the bar owner failed to plausibly allege that the town's action was a brutal and inhumane abuse of official power, or truly outrageous, uncivilized, and intolerable. His class-of-one equal protection claim failed because he failed to show that his comparators (one other bar) were similarly situated in all respects relevant to the challenged government action.

U.S. Supreme Court:

Fourth Amendment

***Missouri v. McNeely*, No. 11–1425 (U.S. April 17, 2013).**

A warrantless blood test to determine blood-alcohol concentration in a routine drunk-driving investigation violated the Fourth Amendment as an unreasonable search and seizure because the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant.

FOIA

***McBurney v. Young,* No. 12-17 (U.S. April 29, 2013)**

Virginia's FOIA, limiting the right of public records to state citizens, does not violate the Privileges and Immunities Clause or the dormant Commerce Clause. The statute does not abridge a fundamental right and it does not interfere with interstate commerce. ■

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Monday, 6/3/13- Teleseminar—Asset Purchase Deals- Securing Value & Limiting Liability, Part 1- Live Replay from 2/11/13. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 6/4/13- Teleseminar—Asset Purchase Deals- Securing Value & Limiting Liability, Part 2- Live Replay from 2/11/13. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 6/4/13 – Webinar—Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 10:00 – 11:00 a.m. CST.

Wednesday, 6/5/13- Teleseminar—Life Insurance and Estate Planning. Presented by the Illinois State Bar Association. 12-1.

Thursday, 6/6/13 – Chicago, ISBA Regional Office—Introduction to Public Private Partnerships (P3s). Presented by the ISBA Construction Law Section, Co-sponsored by the ISBA Local Government Section. 8:30 am – 12:30 pm.

Thursday, 6/6/13- Live Studio Webcast (Studio only)—The Style Manual: A Webcast on Writing in the Illinois Courts. Presented by the ISBA Bench and Bar Section. 1:55-3:00.

Thursday, 6/6/13 – Webinar—Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 10:00 – 11:00 a.m. CST.

Thursday, 6/6/13- Springfield, Hilton Hotel—The Intersection of Social Media and the Practice of Law. Presented by the ISBA and Sangamon County Bar Association. 1-4:15.

Friday, 6/7/2013 – Chicago, ISBA Chicago Regional Office—5th Annual Animal Law Conference. Presented by the ISBA Animal Law Section. 8:30 a.m. - 4:45 p.m.

Friday, 6/7/2013 – Live Webcast—5th Annual Animal Law Conference. Presented by the ISBA Animal Law Section. 8:30 a.m. - 4:45 p.m.

Friday, 6/7/13 – Bloomington, DoubleTree by Hilton—Criminal Law Back to Basics. Presented by the ISBA Criminal Justice Section. 8:30 – 4:00.

Monday, 6/10/2013 – Live Studio Webcast (STUDIO only)—Getting Paid in Commercial Cases – Fee Arrangements from A to Z. Presented by the ISBA Commercial Banking, Collections and Banking Section. Noon – 1:00 pm.

Monday, 6/10/13- Teleseminar—Liquidity Planning in Estates and Trusts- Live Replay from 2/8/13. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 6/11/13- Teleseminar—2013 Estate & Trust Planning Update, Part 1. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 6/12/13- Teleseminar—2013 Estate & Trust Planning Update, Part 2. Presented by the Illinois State Bar Association. 12-1.

Thursday, 6/13/13- Teleseminar—Drafting Confidentiality and Non-disclosure Agreements- Live Replay from 3/14/13. Presented by the Illinois State Bar Association. 12-1.

Thursday, 6/13-14/12- Chicago, Sofitel Chicago Water Tower—Great Lakes Benefits Conference. Presented by the ASPPA and the IRS; co-sponsored by the ISBA Employee Benefits Section.

Thursday, 6/13/13- Live Studio Webcast—Medicare and its Impact on Tort Practitioners. Presented by the ISBA Tort Law Section. 9:30-11:30.

Friday, 6/14/2013 – Chicago, ISBA Regional Office—Ethics of Persuasion. Master Series Presented by the Illinois State Bar Association. 9:00 – 3:00. ■

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