

IML LEGAL BULLETIN
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Printable Version of Opinion Summaries

Wisbey v. City of Lincoln

ADA - FMLA

Federal Circuit Courts of Appeals

[Wisbey v. City of Lincoln](#), No. 09-2100 (8th Cir. July 6, 2010).

OVERVIEW: The city did not violate the ADA or the FMLA when it terminated the plaintiff's employment as an emergency 911 operator after a fitness-for-duty examination showed that she was unfit for duty due to her chronic relapsing depression and excessive tiredness, which resulted in excessive absenteeism. The plaintiff failed to show that she was a disabled person within the meaning of the ADA, and the city did not interfere with her FMLA leave or retaliate against her for her use of FMLA leave.

Brandt v. Village of Winnetka

FIRST AMENDMENT

Federal Circuit Courts of Appeals

[Brandt v. Village of Winnetka](#), No. 09-3709 (7th Cir. July 20, 2010).

OVERVIEW: A political promoter had standing to challenge a village ordinance under the First Amendment that required people whose events occasion the need for "special services" from the village to bear the cost of the services because of his potential for injury. His claim, however, was not ripe for adjudication because the ordinance had not yet applied to him.

SUMMARY: The plaintiff successfully holds a number of fund-raising events at his home for high-ranking elected officials and candidates, such as candidates for the U.S. Senate, Congress, and President. Because if the village provides security assistance for such events, such as providing police officers, closing streets, and rerouting traffic, the village enacted an ordinance requiring people whose events occasion the need for these services to bear the cost. Although the ordinance was never enforced upon the plaintiff, he filed suit against the village under § 1983 claiming a violation of his First Amendment rights. The plaintiff specifically claimed that the ordinance chilled his willingness to invite political officials and candidates to his home in the village. The district court dismissed the case for lack of jurisdiction finding that: the plaintiff lacked standing; the controversy was not ripe for adjudication; and the matter called upon the court to commence a premature constitutional adjudication.

The appeals court determined that the plaintiff had standing, but his complaint was not ripe for adjudication. Although the ordinance was never enforced upon the plaintiff, the plaintiff had standing to bring his First Amendment claim because of the potential for injury. Following

Supreme Court precedent, the appeals court determined that standing exists: (i) if the plaintiff suffers an actual or impending injury, no matter how small; (ii) if that injury is caused by the defendant's acts; and (iii) if a judicial decision in the plaintiff's favor would redress that injury. In the present case, the plaintiff is a political promoter, and his home in the village has hosted guests whose protection led to "special services" within the scope of the ordinance. Although a court cannot be sure that the plaintiff will again have a guest whose protection detail will ask the village for "special services," the probability is materially greater than zero. Therefore, the plaintiff had standing.

The plaintiff's complaint, however, was not ripe for adjudication. The plaintiff describes his challenge to the ordinance as an "as-applied" challenge. A court cannot evaluate an as-applied challenge sensibly until a law is applied, or application is soon to occur and the way in which it works can be determined. Thus, the challenge is currently too abstract to warrant constitutional adjudication.

Melrose, Inc. v. City of Pittsburgh

FIRST AMENDMENT - SIGNAGE

Federal Circuit Courts of Appeals

[Melrose, Inc. v. City of Pittsburgh](#), No. 08-4425 (3d Cir. July 20, 2010).

OVERVIEW: Under the test the Third Circuit delineated in *Rappa v. New Castle County*, 18 F.3d 1043 (3d Cir. 1994), the Pittsburgh zoning board's rejection of the plaintiff's applications to change its identification signs did not violate the First Amendment or the Equal Protection Clause of the Fourteenth Amendment. The board determined that the signs were prohibited in the zoning area because they were "advertising signs," not "identification signs." Under *Rappa*, the board's application of the criteria to make its determination constituted a permissible "context-sensitive" analysis, and the plaintiff was not similarly situated to the entities that its claims were treated differently.

Krywin v. Chicago Transit Authority

GOVERNMENTAL IMMUNITY

Illinois Supreme Court

[Krywin v. Chicago Transit Authority](#), No. 108888 (July 15, 2010).

OVERVIEW: Because of the "natural-accumulation rule," a common carrier was not liable for the plaintiff's injuries when she slipped and fell on a natural accumulation of ice and snow as she tried to exit a train.

SUMMARY: The plaintiff sued the Chicago Transit Authority (CTA) for negligence and willful and wanton conduct after she was injured when she slipped and fell on a natural accumulation of ice and snow while deboarding a train. The plaintiff claimed that the CTA breached its duty to provide plaintiff with a safe place to exit the train when it stopped the train in front of a natural

accumulation of ice and snow. The jury returned a verdict in favor of the plaintiff, and the trial court denied the CTA's post-trial motion for a directed verdict in its favor.

The CTA appealed. Relying on the natural-accumulation rule, the CTA argued that the plaintiff failed to prove that the CTA owed her any duty to remove the snow and ice on its platform. Under the natural-accumulation rule, any natural accumulation of ice and snow that was not caused or aggravated by the business or property owner is not a basis for liability. The plaintiff argued that the natural-accumulation rule should not apply because, as a common carrier, the CTA owes its passengers the highest duty of care. The appellate court reversed the trial court's decision. After examining the precedent from several cases, the appellate court held that the natural-accumulation rule prevails over the CTA's duty of highest care. Therefore, the CTA was not liable for the plaintiff's injuries in this case, and the trial court erred when it denied the CTA's motion for a directed verdict.

The Illinois Supreme Court affirmed the appellate court's decision. Like the appellate court, the Supreme Court examined a long line of cases applying the natural-accumulation rule. The Court concluded that the natural-accumulation rule applied in this case because there was no evidence that the ice on the platform where the plaintiff fell was anything other than a natural accumulation. Therefore, the CTA had no duty to remove the natural accumulation of ice and snow from its train platform, and it had no duty to warn of such accumulation.

U.S. v. Skoien

GUN CONTROL

Federal Circuit Courts of Appeals

[U.S. v. Skoien](#), No. 08-3770 (7th Cir. July 13, 2010).

OVERVIEW: The federal law that prohibits a person convicted of two misdemeanor offenses of domestic violence from possessing a shotgun does not violate the Second Amendment as it was interpreted by the Supreme Court in *D.C. v. Heller*. Those with misdemeanor convictions of domestic violence were properly placed in a category to be excluded from possessing firearms, and the language in *Heller* did not change that fact.

SUMMARY: The defendant was forbidden under federal law (18 U.S.C. §922(g)(9)) from carrying firearms in or affecting interstate commerce because of his two misdemeanor convictions of domestic violence. While on probation, he was found in possession of three firearms: a pistol, a rifle, and a shotgun. Pursuant to a conditional guilty plea, he was sentenced to two years' imprisonment for possession of the shotgun. But, he reserved his right to challenge the federal law under the Second Amendment. The appeals court heard this appeal *en banc* to decide whether §922(g)(9) violates the Second Amendment as interpreted by the Supreme Court in *D.C. v. Heller*, 128 S. Ct. 2783 (2008).

The prosecution relied on the following passage from *Heller*:

Like most rights, the right secured by the Second Amendment is not limited. . . . Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on

longstanding prohibitions on the possession of firearms by felons and the mentally ill, . . .
(Emphasis added).

The defendant claimed that his offenses were misdemeanors, rather than felonies, and that §922(g)(9) is not a “longstanding prohibition,” having been enacted in 1996. The majority of the Court determined, however, that those with misdemeanor convictions of domestic violence are properly placed in a category for the legal exclusion of firearms, and such exclusion does not violate the Second Amendment. In addition, the term “longstanding” in relation to statutory prohibitions is too relative of a term for a court to provide an absolute time frame. Therefore, the appeals court affirmed the defendant’s federal criminal conviction.

Best v. Malec

MUNICIPAL LIABILITY

Federal District Courts

[Best v. Malec](#), No. 1:09-CV-07749 (N.D. Ill. June 11, 2010).

OVERVIEW: The municipal defendants were not entitled to the dismissal of plaintiff’s claims for invasion of privacy by publication and intentional infliction of emotional distress. During the airing of an episode of a reality television show in which the plaintiff was stopped, detained, and arrested, the municipal defendants allowed her arrest as a minor to be broadcast, and the incident aired over her objections and without her consent. But, she failed to state a claim under the Personal Information Protection Act because the Act and the Consumer Fraud and Deceptive Business Practices Act do not provide for a private right of action against a municipality.

SUMMARY: The plaintiff’s vehicle was stopped by a Naperville police officer, who was followed by a camera crew from a reality television show. The camera crew recorded and broadcasted the stop, detention, investigation, and arrest on its show without the plaintiff’s consent. In the episode, two officers are seen making fun of the plaintiff, and the plaintiff’s prior arrest record -- including an arrest when she was a minor -- on the computer screen in the police squad car. The plaintiff refused to sign a permission form allowing her incident to be broadcasted, and she stated that she did not want the incident to be broadcasted. After the episode with the incident aired, she sued the reality show and the television network which aired the episode (the media defendants), and the city and the two police officers (the municipal defendants) under § 1983 and several state law claims. All defendants filed motions to dismiss.

In regards to the municipal defendants, the district court determined that the plaintiff sufficiently pled facts to make a claim for invasion of privacy by publication of private facts under Illinois law. The depiction of her arrest as a minor on the monitor of the patrol car in the episode raised a privacy implication. In addition, the depiction from the monitor included her name, age, height, weight, and driver’s license number could be classified as “facially compromising,” particularly given the identity-theft risks that disclosure of such information presents.

The district court also determined that the plaintiff sufficiently pled a claim for the intentional infliction of emotional distress (IIED) under Illinois law. Although the mocking comments alone would fail to raise a claim for IIED, the mocking comments mixed with the fact that the incident

was aired without her consent elevated her claim above the level of “mere insults,” at least for purposes of a motion to dismiss. Not only did she not sign the permission form, she clearly objected to the broadcasting of the incident and was assured that the incident would not be aired without her consent.

The district court did, however, grant the municipal defendants’ motion to dismiss the plaintiff’s claim under the Illinois Personal Information Protection Act (PIPA) (815 ILCS 530/). The PIPA does not provide for a private cause of action. It provides that a violation constitutes an unlawful practice under the Consumer Fraud and Deceptive Business Practices Act (ICFA) (815 ILCS 505/). However, the PIPA and ICFA do not allow a private action against a municipality. Only “persons,” as that term is defined in the Acts, can be sued under these Acts, and the definition of “persons” cannot be expanded to include municipalities.

Kramarski v. Board of Trustees

PENSIONS

Illinois Appellate Courts

[*Kramarski v. Board of Trustees of the Village of Orland Park Police Pension Fund*](#), First District No. 1-09-1557 (June 30, 2010).

OVERVIEW: The board’s decision denying a police officer a duty-related or a non-duty related disability pension was confirmed because the officer received a fair and impartial hearing, the board’s decision was not against the manifest weight of the evidence, and the record contained evidence to support the board’s decision.

SUMMARY: The plaintiff -- a police officer for the village -- filed an administrative review action after the board denied her application for a line-of-duty disability and an alternative non-duty disability. The officer claimed that she was denied a fair and impartial hearing because two members of the board -- who were named in a previous sexual harassment lawsuit involving the plaintiff -- refused to recuse themselves from the hearing, even though they abstained from voting. The plaintiff also claimed that she sufficiently proved that she was entitled to the line-of-duty disability because she was mentally and physically disabled as a result of an incident during a training drill.

The board relied primarily on: (i) the medical opinions of two psychiatrists who said the plaintiff did not suffer from post-traumatic stress disorder and depression; (ii) a physician who said she was not physically disabled; and (iii) the plaintiff’s medical records. The board did not give any weight to the conclusions of the physicians who based their conclusions that plaintiff was disabled upon her subjective complaints as to her limitations. The board further concluded that the plaintiff’s testimony was not credible.

The trial court affirmed the board’s findings that the plaintiff was not mentally disabled and was not injured in the line of duty. But, the court reversed the board’s finding that plaintiff was not physically disabled and held that she was entitled to not-on-duty disability pension benefits. The appellate court reversed the trial court’s ruling and confirmed the board’s decision. The appellate court determined that the plaintiff was not denied a fair and impartial hearing because she provided no evidence of bias. “A mere possibility of prejudice is insufficient to show that a

board, or any of its members, was biased.” *Collura v. Bd. Of Police Commissioners*, 113 Ill. 2d 361, 370 (1986). Here, the plaintiff’s only evidence of bias was the sexual harassment lawsuit against the village, settled without a decision on the merits, and without more, the plaintiff’s claim was unpersuasive.

The appellate court further determined that the board’s ruling was not against the manifest weight of the evidence. The board’s finding that the plaintiff’s testimony was not credible was within the province of the board, and it was not the appellate court’s function to reevaluate witness credibility. Furthermore, the board’s finding that the plaintiff was not entitled to a not-on-duty disability was confirmed because, under the test enunciated in *Marconi v. Chicago Heights Police Pension Board*, 225 Ill. 2d 497 (2006), the record contained evidence to support the board’s decision.

Chaney v. Plainfield Healthcare Center

PUBLIC EMPLOYMENT - DISCRIMINATION

Federal Circuit Court of Appeals

[Chaney v. Plainfield Healthcare Center](#), No. 09-3661 (7th Cir. July 20, 2010).

OVERVIEW: A nursing home’s racial preference policy, in which it complied with residents’ requests for nursing assistants based on race, violated Title VII because it created a hostile work environment. And, the nursing home was not entitled to summary judgment on the plaintiff’s discriminatory discharge claim because issues of fact remained as to whether race motivated the discharge.

SUMMARY: The plaintiff was employed by defendant nursing home as a certified nursing assistant (CNA). A resident of the facility said that she did not want assistance from any black CNAs. Considering Indiana’s patient-rights laws, the defendant complied with this racial preference by telling the plaintiff -- who is black -- in writing, every day that “no black” CNAs should enter this resident’s room or provide her with care. After being terminated for allegedly cussing in front of a resident, the plaintiff sued the nursing home under Title VII of the Civil Rights Act claiming that the defendant’s practice of acceding to the racial biases of its residents is illegal and created a hostile work environment. She also claimed that the nursing home terminated her employment because she is black.

The district court granted the nursing home’s motion for summary judgment. Although the district court determined that the nursing home may have created a hostile work environment, the court concluded that its actions were reasonable given its good-faith consideration of the state’s patient-rights laws. The court additionally concluded that the plaintiff failed to produce evidence from which an inference could be drawn that racial discrimination motivated the nursing home’s decision to terminate her employment.

The Seventh Circuit reversed the district court’s decision. Considering the entire context of the workplace, the appeals court found that a reasonable person would find the work environment in this case hostile or abusive. Although the home’s administration addressed and stopped the most vulgar racial epithets by the staff, more subtle racial slights and comments continued thereafter. In addition, the nursing home management acted to foster and engender a racially-

charged environment through its assignment sheet that unambiguously reminded the plaintiff and her co-workers that certain residents preferred no black CNAs. A company's desire to cater to the perceived racial preferences of its customers is not a defense under Title VII for treating employees differently based on race. Thus, the home's racial preference policy violated Title VII by creating a hostile work environment.

The appeals court also reversed the district court's grant of summary judgment for the nursing home on plaintiff's discriminatory discharge claim. The record contains evidence that the defendant's grounds for terminating the plaintiff were insincere because there was evidence that the complaint against the plaintiff for cussing in front of a resident was unfounded. Plus, there was circumstantial evidence of a disparity in treatment between the plaintiff and a comparable white CNA. Therefore, the appeals court determined that the nursing home was not entitled to summary judgment on the plaintiff's discriminatory discharge claim because issues of fact remained as to whether race motivated the discharge.

Dixon v. Town of Coats

RLUIPA - FIRST AMENDMENT

Federal District Courts

[Dixon v. Town of Coats](#), No. 5:08-CV-489-BR (E.D. N.C. June 9, 2010).

OVERVIEW: The landowner -- a landlord wanting to rent the property as a church -- had standing to make a "substantial burden" claim under the RLUIPA when the town refused to permit the use in a specific zoning district because the plaintiff alleged that he suffered foreseeable financial harm. Nevertheless, the town was entitled to summary judgment on this claim because the plaintiff failed to show that prohibiting religious assemblies within the mixed-use zone rendered religious exercise effectively impracticable within the town as a whole. Dismissal of plaintiff's "equal terms" claim was granted as well because the plaintiff is not a religious assembly or institution. The plaintiff's First Amendment claim failed too because the Establishment Clause does not restrict towns from making land use decisions.

Peeples v. Village of Johnsburg

TAXATION - SPECIAL SERVICE AREAS

Illinois Appellate Courts

[Peeples v. Village of Johnsburg](#), Second District No. 2-09-0516 (July 9, 2010).

OVERVIEW: Objectors failed to veto the village's establishment of a special service area because they failed to obtain the signatures of 51% of the electors in the special service area.

SUMMARY: This case involves an ordinance enacted by the village establishing a special service area in order to create a wastewater treatment system and facility. The project was to be financed with special tax bonds that would result in each resident of the special service area paying additional taxes each year for 20 years. After the village proposed the ordinance, the plaintiffs and other residents of the area (objectors) filed an objection petition. The village determined that the objectors did not collect enough signatures to meet the statutory threshold

to veto the ordinance, and the village subsequently adopted the ordinance. The plaintiffs filed suit seeking an injunction and a declaration that the ordinance was void.

At trial, the record indicated that the village relied upon the following numbers to make its determination:

- Section 27-55 of the Property Tax Code (35 ILCS 200/27-55) required objection petitions against special service areas to contain the signatures of 51% of the electors residing in the area and 51% of the owners of record of the land within the area.
- The village clerk ultimately determined that there were 1,240 owners of record and 1,014 electors within the area.
- The objectors submitted 736 signatures of owners and 567 signatures of electors.
- The clerk disqualified 174 signatures of owners and 78 signatures of electors.
- Thus, the objectors submitted signatures for 45% of the owners of record and 48% of the electors.

After conducting a full hearing, admitting new evidence presented by the objectors, and not admitting new evidence submitted by the village as irrelevant, the trial court determined that the objectors did meet the statutory threshold. According to the trial court, there were only 1,210 owners of record and 946 electors. The 51% threshold, therefore, was 617 signatures of owners and 483 electors. The trial court found that the objectors provided 619 valid signatures of owners and 489 valid signatures of electors.

On appeal, the appellate court first determined that the trial court erred by not allowing the village's new evidence when it allowed the objectors' new evidence. The trial court did not allow the village's new evidence showing a revised number of owners and electors because that evidence was not considered during the public hearing. But, the trial court allowed the objectors to present evidence that was not considered at the public hearing. This, according to the appellate court, was an arbitrary decision and an abuse of the court's discretion.

The appellate court then examined whether the objectors provided enough signatures to veto the establishment of the special service area. The appellate court determined that the trial court erred as a matter of law when it reduced the number of electors determined by the village clerk. Sections 3-1.2 and 1.3 of the Election Code (10 ILCS 5/3-1.2 and 1.3) define an "elector" as one who is registered to vote at an address within the area. Therefore, the clerk properly relied upon the county clerk's list of registered voters in compiling the total number of electors, and the trial court erred by considering the testimony and affidavits about people that moved out of the area because the electors did not follow the statutory procedure to be removed from the list. After examining the relevant evidence, the appellate court determined the objectors only provided valid signatures of 48.6% of the electors. Since the objectors did not meet one of the two required thresholds, the objectors failed to veto the village's establishment of the special service area.

Vaughn v. Barton

TORT IMMUNITY

Illinois Appellate Courts

[Vaughn v. Barton](#), Fifth District No. 5-09-0213 (July 8, 2010).

OVERVIEW: Under the Recreational Use Act, a recreational association and its agent were immune from liability for the injuries of a spectator who was hit by a ball at a youth baseball league game in a city park because it did not owe the plaintiff a duty. The association was the “owner” of the facility when it was being used for a “recreational purpose.” In addition, she was not charged an admission fee to attend the event.

SUMMARY: The plaintiff filed a negligence complaint against a recreation association -- a not-for-profit corporation that organizes baseball leagues for youths in a city park -- and its agent claiming that she was injured while watching her minor son’s baseball game when she was hit by a baseball thrown by another player warming up for the next game. After the evidence was presented, the trial court granted the defendants’ motions for a directed verdict based on the immunity provided in the Recreational Use of Land and Water Areas Act (Recreational Use Act) (745 ILCS 65/), but denied their motions for a directed verdict based on the Baseball Facility Liability Act (Baseball Facility Act) (745 ILCS 38/), and denied the agent’s motion for a directed verdict based on the Sports Volunteer Immunity Act (Sports Volunteer Act) (745 ILCS 80/).

On appeal, the plaintiff contended that the fee paid so that her son could play baseball with the association removed the immunity provided in the Recreational Use Act. She alternatively claimed that, if the Recreational Use Act applied, it did not apply to all allegations of negligence. On cross-appeal, the association contended that the immunity provided by the Baseball Facility Act applied, and the agent cross-appealed the trial court’s denial of his motion for a directed verdict under the Sports Volunteer Act.

Giving the statutory language its plain and ordinary meaning, the appellate court determined that the immunities provided in the Recreational Use Act applied to this case. The association, as a “lessee” or the “person in control of the premises,” was the “owner” of the property as defined in the Act. And, the game of baseball certainly falls within the meaning of “recreational purpose” as also defined in the Act. In addition, the fee paid so that her son could play did not constitute a “charge” as defined in the Act because neither the spectators nor the players were charged an admission fee to attend the games. Thus, the association and the agent did not owe the plaintiff a duty of care, and they were, therefore, immune from liability for her injuries.

The appellate court also determined that, except for the exceptions in Section 6 of the Act (willful and wanton conduct or charging an admission fee), the Recreational Use Act provided immunity for all acts of negligence. Furthermore, the defendants’ cross-appeals were moot considering they were immune from liability under the Recreational Use Act. Therefore, the appellate court affirmed the decision of the trial court.
