

# Local Government Law News

Salmon P. Chase College of Law ♦ Governor's Office for Local Development ♦ Northern Kentucky University

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## FAMILY AND MEDICAL LEAVE ACT AMENDMENTS

The Family and Medical Leave Act affords benefits to all eligible public employees. For nearly 15 years the act remained unchanged. Recently, as part of the National Defense Authorization Act, Congress passed and the president signed amendments to the FMLA. Shortly thereafter, the U.S. Department of Labor proposed extensive amendments to the longstanding regulations issued under the FMLA.

Prior to the amendments, the FMLA<sup>1</sup> required a covered employer to grant an eligible employee up to 12 weeks leave in any twelve-month period for specified reasons. A covered employer includes a state or a political subdivision.<sup>2</sup> An eligible employee is one who has worked for the employer for at least twelve months (which need not be consecutive) and who has performed 1,250 hours of service in the twelve months leading up to the request for leave. An employee could request leave (1) for the birth and care of a newborn child of the employee, (2) for the placement of a child with the employee for adoption or foster care, (3) to care for a member of the employee's immediate family suffering with a serious health condition, and (4) because of the employee's own serious health condition.

The amendments<sup>3</sup> add two new bases for leave. One new provision allows employees to take up to 26 weeks of leave to care for a "covered servicemember" injured while on active duty in the Armed Forces. A covered servicemember includes a member of the Armed Forces, the National Guard, or the Reserves who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness. For this type of leave, the amendments expand the eligible caregivers to include the next of kin or nearest blood relative of a covered servicemember. The provisions of the amendment providing leave to care for a covered servicemember became effective when the amendments became law in January 2008.

The other new provision allows employees to take up to 12 weeks of leave for a "qualifying exigency" arising out of the fact that an employee's spouse, child, or parent is on or has been called to active duty in the U.S. Armed Forces. Congress left it to the Secretary of Labor to define "qualifying exigency." Presumably, however, no medical condition is necessary to qualify for this type of leave. The provisions of the amendment providing for leave due to a qualifying exigency arising out of a covered family member's active duty (or call to active duty) status are not effective until the Secretary of Labor issues regulations defining "qualifying exigencies."<sup>4</sup>

Although the FMLA has been controversial,<sup>5</sup> the amendments do not affect the majority of FMLA provisions. Consequently, an employer's duties under the act, which include restoring returning employees to the same position as when

their leave began and continuing group health coverage during the leave, extend to the new types of leave as well. Similarly, the employee's ability to enforce the act is unaffected by the amendments. An employee may bring an action in instances of employer interference or in instances of employer retaliation or discrimination.<sup>6</sup>

An employer interferes with employee rights under the FMLA when, for example, it refuses to grant or discourages an employee from taking leave authorized by the act. The Department of Labor provides other examples of interference in its current regulations.<sup>7</sup> A retaliation or discrimination claim arises when, for example, an employer discharges or uses the taking of FMLA leave as a negative factor in employment actions such as hiring, promotions, or disciplinary actions. Again, the current regulations provide other examples of discriminatory conduct.<sup>8</sup>

The changes in the regulations announced in the Department of Labor's recent Notice of Proposed Rulemaking<sup>9</sup> are not simply a response to the recent statutory amendments. In fact, although the amendments require the Secretary of Labor to issue regulations on "qualifying exigencies," the notice instead requests comments on the subject rather than proposing a rule. The department anticipates that it will issue final regulations after consideration of the comments it receives in response.

According to the Department of Labor, the proposed rule is a response to court decisions invalidating portions of the original regulations, its 15 years of experience administering the FMLA, discussions with various stakeholders over the years, and comments received in response to its 2006 request for information.<sup>10</sup> Many of the proposed changes address complaints by employers that employees too often abuse the act.

One of the principal complaints employers have had with the current regulations is that an employee may provide an employer with notice of the need for FMLA leave up to two

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# DIRECTOR'S DESK

*The Mortgage Crisis*, a report prepared for the U.S. Conference of Mayors and the Council for the New American City, forecasts that the mortgage foreclosure crisis will have profound economic effects. The report estimates that in 2008 the gross domestic product will be \$166 billion lower as a result and that homeowners will see property values decline by \$1.2 trillion.

According to the report, Kentucky itself will see nearly 14,000 homes worth \$1.47 billion go into foreclosure. The gross metropolitan product will fall \$690 million in the Cincinnati-Northern Kentucky region, \$118 million in the Lexington-Fayette area, and \$499 million in the Louisville region. Other areas will experience similar GMP losses, for example \$61.8 million in Bowling Green, \$6.5 million in Elizabethtown, and \$13.7 million in Owensboro.

State and local government revenue sources will feel the impact as well. While much attention has been paid to the budgetary shortfall at the state level in Kentucky, relatively little of that is attributable to the foreclosure crisis. Inaccurate revenue and spending forecasts and reliance on one-time funds to balance the budget are more to blame. For local government, however, the situation is more problematic.

The local government revenue stream most obviously affected is the property tax. For years local government property tax revenue was bolstered by rapidly escalating market values and assessment. Now, not only is the growth of this budget source reduced, there is significant risk of downward pressure on taxable value as well.

## Family and Medical Leave Act Amendments *continued from page 1*

full business days after an absence. Employers say that this causes planning and scheduling difficulties and can cover up deeper problems of employee tardiness or time abuse. The proposed rule modifies the current provision to provide that, except in emergency situations, an employee needing FMLA leave must follow the employer's usual and customary call-in procedures for reporting an absence in unusual circumstances.

Another employer complaint involved the definition of "serious health condition," a definition occasionally challenged in court.<sup>11</sup> The proposed rule retains the six individual definitions of serious health condition, but adds guidance on two regulatory terms.

The proposed rule also addresses employer complaints about their inability to verify employee illnesses. Employers contended that their inability to verify illness prevented them from catching employees who are abusing FMLA leave. They wanted the ability to converse with their employees' doctors to verify the existence of health conditions and require employees to get more frequent certifications in some cases. The proposal allows direct contact between employer and the health care provider so long as the requirements of the

As cities and counties scramble to adjust to their own budgetary issues, their first thought is unlikely to be how they can help homeowners respond to the mortgage crisis. However, as the League of California Cities points out, local officials are on the front line. Their access to homeowners is increasingly valuable in meeting the crisis, making them key players.

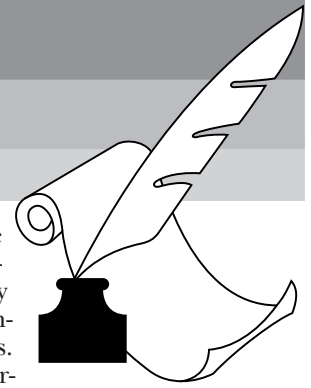
Among the ways local governments can help is to encourage those with distressed mortgages to contact their lender immediately. Local governments can also serve as a resource by helping dispel fears that homeowners may have about contacting their lender. These steps are important because the sooner a homeowner contacts the lender about a distressed mortgage, the more options are available.

Another way that local governments can help is by referring homeowners to counseling agencies such as those approved by the U.S. Department of Housing and Urban Development. An alternative is an initiative like that of Chief Justice Thomas Moyer in Ohio. He called on Ohio lawyers to offer more free help to Ohioans about to lose their homes. In Ohio, the governor, the attorney general, bar associations and legal aid societies are all part of the push. Similar initiatives are underway in Kentucky with the involvement of NKU-Chase students and faculty and the Local Government Law Center. Expect to hear more shortly.

Health Insurance Portability and Accountability Act are met. The proposal also allows an employer to request recertification of an ongoing condition at least every six months in conjunction with an absence.

Intermittent leave, taking FMLA leave in small, intermittent segments rather than in one block, is another point of contention. This type of leave was designed to allow employees, for example, to get physical therapy, keep regular doctor appointments for ongoing conditions, and receive frequent, short treatments. According to the U.S. Chamber of Commerce, a leading proponent of changes to the FMLA and the regulations, this causes not only scheduling problems for the employer but morale problems among the other employees.<sup>12</sup> Business groups wanted the department to limit intermittent leave to half-day increments, but the department concluded it did not have the authority under the act to make such a rule.

Other proposed changes reflect holdings, such as the U.S. Supreme Court's decision in *Ragsdale v. Wolverine World Wide, Inc.*, interpreting the regulations.<sup>13</sup> *Ragsdale* was the court's first decision interpreting the FMLA. Tracy Ragsdale was an employee of Wolverine World Wide, Inc. The company gave



her 30 weeks of leave when she was diagnosed with cancer, but the company did not tell her that it was designating 12 of the 30 weeks as FMLA leave. As she understood the regulations, the company's failure to notify her of that entitled her to 12 more weeks of leave. When she asked for it, the company denied her request. When she did not return to work, the company fired her. She sued for reinstatement and back pay. In its decision, the court held that the regulation upon which Ragsdale relied was contrary to the FMLA. The court said that the regulation was inconsistent with the statutory entitlement to only 12 weeks of FMLA leave and contrary to the statute's remedial requirement that an employee demonstrate individual harm. Ragsdale was not entitled to any more leave, and the company could permissibly fire her.

The proposed regulations make several changes to reflect the result in *Ragsdale*. It removes the categorical penalty provisions at issue in *Ragsdale* and clarifies that the employer may be liable where an employee suffers individualized harm because the employer failed to follow the notification rule.

Another response to court decisions concerns "light duty" assignments following FMLA leave. At least two court decisions<sup>14</sup> held that an employee uses up his or her 12 week FMLA leave while on a light duty assignment. The proposed rule clarifies that time spent performing light duty work does not count against an employee's FMLA entitlement. The proposal also changes the rules so that a light duty assignment does not affect reinstatement rights. Under the new rules, if an employee is voluntarily performing a light duty assignment, the employee is not on FMLA leave.

At the same time as employer groups have been attempting to narrow the coverage of FMLA, employee groups have been proposing to expand its coverage. While employer and employee groups have been similarly unsuccessful in Congress, at least until the recent amendments, many states have enacted their own version of a family and medical leave act that is more generous than the federal act. In the current session of Congress, several bills propose expansions of the Family and Medical Leave Act to include features already found in some of the state acts.

Arkansas and Louisiana, for example, require employers to provide an unpaid leave of absence for employees to serve as organ donors or bone marrow donors. Connecticut and Vermont, which recognize civil unions, extend family leave benefits to same-sex partners. Hawaii allows employees to take a leave of absence from work if they or their minor children are victims of domestic or sexual violence. Minnesota employees may also take time off work to seek relief under the Minnesota Domestic Abuse Act. In a similar vein, New York employers must permit time off for victims or witnesses to pursue legal action related to domestic violence.

Several states, among them Illinois, Louisiana, Massachusetts, Minnesota, North Carolina, and Rhode Island, provide that an employer must grant an employee leave during any school year to attend school conferences or classroom activities for the employee's child. Massachusetts goes further still and provides that employers must allow employees leave for certain family obligations such as accompanying the employee's child to routine medical and dental appointments and accompanying an elderly relative to medical, dental, or nursing home interview appointments. Washington, Oregon, California, and New Jersey have paid family leave programs.

The current regulations require employers to provide notice to employees about the employees' rights under the FMLA. This obligation will continue under the new regulations. Proposed § 825.300, for example, imposes on employers a "general notice" requirement. In order to satisfy that requirement, an employer must post a notice explaining the act's provisions and complaint filing procedures. The Department of Labor has workplace posters for this purpose at its website.<sup>15</sup> In addition, employers must provide this same notice in employee handbooks or by distributing a copy annually.

In view of the notice provisions, careful employers should examine their FMLA policies against the amended statute and regulations. While awaiting the Department of Labor's final regulations, a public employer faced with a leave request under the amendments might be wise to err on the side of liberally granting the leave.

### Endnotes

1. Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.*
2. 29 U.S.C. § 2611 defines the term "employer" to include any "public agency" as defined under the Fair Labor Standards Act. Section 3(x) of the FLSA defines "public agency" as the government of a state or political subdivision of a state. States and their political subdivisions are covered employers regardless of the number of employees. The act covers other employers that employ 50 persons or more.
3. National Defense Authorization Act for Fiscal Year 2008, H.R. 4986 § 585 (P.L. 110-181).
4. 73 Fed. Reg. 7876 (February 11, 2008).
5. See *Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information; Proposed Rule*, 72 Fed. Reg. 35550 (June 28, 2007).
6. Public employers enjoy no immunity from liability under the FMLA. See *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (Congress validly abrogated states' Eleventh Amendment immunity to suits under FMLA).
7. 29 C.F.R. § 825.220(b).
8. 29 C.F.R. § 825.220(c).
9. 73 Fed. Reg. 7876 (February 11, 2008) to be codified at 29 C.F.R. § 825.
10. Department of Labor, *The Family and Medical Leave Act: The Department of Labor's Regulatory Proposal*, (fact sheet available at <[http://www.dol.gov/esa/regs/compliance/whd/whdfs\\_FMLA\\_NPRM.pdf](http://www.dol.gov/esa/regs/compliance/whd/whdfs_FMLA_NPRM.pdf)>).
11. See, e.g., *Miller v. AT&T Corp.*, 250 F.3d 820 (4th Cir. 2001); *Thorson v. Gemini, Inc.*, 205 F.3d 370 (8th Cir. 2000).
12. United States Chamber of Commerce, *Real Experiences Administering the FMLA: Why the Regulations Need Reform*.
13. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002). See Richard Bales and Sarah Nefzger, *Employer Notice Requirements Under the Family and Medical Leave Act*, 67 Mo. L. Rev. 883, 899-905 (2002) (analyzing the *Ragsdale* decision).
14. See *Roberts v. Owens-Illinois, Inc.*, 2004 WL 1087355 (S.D. Ind. 2004); *Artis v. Palos Community Hospital*, 2004 WL 2125414 (N.D. Ill. 2004).
15. U.S. Department of Labor, *Compliance Assistance- Family and Medical Leave Act*, <<http://www.dol.gov/esa/whd/fmla/>>.

# DECISIONS OF NOTE



## KENTUCKY COURT OF APPEALS

### Conditional Zoning Change – Procedure to Revoke

A city amended its zoning map, but made the change conditional. One condition was a temporary access point nearer to an intersection than otherwise allowed. Later, the city granted a change for an abutting property subject to its provided access for the first property, thus allowing the closing of the temporary access point. The second access was never constructed, and the temporary access remained in use. Later still, the city notified the current property owners that it intended to revoke the temporary access. When attempts to secure the owners' compliance were unsuccessful, the city sought a declaration that it had the right to close the temporary access point and to an injunction against the owners. The owners counterclaimed for unlawful taking, malicious prosecution, abuse of process, outrageous conduct, harassment, tortious interference, and fraud. The trial court found for the city and dismissed the counterclaims. The appeals court reversed in part. The notice the owners received did not comport with minimal due process. Hence, their right to administrative review of the decision to close the temporary access remains alive. However, the owners' tort claims do not survive. KRS 65.2003 protects the city and its officials in this instance. *Godman v. City of Fort Wright*, 234 S.W.3d 362 (Ky. Ct. App. 2007).

### Denial of Zoning Amendment – Substantial Evidence

The owner of property adjacent to an area zoned for industrial uses sought a change to permit similar uses on his property. The comprehensive plan designated the subject property as a buffer between the industrial uses and rural agricultural land. The planning commission denied the rezoning application. The owner appealed, but the appeals court upheld the denial. Although there was some evidence in the record that contradicted the commission's findings, there was ample evidence supporting the decision as well. Further, it was up to the commission to judge the credibility of the witnesses and the weight of the evidence. In that vein, the court found no impropriety in allowing a council member to testify to the commission. *Baesler v. Lexington-Fayette Urban County Government*, 237 S.W.3d 209 (Ky. Ct. App. 2007).

### Election Contest – Write-in Votes

A write-in candidate for sheriff contested the results of the election at which he received 10 fewer votes than the person certified as the winner by the board of elections. He claimed that the board failed to include in his total those votes cast using only his first name, a number sufficient to give him the most votes. The circuit court determined that the votes cast using the candidate's first name should count because the voters' clear expression of intent was adequate under the statute governing write-in votes. The appeals court affirmed. Absent an allegation that a voter was ineligible or disqualified, the votes cast are presumptively valid. Any irregularities on the part of

election officials cannot operate to disenfranchise votes. Given the clearly expressed intent of the voters who wrote only the candidate's first name, the votes must count. *Waters v. Skinner*, 237 S.W.3d 551 (Ky. Ct. App. 2007).

### Paramedics and EMTs – Wrongful Termination

After the medical director of a county EMS refused to allow two employees to continue to work under his medical supervision, the service suspended, and then terminated, the employees. On appeal, the court found that the refusal to provide medical supervision necessitated termination regardless of the motivation for the medical director's action. Continuing, the court treated the employees as employees-at-will. It rejected the employees' assertion that public policy protected them from discharge in this situation because they were blowing the whistle on Medicare or Medicaid fraud. Neither the trial court nor appellate court found merit in the claim. *Miracle v. Bell County Emergency Medical Services*, 237 S.W.3d 555 (Ky. Ct. App. 2007).

### Zoning Change – Improper Conditions

Acknowledging that the property owners met all the requirements, a planning and zoning commission recommended a proposed zoning change. However, in its recommendation to the city board of commissioners, the planning commission asked that the city attach four conditions. The city approved the change with the conditions attached. The owners appealed the conditions. The trial court ruled that the attached conditions were impermissible conditions subsequent, severed the conditions, and allowed the change to stand without conditions. The city appealed, but the court of appeals affirmed the lower court. If the planning commission had concerns about factors related to the development of the property, it should have delayed the rezoning rather than sending it on. The statutory requirement for a development plan does not give the city "an all-inclusive power to impose [a] development plan and use its shortcomings to place additional conditions upon the zone change." *Board of Commissioners v. Davis*, 238 S.W.3d 132 (Ky. Ct. App. 2007).

### Deputy Jailer – Misconduct with Inmates

A jailer received separate reports from women who claimed that a deputy jailer engaged in sexual activities with them when the women were inmates in the county jail. Following an investigation, the jailer terminated the deputy. The deputy sued, claiming that the firing was without cause and was retribution for his support of the jailer's opponent in the preceding election. At trial a jury found for the defendant jailer, and the deputy appealed. Affirming, the appeals court held that the facts of either the ethical misconduct or the sexual misconduct, if believed by the jailer, provided a sufficient basis for the termination. "[S]uch conduct not only related to and affected the administration of his office, but also directly affect[ed] the rights and interests of the public." The deputy's claims that he did not receive due process fail where the jailer afforded him notice and an opportunity to be heard prior to his suspension. *Martin v. Osborne*, 239 S.W.3d 90 (Ky. Ct. App. 2007).

## Eminent Domain – Attorney’s Fees

Following an earlier decision in the court of appeals that a county sewer district failed to negotiate in good faith prior to the initiation of condemnation proceedings, the property owners sought an award of attorney’s fees. The circuit court denied the motion of the property owners, and the appeals court affirmed. An exception to the general rule that attorney’s fees are not recoverable without a contractual provision or a fee-shifting statute provides that a trial court can award fees if the court determines that the condemnor acted in bad faith. The award is at the discretion of the trial court, and here the court did not abuse its discretion in denying fees. The sewer district’s conduct was not so prejudicial as to justify the award. *Golden Foods, Inc. v. Louisville and Jefferson County Metropolitan Sewer District*, 240 S.W. 3d 679 (Ky. Ct. App. 2007).

## UNITED STATES COURT OF APPEALS



### Kentucky

#### Dismissed Teacher – Limitation of Actions

A teacher dismissed for taking topless photographs of a female student sued claiming that “faked” photographs were used against him. The trial court dismissed the claim for failure to comply with the applicable one-year statute of limitations. The court of appeals affirmed. Despite the teacher’s claims, there was no continuing violation of his rights. All the claims derived from his firing, which occurred in 1996, not from a re-sentencing hearing in 2005. The claims against the hearing officer at the re-sentencing hearing, while timely, nevertheless fail because sovereign immunity protects him in his official capacity and judicial immunity protects him in his individual capacity. *Dixon v. Clem*, 492 F.3d 665 (6th Cir. 2007).

#### Tax Protest – Refusal to Leave County Office

A citizen went to the office of a county judge/executive to voice concerns over a proposed payroll tax. Informed that the judge/executive was out and would not return that day, the citizen launched into a tirade that disrupted the entire office. Asked to leave, the citizen refused resulting in her arrest for criminal trespass. Acquitted in the subsequent trial, she sued the judge/executive and others for infringing her rights of free speech. The district court granted summary judgment in favor of the county defendants, and the court of appeals affirmed. The court rejected the protester’s assertion that the judge/executive’s “open-door policy” created a designated public forum. No reasonable person would understand that by making himself available to constituents, the judge/executive opened the office to prolonged sit-ins. Further, the judge/executive’s open-door policy did not preempt the county’s control over a government workplace. *Helms v. Zubaty*, 495 F.3d 252 (6th Cir. 2007).

#### County Jails – Canteen Accounts

Inmates in county jails have a canteen account with which they may purchase goods from the commissary while in jail.

The counties automatically withheld a portion of those monies to cover charges for booking and room and board. Inmates challenged this practice as a violation of due process, asserting that they had a right to a hearing before the counties took the money. The trial court rejected the claim, and the court of appeals affirmed. Applying the so-called *Matthews* balancing test, the court held that the private interests at issue are “small in absolute and relative terms,” the risk of erroneous deprivation is “minor” and involves elementary accounting with little risk of error, the potential benefits of additional safeguards are few, and the government’s interests in having inmates share costs and in fostering offender accountability are “substantial.” The claims of donors to the inmates’ accounts that they have cognizable property interests fail, as do claims that the county practices curb their free-speech rights to send money to inmates. *Sickles v. Campbell County*, 501 F.3d 726 (6th Cir. 2007).

#### Disappointed Bidder – Real Property Lease

After declaring an emergency, the state proceeded to lease office space for an agency’s regional office. Claiming irregularities in the process, a losing bidder sued under § 1983. The court of appeals held that, because the bidder lacked a cognizable property interest, there was no valid constitutional claim of a violation of due process. The court rejected the bidder’s claim that the state officers violated their limited discretion in awarding the contract. The bidder “cannot have a protected property interest in the procedure itself.... Indeed, if state law procedural protections were sufficient to create federally protected property interests, then every state law procedural violation would be a potential federal case.” *Experimental Holdings, Inc. v. Farris*, 503 F.3d 514 (6th Cir. 2007).

#### Candidate for Office – Wrongful Discharge

When a property valuation administrator retired, the Republican Party nominated the chief deputy PVA to run for the office and the Democratic Party nominated another deputy PVA to run. When the governor appointed the chief deputy as the interim PVA, the chief deputy moved her rival to the back office where she would not have public contact. Two days after the chief deputy won the office, she terminated her former opponent. Subsequently, the losing candidate sued claiming violation of her constitutional rights and of state law. The district court granted summary judgment in favor of the new PVA, but the court of appeals reversed. As to the claim that the termination violated First Amendment rights to free speech and free association, the court agreed that she was terminated for her political speech during the course of her campaign. Answering a question left unanswered by earlier cases, the court holds that “the First Amendment protects a public employee from termination based on that employee’s political expressions during her own candidacy.” In the absence here of a countervailing governmental interest, the government may not discharge the employee. The court holds further that a deputy PVA is not in a confidential or policymaking position such that the PVA can claim qualified immunity for the wrongful discharge. [See *Discharge and Patronage: Firing Someone on the Losing Side*, Local Government Law News (Winter 2005) – Ed.]. *Murphy v. Cockrell*, 505 F.3d 446 (6th Cir. 2007).

## Michigan

### Employment Retaliation – Protected Activity

A city dismissed two female police officers after each was found to be psychologically unfit to continue in her job. Each was also a party to an earlier suit against the police department by female officers claiming gender discrimination, retaliation, and harassment in connection with their employment. Following their dismissal, the officers brought this suit claiming that the city was retaliating for their participation in the earlier litigation. A jury awarded each of them \$1 million in compensatory damages plus back pay and front pay. After the trial, the court granted judgment for the city as a matter of law, alternatively reduced the compensatory damages to \$350,000, and denied punitive damages. The court of appeals overturned the judgment as a matter of law, holding that a reasonable juror could have concluded that the police chief's actions were unreasonable in light of the conduct of the police psychologist and the broader actions by city officials. However, the court affirmed the reduction in damages. Although the city's actions caused the former officers humiliation and anguish, there was no evidence of serious or long-lasting mental injuries. *Denhof v. City of Grand Rapids*, 494 F.3d 534 (6th Cir. 2007).

### Corrections Officers – Release of Personal Information

In the course of disciplinary actions against inmates who made baseless allegations of abuse, the Michigan Department of Corrections released an investigative report to inmates that included the social security numbers and birth dates of some corrections officers. Using this information, prisoners obtained other confidential information about the officers and their families. The officers and family members sued the hearing officer and other employees of the department claiming violations of their constitutional rights. The district court dismissed the claims against the hearing officer because it concluded that he was entitled to absolute judicial immunity. The court of appeals agreed. The district court concluded that the other employees were entitled to qualified immunity. Again, the court of appeals agreed. It found that the constitution did not require the state to keep the social security numbers and dates of birth private. The court rejected the argument that an earlier case, *Kallstrom v. City of Columbus*, created a broad right protecting this kind of personal information. The court concluded that the release of the information was not sensitive enough, nor was the threat of inmate retaliation apparent enough, to warrant constitutional protection. *Barber v. Overton*, 496 F.3d 449 (6th Cir. 2007).

### Fleeing Suspect – Use of Deadly Force

Two police officers used their cruisers to box in a car the occupants of which were suspected of tampering with cars. As the driver, a minor, attempted to maneuver around the cruisers and flee, one of the officers fired shots, striking the driver and paralyzing him. The video camera in the officer's cruiser captured the entire incident. In the subsequent suit against the officers and the city, the district court granted their motion for summary judgment. On appeal, a divided court of appeals affirmed. In the court's view, the driver was intent on escape, was willing to use his vehicle as a weapon, and acted without regard for the safety of the officers, pedestrians, and motorists, thus justifying the use of deadly force. While the suspected crime was a nonviolent property offense, the im-

mediate threat the driver posed to the officer and other drivers and pedestrians and the fact that the driver elected to flee both suggest that the officer's chosen use of force to apprehend him was reasonable. *Williams v. City of Gross Pointe Park*, 496 F.3d 482 (6th Cir. 2007).

### Nude Dancing Ban – Injunctive Relief

The operator of an adult entertainment establishment with a Michigan liquor license challenged a Michigan law that prohibited entities with liquor licenses from allowing exotic dancers to perform fully nude or to mimic sexual acts on stage. The district court denied a request for an injunction, but the court of appeals reversed. The state cannot rely on its power to regulate liquor sales under the Twenty-first Amendment to prohibit nude dancing in places where liquor is sold. The regulation of nude dancing is subject to one or the other of two tests. If the government's interest in enacting the regulation is unrelated to the suppression of expression, then the law must survive intermediate scrutiny as required by *United States v. O'Brien*. If the government interest is related to the content of the expression, then it must meet a more demanding standard. Because the state relied on its claimed power under the Twenty-first Amendment, it advanced no relevant governmental interest on which the court could rule. Therefore, preliminary injunctive relief was necessary. *Hamilton Bogart's, Inc. v. State of Michigan*, 501 F.3d 644 (6th Cir. 2007).

### False Arrest – Malicious Prosecution

Responding to reports of shots fired, police identified two suspected accomplices of the shooter and took them into custody. Subsequently acquitted, they sued the officers and the city under § 1983 for arrest without probable cause and malicious prosecution. The district court granted summary judgment to the city and the officers, and a divided court of appeals affirmed. Based on witness statements, officers had a reasonable belief in the trustworthiness and accuracy of the accounts to establish probable cause for the arrest. As to the claim of malicious prosecution, it fails where a magistrate judge determined there was probable cause to bind the suspects over for trial and there was no evidence that anyone supplied false information to the judge. *Peet v. City of Detroit*, 502 F.3d 557 (6th Cir. 2007).

### Searches – “Property Check” of Rural House

Seeing tire tracks and footprints in the snow and suspecting a trespasser, a conservation officer checked the condition of a house in a rural area by peering into windows, rattling doorknobs, and conducting a five-minute walk around. The owner returned to find the officer's card in the door. After viewing the officer's conduct on the home security system, the owner called the officer's superiors to complain that the actions were illegal. Getting no satisfaction there, he sued alleging a violation of the Fourth Amendment and his right to privacy. The district court concluded that the officer's conduct was not a search and dismissed the case. A divided court of appeals affirmed. Because this was an instance where the court believed a homeowner would want the police to investigate a possible break-in, the court reasoned that this tipped the balance in favor of finding the officer's actions reasonable. The dissent would have found the officer's invasion of the curtilage sufficiently intrusive to constitute a search. *Taylor v. Michigan Department of Natural Resources*, 502 F.3d 452 (6th Cir. 2007).

## Police Department – Disclosure of Arrestee Information

Arrested for drunk-driving, the arrestee claimed that the police department violated her constitutional right to privacy by disclosing her name, hometown, photograph, phone number, and husband's occupation after prosecutors charged her. The district court found that the department did not violate her right to privacy, and the court of appeals affirmed. "As a matter of federal constitutional law, a criminal suspect does not have a right to keep her mug shot and the information contained in a police report outside of the public domain – and least of all from legitimate requests for the information from the press." *Bailey v. City of Port Huron*, 507 F.3d 364 (6th Cir. 2007).

## Police Officers – Excessive Force

A motorist rear-ended the private vehicle of a police officer stopped at an intersection. Exiting their respective vehicles, the police officer observed that the other motorist was intoxicated. The motorist admitted as much, unaware that he was speaking to a police officer. The police were called, and they placed the motorist under arrest. In the course of the arrest, booking, and detention, the motorist claimed, the police used excessive force and cause him injury that necessitated an emergency room visit and other medical care. The police disputed the claim, and videos of the encounter contradicted the motorist's version of the facts. The district court denied qualified immunity to the officer's involved, but a divided court of appeals reversed. Analyzing the events depicted in the videos, the court concluded that the motorist failed to show that the officers acted in an objectively unreasonable manner. *Marvin v. City of Taylor*, 509 F.3d 234 (6th Cir. 2007).

## Ohio

### Taking of Property – Exhaustion of Remedies

After rains caused a sinkhole to develop on commercial property, the owners filed suit claiming that the county caused a taking by permitting commercial development on adjacent land. The county required the owners of that land to provide private storm water drainage and divert storm water into its private storm sewer. Treating the matter as a kind of regulatory (as opposed to physical) taking, the court of appeals held under the rule of *Williamson County Regional Planning Commission* that the property owner may not proceed directly in federal court, but must exhaust its available state remedies. Consequently, the case is not ripe for review and the court cannot entertain its merits. *River City Capital, L.P. v. Board of County Commissioners, Clermont County*, 491 F.3d 301 (6th Cir. 2007).

### Commercial Speech – Sign Ordinance

The owner of a car placed a "For Sale" sign on it and left it parked on a public street in front of his residence. A village ordinance made it unlawful to park a car on the street to display it for sale. Police asked him to remove it or face being cited for a violation. He removed the sign. Subsequently, he challenged the ordinance as an impermissible limitation on protected commercial speech. The district court upheld the ordinance, but the court of appeals reversed. The village's claimed purpose in adopting the ordinance was to promote traffic safety. However, the court saw the risk of people in the roadway looking at cars displaying "For Sale" signs as simple

conjecture by the police chief that something might occur, not evidence of any concrete harm to traffic or aesthetics. The village must produce "some evidence to establish that a speech regulation addresses actual harms with some basis in fact." *Pagan v. Fruchey*, 492 F.3d 766 (6th Cir. 2007).

### Probable Cause to Arrest – Potentially Exculpatory Evidence

A peaceful protester outside an abortion clinic was twice arrested for criminal trespass. In each instance the arresting officer, who had no arrest warrant and who did not observe the conduct, refused to listen to exculpatory eyewitness accounts of the incident. Following favorable determinations on the trespass charges, the protester sued the arresting officers under 28 U.S.C. § 1983. The trial court dismissed the claims, but the court of appeals reversed. In the opinion of the court, by refusing to listen to witnesses the officers failed reasonably to determine whether there was probable cause for arrest. In refusing to listen to witnesses who had information that might bear on the accuracy, reliability, and trustworthiness of the reports of criminal trespass, the officers did not act prudently. On these facts, the officers were not protected by qualified immunity. Further, the facts are sufficient to allow the protester's claim that the officers were motivated by the content of his speech and not by any criminal trespass to go to trial. The officers have no qualified immunity against this claim as well. *Logsdon v. Hains*, 492 F.3d 334 (6th Cir. 2007).

### Right to Gather News – Removal of Cameras

A park agency decided to conduct a deer-culling operation in certain parks in its system of parks. An animal rights organization placed cameras in the park to have video to share with the media. Rangers discovered the cameras and removed them. The group later sued, claiming a violation of their First Amendment rights. Treating the case as one involving access to information rather than one involving the right to expression, the court of appeals granted summary judgment to the park agency and its employees. The question for the court was whether the group's newsgathering efforts were within the law. The court found that the park agency's policies regarding damage to trees and handling found property justified the removal of the cameras in this instance. *S.H.A.R.K. v. Metro Parks Serving Summit County*, 499 F.3d 553 (6th Cir. 2007).

### Employee Speech – Comments to Consultant

In the course of conducting an evaluation of a park district's ranger department, a consultant rode along with one of the rangers. The consultant reported the ranger's comments to the district. Thereafter, the ranger claimed, the district developed a strategy to fire her. When it did so, on the basis of a psychological evaluation, the ranger claimed the true motive was retaliation for the speech in the ride-along, speech the ranger asserted was protected by the First Amendment. After an arbitrator agreed with her position, she sued the park district. The district court dismissed the ranger's complaint, and the court of appeals affirmed. The park district hired the consultant for legitimate department business, and the topics about which he questioned the ranger were concerned with her day-to-day duties. As such, the speech was pursuant to her official duties and not protected under the First Amendment. *Weisbarth v. Geauga Park District*, 499 F.3d 538 (6th Cir. 2007).

## Employee Speech – Statements to FBI

A police officer, an active union official, contacted the FBI to report alleged illegal or immoral activity within the police department. Subsequently, the department twice disciplined the officer, actions the officer maintained were in retaliation for his general activities as a union official and for his statements to the FBI. The officer brought a § 1983 action against the city and the chief of police. The district court granted summary judgment to the city but denied qualified immunity to the chief, who appealed. The court of appeals held that the matters about which the officer spoke to the FBI were matters of public concern, and thus protected speech, because they involved allegations of corruption in the police department. It is for the jury to decide whether the chief's interest in department efficiency outweighs the officer's right to disclose misconduct. The chief's belief that the officer's statements to the FBI were false does not entitle him to qualified immunity. *See v. City of Elyria*, 502 F.3d 484 (6th Cir. 2007).

## Municipal Employees – Residency Requirement

The city charter of Cleveland requires that city officers and employees live within the city. Various persons denied exemptions from or waivers of the requirement sued the city claiming that the charter provision violated their constitutional rights. The district court dismissed the action, and a divided court of appeals affirmed. Citing decisions in other circuits, the court found no support for the claim that the charter provision impinged on the constitutional right to travel. Neither does it violate the Equal Protection Clause, on its face or as applied. Finally, the court rejects the claim that the provision is unconstitutionally vague. The city council can, by ordinance and in its discretion, make exceptions to the rule in the charter. Said the court, “[M]unicipal governments should not be barred from making individualized determinations based on unique circumstances.” *Association of Cleveland Firefighters v. City of Cleveland*, 502 F.3d 545 (6 Cir. 2007).

## Sign Ordinance – Standing to Sue

A company that erects and operates advertising signs applied for permits to erect billboards. After the township rejected the applications, the company sued. While the suit was pending, the township amended its ordinance but left in place the size and height restrictions. Subsequently, the district court granted summary judgment to the township on the ground that the company lacked standing to bring its claims. A divided court of appeals affirmed. Having chosen not to challenge the size and height requirements, a point with which the dissent takes issue, and having filed applications that violated those provisions of the ordinance, the company cannot show that a successful challenge of other provisions would afford them the relief they seek. *Midwest Media Property, L.L.C. v. Symmes Township*, 503 F.3d 456 (6th Cir. 2007).

## Ceremonial Burning – Permit Requirement

While attending a “gay pride” parade, two men burned a rainbow flag to protest the celebration of the homosexual lifestyle. Police arrested the two and charged them with open burning without a permit. At their trial in municipal court, the judge dismissed the charges holding that, as applied to flag burning, the state fire code and city ordinance incorporating it were un-

constitutional. On appeal, the Ohio Court of Appeals reinstated the charges, and the Ohio Supreme Court denied review. On remand, they pleaded no contest. Subsequently, they sued the city alleging violations of their First, Fourth, and Fourteenth Amendment rights. The district court decided for the city; the Sixth Circuit Court of Appeals affirmed in part and reversed in part. The appeals court disagreed with the district court that the two lacked standing. Their treatment during the permitting process and their desire to engage in future ceremonial burning is sufficient to confer standing. However, the appeals court agreed that, since they raised their First Amendment claim in state court, they may not raise it again in their federal action. Finally, as to the claim of selective enforcement, the two fail to state a prima facie case. *Daubemire v. City of Columbus*, 507 F.3d 383 (6th Cir. 2007).

## Juvenile Placement – State-Created Danger

Caseworkers in a county children's services office placed a juvenile in the custody of neighbors of his mother; the custodian subsequently shot and killed the juvenile. The surviving parents later sued the county and those employees involved claiming that they created the danger to the juvenile. The district court dismissed the suit on the ground that the parents could not establish the requisite degree of culpability to maintain their claims. On appeal, the court of appeals affirmed. While in hindsight there were many facts that should have given the government pause, the totality of the circumstances is such that it was not clear that the caseworkers should have known of the dangers. The training provided to the caseworkers was not so obviously inadequate as to likely result in a constitutional violation. *Arledge v. Franklin County*, 509 F.3d 258 (6th Cir. 2007).

## Tennessee

## Wrongful Discharge – Political Affiliation

A city recreation director claimed that the new mayor dismissed him from his position because of his support for the former mayor, the losing candidate in the election. Claiming his right not to be terminated for his political beliefs, he sued the city, the mayor, and members of the city council. They denied that he was terminated for political reasons. Alternatively, they asserted that his position was one that would allow the city to terminate him for political reasons. Denied summary judgment and qualified immunity by the district court, the city and its officials appealed. Finding that the former employee raised an issue of genuine fact as to whether his termination was politically motivated, the court of appeals upheld the decision of the district court. Whether the positions was one for which political affiliation is an appropriate consideration is a “closer question,” but the dispute over the nature of the position precludes summary judgment at this stage. *Lane v. City of LaFollette, Tenn.*, 490 F.3d 410 (6th Cir. 2007).

## Illegal Drag Race – Neglect of Duty

The driver of a vehicle in an illegal drag race on a public street lost control of his car, crashed into a crowd of spectators, injured two of them, and killed another. City police officers were present before and after the race began and allowed the race to proceed. They eventually pleaded no contest to crimi-

nal charges of neglect of duty. The injured parties brought a federal civil rights action against the city and the officers. The trial court dismissed the action, and the court of appeals affirmed. Nothing in the Due Process Clause requires a state to protect the life, liberty, and property of its citizens against invasion by private actors. The state only absorbs a duty to protect its citizens when the state has so restrained the liberty of the individual that it renders him unable to care for himself or when the state causes or greatly increases the risk of harm to its citizens through its own affirmative acts. Although the officers' conduct was "irresponsible" and "showed incredibly poor judgment," it did not implicate constitutional concerns. *Draw v. City of Lincoln Park*, 491 F.3d 550 (6th Cir. 2007).

### High Speed Pursuit – "Shocks the Conscience" Standard

A vehicle, traveling at high speed and being pursued by police, crossed into oncoming traffic, struck a car, killed the passengers, and crippled the driver. A suit against the city and the police officer involved in the chase followed. The trial court denied the city's motion for summary judgment and denied the officer's motion for summary judgment and her claim for qualified immunity. They appealed, and the court of appeals reversed. Relying on the decision in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), the court said that high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment. Although the officer here violated the city's police pursuit policy, the facts do not meet the shocks-the-conscience test. Citing the Third Circuit the court said, "[I]n the absence of evidence from which a jury could infer a purpose to cause harm unrelated to the legitimate object of the chase, the evidence does not satisfy the requisite element of arbitrary conduct shocking the conscience." *Meals v. City of Memphis*, 493 F.3d 720 (6th Cir. 2007).

### Student Speech – Sports Teams

Members of a high school football team, unhappy with their coach and his methods, asked players to sign a petition to the principal to replace the coach. After learning of the petition, the coach dismissed from the team those players who signed it and did not recant. Those players sued, claiming that their dismissal was retaliation for their exercise of First Amendment rights. The court of appeals asks, "[W]hat is the proper balance between a student athlete's First Amendment rights and a coach's need to maintain order and discipline?" After an extended discussion of the cases and of the roles of players and coaches, the court answers that *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* "does not require teachers to surrender control of the classroom to students and it does not require coaches to surrender control of the team to players." *Lowery v. Euverard*, 497 F.3d 584 (6th Cir. 2007).

### Drivers' Licenses – Citizenship and Residency

Tennessee amended its laws in 2004 to condition issuance of a driver's license upon proof of U.S. citizenship or lawful permanent resident status. Aliens temporarily resident in the state can receive a "certificate for driving" instead of a license. An advocacy group challenged that and related laws as a classification based on alienage that denied them equal protection of the law and burdened their fundamental right to travel. The district court dismissed the action, and the court of appeals

affirmed. The court declined to treat temporary resident aliens as a suspect class for equal protection purposes. Further, the court held that the alleged burdens on the right to travel are "simply too speculative, factually and legally" to justify the conclusion that the right to travel is burdened impermissibly by issuing a certificate for driving that is not otherwise valid for identification. *League of United Latin American Citizens v. Bredesen*, 500 F.3d 523 (6th Cir. 2007).

### In-school Suspension – Cell Phone in Class

A middle school's code of conduct prohibited cell phones on school property during school hours. During a class, a student's cell phone began to ring. In accordance with school policy, the teacher confiscated the phone and delivered it to the principal along with a partially completed disciplinary form. As prescribed in the code of conduct, the school retained the phone for 30 days and the student served a one-day in-school suspension. Subsequently, the parents sued the school and individual employees seeking compensatory and punitive damages. The trial court ruled that the parent's due process claim as to the suspension could proceed, and the school took an interlocutory appeal. The court of appeals, agreeing with other courts that have considered the question, concluded that in-school suspensions do not implicate a student's property interest in a public education. Neither does it trigger the due process protections afforded the student's liberty interest in her reputation. A one-day in-school suspension, says the court, is a *de minimis* deprivation. *Laney v. Farley*, 501 F.3d 577 (6th Cir. 2007).

### Sex Offender Registration – Ex Post Facto Application

After he was convicted and sentenced, Tennessee law reclassified an individual as a violent sexual offender subject to the state's registration act, thus requiring him to wear a GPS device at all times. Because he was convicted before the effective date of the registration act, the individual challenged its application to him. The district court dismissed the claims, and a divided court of appeals affirmed. The offender argued that the registration law violated the Ex Post Facto Clause of the U.S. Constitution. Accepting the Tennessee legislature's declaration, the court found the registration act to be a civil regulatory scheme rather than a punitive scheme. Further, the practical effect of the law – registration, reporting, and surveillance – traditionally have not been considered to be punishment. Consequently, the Ex Post Facto argument failed. *Doe v. Bredesen*, 507 F.3d 998 (6th Cir. 2007).

## UNITED STATES DISTRICT COURTS



### Protests at Funerals – Overbroad Restrictions

In its 2006 regular session, the Kentucky General Assembly passed a law (2006 Kentucky Acts Ch. 50 (SB 93)) creating the crimes of disorderly conduct in the first degree, disrupting meetings and processions in the first degree, and interference with a funeral. The act, and others like it in other states, was a response to disruptions at funerals of soldiers in Kentucky and around the country by the Westboro Baptist Church and its sympathizers. One of those sympathizers challenged

portions of the act as violating the First Amendment on its face. Examining the act, the court decided that, although the motivation for the act was in part a specific desire to restrict one group's ability to demonstrate against homosexuality at soldiers' funerals, the legislation's predominant purpose was content-neutral. The court also decided that the state has a valid interest in protecting attendees at funerals from unwanted communications that are so obtrusive that they are impractical to avoid. However, the court decided, the law restricts substantially more speech than that which would interfere with a funeral or that would be so obtrusive that funeral participants could not avoid it. Therefore, the court granted the requested injunction against those provisions. *McQueary v. Stumbo*, 453 F.Supp.2d 975 (E.D.Ky. 2006). [The offending provisions were deleted from KRS 525.155 by 2007 Kentucky Acts Ch. 107, § 3 (HB 280). -Ed.]

### **School Property – Right of Reversion**

Because of school consolidation, a county board of education decided to cease use of certain property for school purposes and declared it excess property to be sold. The original deed contained a right of reversion, and the holder of that interest asserted ownership of the property. The school board refused to acknowledge the claim of title in light of the Kentucky Perpetuities Act of 1960. The act cut off any possibility of reverter unless a declaration of intention to preserve it was filed with the county clerk before July 1, 1965. No declaration was on file for the subject property. Consequently, the company claiming ownership sued, alleging that the act impaired the obligations of contract protected under the U.S. Constitution. The court rejected the claim. A state may require periodic registration of intent to preserve those interests created more than thirty years before. This requirement does not rise to the level of a severe impairment on existing contracts. The act does not automatically terminate the possibility of reverter and provides a saving clause by which a property owner can preserve the future interest. Further, the act "is reasonable and appropriate in light of the important state interest of alleviating burdens on marketability of title." *Black Mountain Energy Corporation v. Bell County Board of Education*, 467 F.Supp.2d 715 (E.D.Ky. 2006).

### **Outside Speaker – Campus Sponsorship Policy**

A traveling evangelist sought to proclaim his faith in a designated free-speech area on a university campus. A policy at a state university required that an outside organization or individual wishing to come on campus for the purpose of solicitation had to have the sponsorship of a university-registered organization or university department. When the evangelist appeared without a sponsor, the university invoked the policy and told him to leave. Unable to procure a sponsor, the evangelist sought a preliminary injunction against the policy. After holding that the evangelist had standing to contest the policy, the district court addressed the likelihood of success on the merits. For purposes of its decision, the court concluded that the university campus was a designated public forum. The

university's policy reserves the forum for those invited by student organizations and university departments, and does so in a manner that is content neutral. The policy is consistent with the university's educational mission and, holds the court, is reasonable in light of the purpose served. *Gilles v. Miller*, 501 F.Supp. 939 (W.D.Ky. 2007).

### **School Investigation – Juvenile Diversion Program**

A middle school student who took medication for ADHD gave one of her pills to another student. After a time, the student faced criminal charges as a result and was given the opportunity to enter into a diversion agreement. Subsequently, the student and her parent sued the school district in a § 1983 action alleging violations of the student's Fourth and Fifth Amendment rights in connection with the school's investigation of the incident. Describing the diversion program as a kind of "anticipatory probation," the court treated entry into the program as equivalent to a sentence of probation after conviction. In such instances, a § 1983 action is unavailable. "[I]t would constitute poor public policy to permit a criminal defendant to obtain lenient treatment by submitting to a benevolent program of this kind and then turn around and sue the arresting officer." The doctrine of *Heck v. Humphrey*, 512 U.S. 477 (1994), requires dismissal of all the student's federal claims. *S.E. v. Grant County Board of Education*, 522 F.Supp. 826 (E.D.Ky. 2007).

### **Parking Tickets – Enforcement Procedures**

Eleven individuals ticketed for parking violations brought a class action against a city challenging the city's enforcement practices. They alleged that the city failed to comply with state statutes governing parking violation notices, thereby denying them procedural due process and taking their property. They claimed that the parking citation was not a reasonably calculated method to notify a violator of his rights or the potential consequences of his failure to respond. This, they claimed, affects the city's collection of parking fines and impoundment of vehicles. In addition, they claimed, state law does not permit the city to immobilize or impound vehicles solely due to accumulated unpaid parking tickets. As to the first point, the court was satisfied that affixing a parking ticket to a vehicle windshield is reasonably certain to provide an owner with notice of the violation and of the potential penalties. Further, the court finds support in the decisions of other courts that, when a vehicle is immobilized or towed, due process does not require a separate notice or a pre-deprivation hearing. The post-deprivation hearing provided in the city ordinance is adequate. The court also rejects the property rights claims. "Paying a parking fine under these circumstances does not amount to the deprivation of a property interest without due process." In addition, a violation of a statutory notice provision does not equate to a violation of constitutional due process. Where the notice comports with constitutional requirements, failure to follow the statutory procedure merely presents a separate claim for relief under state law. *Oberhausen v. Louisville-Jefferson County Metro Government*, 527 F.Supp. 713 (W.D.Ky. 2007).

# OPINIONS OF THE ATTORNEY GENERAL

**OAG 07-007**

**October 22, 2007**

Subject: Ordinance veto procedure - city with mayor-council form of government

Requested by: Carrie D. Wiese, City Attorney, Somerset

Written by: Gerard R. Gerhard

Syllabus: Mayor's return of ordinances, with reasons for not signing them, to the city clerk, rather than, as required by KRS 83A.130(6), to the city council, did not constitute an effective veto of the ordinances.

Statutes construed: KRS 83A.130(6)

OAGs cited: None.

## *Opinion of the Attorney General*

The principal question addressed here is whether a mayor's return of ordinances, with reasons for not signing them, to the *city clerk*, instead of to the *city council*, constituted an effective veto of those ordinances.

In our view the answer is no.

The pertinent facts as related by the request for this Opinion are, in substance: The mayor "vetoed" ordinances by not signing them and by providing reasons for not doing so, and attaching the reasons to the ordinances and returning the ordinances to the **city clerk**. The request also indicates, in part, that it has been the custom for the Somerset mayor to "return" ordinances to the city clerk rather than to the council as a whole.

### **City ordinance veto procedure – KRS 83A.130(6)**

Kentucky Revised Statutes (KRS) 83A.130(6), is the current law regarding the procedure to be followed by a mayor of a city with a mayor-council form of government, in vetoing an ordinance. It was enacted in 1980 (Enact. Acts 1980, ch. 235 § 13, effective July 15, 1980), and provides:

All ordinances adopted by the council shall be submitted to the mayor who shall within ten (10) days after submission either approve the ordinance by affixing his signature *or disapprove it by returning it to the council* together with a statement of his objections. No ordinance shall

take effect without the mayor's approval unless he fails to return it to the legislative body within ten (10) days after receiving it or unless the council votes to override the mayor's veto, upon reconsideration of the ordinance not later than the second regular meeting following its return, by the affirmative vote of one (1) more than a majority of the membership.

[Emphasis added.]

In KRS 83A.130(6) (above), the legislature has established a statutory procedure to be followed by a mayor (of a city operating under the mayor-council plan) in vetoing an ordinance. A mayor, in order to veto an ordinance, is directed by clear statutory language to return the ordinance to the *council* together with a statement of his objections. The obvious purpose of the plain words of the statute is to ensure that the city council will be made aware of the mayor's action so that it will have an opportunity to override the mayor's veto. KRS 83A.130(6) is a significant change from the former statute on the same subject, KRS 86.090(3), which directed return of a veto to the city clerk. KRS 86.090 (including (3) thereof) was repealed (Acts 1980, ch. 235 § 20) in the same legislation that established KRS 83A.130(6).

We find no basis for suggesting that a mayor may satisfy a statutory requirement by following a procedure not provided for by law, such as returning an ordinance to the city clerk, rather than to the council.

In our view, if a mayor does not comply with the statutory procedure for disapproval of an ordinance, his attempted disapproval or veto is ineffective, and, in relation to the disapproval or veto of an ordinance, is a nullity. In accord with this view see 62 Corpus Juris Secundum (CJS) Municipal Corporations § 270 (a): "Statutory requirements as to the manner of exercising the veto power must be complied with; otherwise the attempted exercise of the power is of no effect."

### **Other questions**

The request for this opinion also asked, in substance, when, if ever, is "constructive service/notice" to the council proper in connection with a mayor's attempted veto of an ordinance, and (again in substance) whether *City of Russell v. City of Flatwoods*, 394 S.W.2d 900, (Ky. 1965) "is still good law," since that case construed, in part, KRS 86.090(3), and not the current law (KRS 83A.130(6)), regarding the veto procedure.

### **"Constructive service/notice" not a substitute for actual notice**

"Constructive service/notice," here meaning for the mayor to provide to the city clerk, instead of to the council itself, an ordinance together with the mayor's grounds for disapproval, is not in compliance with KRS 83A.130(6), and is not proper to constitute a mayor's veto of a city ordinance. In our view,

purported “constructive service/notice” to the **city clerk** of a mayor’s veto of a city ordinance would never be a proper substitute for return to the **city council**, specified in KRS 83A.130(6), of a mayor’s veto of a city ordinance.

#### “Note” in *City Officials Legal Handbook* erroneous

The request for this opinion indicates that the 2007 edition of the *City Official’s Legal Handbook*, published by the Kentucky League of Cities, contains a note at page 179 stating that the mayor may satisfy the return requirement (meaning return to the *city council* of a mayor’s veto of an ordinance) by returning the unsigned ordinance and explanation to the *city clerk*, and that doing such is considered constructive service under *City of Russell v. City of Flatwoods*, 394 S.W2d 900 (Ky. 1965). We believe the note is erroneous.

The *Handbook* (above), at page 179, indicates in part:

- b. The mayor may veto the ordinance by returning it to the legislative body unsigned with a statement of the reasons for the veto within ten (10) days of receiving it.

NOTE: The mayor may satisfy the veto requirement by returning the vetoed ordinance to the city clerk. This has been held to constitute constructive delivery to the legislative body. *City of Russell v. City of Flatwoods*, 394 S.W.2d 900 (Ky. 1965).

Upon review of the case cited in the “note,” we do not see any language in that case that would support the conclusion set forth in the “note.”

The language of the Court, upon which the “note” in the *Handbook* is apparently based (there being no other language in the case that might apply), states, at page 902:

It is contended that, even though the mayor of Russell signed the contract with Flatwoods, this was ineffectual since the city ordinance authorizing Russell’s mayor to sign the contract was not signed by him. The short answer to this is that the ordinance was validly enacted without the mayor’s signature since he did not return the ordinance to the city clerk with his written objections within ten days after its passage. KRS 86.090(3). It is our opinion that the ordinance was lawfully enacted.

In our view, this language stands for the proposition that where a mayor did not follow the veto procedure *then provided* by KRS 86.090(3), there was no veto, and therefore, an ordinance challenged as not effective because not signed by the mayor, was effective. It was effective because, in the absence of a veto consistent with statutory procedure (KRS 86.090(3)), it became effective without the mayor’s signature, in keeping with the statute then in effect. “Constructive delivery” to the legislative body was not mentioned or at issue in the case.

KRS 86.090(3), which was repealed in 1980 (Acts 1980, ch. 235, § 20), provided, at the time *City of Russell* was decided:

If the mayor fails to sign any ordinance or resolution, or to return it to the *city clerk* with his written objections, within ten days after its passage, the ordinance or resolution shall take effect without his signature.

[Emphasis added.]

Under the law in effect when *City of Russell* was decided in 1965, a mayor’s veto was to be returned to the *city clerk*, as was

then provided for by KRS 86.090(3). “Constructive delivery to the legislative body” was not an issue in *City of Russell*. There is no holding or discussion in the case that might be properly construed as a holding of the court that return to the city clerk constitutes constructive delivery to the legislative body. We believe the proper conclusion to be drawn from the text quoted above from *City of Russell* is that, in matters involving passage and possible veto of a city ordinance, statutorily specified procedure must be followed. For the reasons indicated, we believe the note at page 179 of the 2007 edition of the *City Officials Legal Handbook* is erroneous.

KRS 83A.130(6), as noted previously, was enacted in 1980, well after *City of Russell*. The statute specifically provides that if a mayor disapproves of an ordinance, he shall “. . . **disapprove it by returning it to the council** with a statement of his objections.” [Emphasis added.]

Where a mayor in a city with a mayor-council form of government returns ordinances together with a statement of his objections to the city clerk, rather than the city council, his action does not constitute a veto of the ordinances involved, and, insofar as purporting to veto the ordinances, is a nullity. KRS 83A.130(6).

## SUMMARIES OF SELECTED OPEN RECORDS DECISIONS

### Receiving Copies – KRS 61.872(3)(b)

A jailer did not respond to a request for records after the inmate who made the request was transferred to another facility. While the prisoner is no longer able to inspect the records sought, the Attorney General opines that, upon payment of copying and postage charges, the prisoner is entitled to receive copies of the records if he resides or works in a county other than the county where the public records are located, can precisely describe the records he seeks, and those records are readily available. 07-ORD-214.

### Unreasonable Requests – KRS 61.872(6)

A newspaper asked to inspect and copy records of a county emergency medical service pertaining to calls to a particular locale. The agency replied that the request was not one for records but one for information and that it was under no duty to honor the request. The response identified the records that contained the information, and the newspaper subsequently asked to inspect those records. The agency then denied the request on the ground that it was “unreasonably burdensome” because of the volume of records involved. It estimated that it would take 7-10 days to review the records and redact any confidential information and claimed that, in the absence of particular guidelines, this established the unreasonableness of the request. Conceding the agency’s good faith and admitting that the appeal presented a “close question,” the Attorney General disagreed. In the Attorney General’s opinion, the agency’s response lacked the “degree of specificity” present in other instances where agencies successfully claimed the protection of KRS 61.872(6). 07-ORD-261.

### Online Access – KRS 61.874(6)

A member of the general public asked a property valuation administrator for access to property records maintained on the county website to which real estate agents and bankers had

access. In addition, he asked for access to the information at a cost less than the subscription price charged to businesses. The PVA declined, saying that the web site was an optional tool and that the public could inspect the records at the PVA office. The requester appealed to the Attorney General, asserting that the access charges were unreasonable for persons who use the service for non-commercial purposes once or twice a year. The Attorney General agreed. “Although the initial determination of whether to provide online access is within the discretion of the PVA, the fees that may be charged once that discretion is exercised affirmatively are not; only the costs identified at KRS 61.874(6)(a) may be recouped absent a commercial purpose.” Here the cost to the requester may not exceed the cost of physical connection to the system and reasonable cost of computer time access charges. 07-ORD-143.

#### **Exempt Records Generally – KRS 61.878**

A school board denied a request for records from a person engaged in litigation over the board’s use of eminent domain to take his property. While the records sought did not specifically pertain to the condemnation action, the board took the position that the request was an attempt to circumvent the rules governing pretrial discovery. Citing *Kentucky Lottery Corporation v. Stewart*, the Attorney General reaffirmed that “although there is litigation in the background..., [a requester] stands in relationship to the agency under the Open Records Act as any other person.” A litigant with an agency is not foreclosed from accessing records through the Open Records Act. 07-ORD-180.

#### **Information of a Personal Nature – KRS 61.878(1)(a)**

An agency denied a request for an employee’s personnel file because the person making the request had been convicted by a jury on which the employee served. Since being released from prison, the convict had shown up at the employee’s home and attempted to make contact with her. Under the circumstances, the agency reasoned, the employee was the object of attempted harassment and release of the personnel file would constitute an unwarranted invasion of personal privacy. The Attorney General disagreed, saying that the agency may not take into account a person’s purpose in making an open records request. Because the records sought are related to the performance of public employment, “the employee’s privacy interest is outweighed by the public’s right to know that the employee is qualified for public employment.” Should the agency not appeal the decision, the Attorney General noted, the employee can still assert her own interests in court. 07-ORD-192.

A city denied a request to inspect the disciplinary and internal affairs files related to a former police chief, citing the statutory bases for its denial but failing to explain how they applied. On appeal, the Attorney General reaffirmed that records relating to allegations of misconduct or impropriety of employees in the course of their employment are not exempt under KRS 61.878(1)(a) under the rule of *Palmer v. Driggers*. The city’s claims that the information was protected under KRS 61.878(1)(k) and (l) also fail. 07-ORD-226.

Having already furnished a requester with a retired employee’s job application, a school district denied an additional request for the names of references on the application previously redacted in accordance with KRS 61.878(1)(a). The Attorney General agreed with the school district that this was proper. Contrasting this situation with those in prior opinions, the Attorney General noted that the employee is since retired, the information requested is 28 years old, and the heightened public interest in his qualifications is absent. 07-ORD-239.

#### **Law Enforcement – KRS 61.878(1)(h)**

A reporter asked a dispatch center for historical records of responses to an address at which a recent homicide occurred. The center, asserting that it was only the “collateral custodian” of the records and after consulting with the relevant police department, denied the request at the behest of the police department on the ground that the records sought were the subject of a pending police investigation. On appeal, the Attorney General saw nothing wrong in the center’s consultation with the law enforcement agency. However, when it then asserts KRS 61.878(1)(h) as a basis for denial, it must obtain from the agency sufficient proof to sustain the statutory burden with respect to nondisclosure. Here the center did not. Further, the Attorney General finds no support for the asserted status of “collateral custodian.” Dispatch logs are generally open to public inspection. When an agency seeks to withhold them, the need for particularity in stating its reasons is “acute.” 07-ORD-167.

A sheriff’s department denied a request for certain investigative records relating to crimes for which requester was convicted. The department denied the request on the bases of KRS 61.878(1)(h) and KRS 17.150(2). The Attorney General agreed that these sections recognize that law enforcement agencies may withhold investigative records until prosecution is completed. Under *Skaggs v. Redford*, records such as those sought here may be withheld so long as the possibility of further judicial proceedings in the case remains a significant prospect. 07-ORD-216.

#### **Preliminary Materials – KRS 61.878(1)(i), (j)**

Denied copies of letters to council members opposing a change in zoning on the ground that they were correspondence with private individuals, a citizen appealed to the Attorney General. Stating KRS 61.878(1)(i) protects “the narrow category of public records that reflects letters exchanged by private citizens and public agencies or officials under conditions in which the candor of the correspondents depends on assurances of confidentiality,” the Attorney General concludes that the letters at issue are not covered. In the opinion of the Attorney General, the letters were communications upon which the council was expected to rely in taking action on the zoning change advocated in the letters. 07-ORD-181.

#### **Records Related to Employee – KRS 61.878(3)**

A former public employee requested a copy of a letter referred to in a written reprimand of the employee. The city considered the letter to be private correspondence between an individual and a member of the city council and denied the request. Citing earlier decisions that give a former public employee the same access privileges as current public employees, the Attorney General concluded that the city must give the former employee a copy of the letter. The letter was used or referred to in the reprimand meeting and, thus, qualifies as a public record in the possession of a public agency. “KRS 61.878(3) trumps any available exception for nondisclosure because the letter relates to him.” 07-ORD-236.

#### **Interagency Exchange – KRS 61.878(5)**

A mayor asked the county judge/executive for occupational license tax records covering a four-year period. The county partially denied the request claiming that certain records were confidential and could be released only on the order of a court. The city countered that the general exemptions did

not apply to the exchange of documents between two public agencies. The Attorney General disagreed with the mayor's interpretation of KRS 61.878(5). Nevertheless, the county must redact any confidential information rather than deny access to any existing records entirely. 07-ORD-169.

### **Denial of Inspection – KRS 61.880**

A county public administrator failed to respond to a request for records relating to an estate and failed to respond to the Attorney General's notification of an appeal. "Public agencies," said the Attorney General, "are not permitted to elect a course of inaction." In taking that course, the agency failed to advance a legal argument in support of the apparent denial of the request. Consequently, it cannot meet its burden of proof under KRS 61.880(2)(c) and must make the records available unless it articulates a basis for denying access to them. 07-ORD-220. [For a similar result involving a sheriff's department and relying on this decision, see 07-ORD-272.]

A local human rights commission denied a request for records of an investigation into a complaint filed by the person requesting those records. The commission withheld the records on the ground that they were internal and preliminary memoranda not subject to disclosure. Interpreting KRS 344.625(2) for the first time in the context of an open records request, the Attorney General reads the section to create a limited exception to the general confidentiality provisions previously interpreted. Where, as here, the party requesting the records is the aggrieved person or the respondent in a proceeding before the commission, the statute entitles them to the records. 07-ORD-233.

A reporter asked a police department for copies of all accident reports generated by the department on specific dates. The department responded that the Kentucky State Police were the custodians of the records sought. In the course of the appeal, the state police asserted that the records were available to the local police department and that the local department should be obligated to provide the records. The Attorney General agreed. The local department cannot shift its burden to comply with the Open Records Act onto the state police. 07-ORD-235.

A board of education denied a request for records pertaining to the driving record and job performance of a school bus driver asserting that these were internal personnel matters not subject to disclosure. The Attorney General found no support for the board's position saying, "[T]his office, as well as the courts, have consistently recognized the public's right of access to such records when final disciplinary action has been taken or a decision to take no disciplinary action has been made." The Attorney General continued, "We find equally indefensible the Board's refusal to disclose, or even acknowledge the existence of, any records documenting driving irregularities committed by [the bus driver] such as speeding tickets or citations." 07-ORD-241.

A reporter asked for access to and a copy of an application for a business license. The county denied the request in reliance on KRS 67.790(8), which prohibits disclosures of a return. On appeal, the Attorney General reiterated that the section "cannot be construed so broadly as to authorize blanket nondisclosure of applications for business licenses." An agency must disclose any information appearing on a business license application that does not disclose the "affairs of the business." 07-ORD-255.

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Under KRS 61.846 and 61.880 the Attorney General reviews complaints alleging violations of the Open Meetings Act and Open Records Act respectively and issues written decisions stating whether an agency violated the act. If no party timely appeal, the decision has the force and effect of law. Copies of the decisions summarized here are available online at <http://ag.ky.gov/civil/openrecords.htm>.

Under KRS 65.055(1), 160.395(1), and 164.465(1), certain public officers have a continuing duty to distribute written information prepared by the Office of the Attorney General pursuant to KRS 15.257 that explains the procedural and substantive provisions of the Open Meetings Act and the Open Records Act. See <http://ag.ky.gov/civil/alert.htm>. In addition, those officers must distribute information prepared by the Department for Libraries and Archives pursuant to KRS 171.223 concerning proper retention and management of public records.

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## **BE IT ORDAINED . . .**

Customarily, this feature of the newsletter draws attention to model ordinances or recently litigated ordinances. However, in keeping with the theme of this issue's lead article, we present this time not an ordinance but a personnel policy. As noted in the issue's lead article, under forthcoming FMLA regulations employers must provide employees with a general notice of their rights under the FMLA. Employers may do so in their employee handbooks or by distributing a copy. Below is an edited version of the FMLA policy from the employee handbook for state employees in Kentucky. Mindful of the fact that it will need updating when the new regulations become final, it may nevertheless serve as a starting point for a local government's development or review of its own policy.

### **FAMILY AND MEDICAL LEAVE**

The Family Medical Leave Act is intended to balance the demands of the workplace with the needs of families, to

promote the stability and economic security of families, and to promote national interests in preserving family integrity. It was intended that the act accomplish these purposes in a manner that accommodates the legitimate interests of the employers, as well as minimize the potential for employment discrimination on the basis of sex, while promoting equal employment opportunity for men and women.

As a result of the federal FMLA, Kentucky state government has enhanced some of your benefits as state employees. In areas where your benefits were already more generous than the federal law requires, those benefits have been maintained at the higher level. The information contained in this section is a brief summary of the federal FMLA. [Some of the information presented] either clarifies state government's policy or describes the enhanced benefits you receive as a State employee.

## **YOUR RIGHTS under the Family and Medical Leave Act of 1993:**

### **EMPLOYEE ELIGIBILITY:**

To be eligible for FMLA benefits, an employee must

1. have worked for Kentucky State Government for a total of at least 12 months; and
2. have worked or been on paid leave for at least 1,250 hours in the 12 months immediately preceding the first day of FML.

### **LEAVE ENTITLEMENT:**

A covered employer must grant an eligible employee up to a total of 12 workweeks of leave during any 12-month period for one or more of the following reasons:

- for the birth or placement of a child for adoption or foster care. While the federal regulations state that a combined total of twelve (12) weeks shall be granted to an eligible husband and wife who work for the same employer, Kentucky State Government grants up to 12 weeks to each parent.
- to care for an immediate family member (spouse, child, or parent or someone of similarly close blood or legal relationship who has resided with the employee for not less than thirty (30) days prior to first day of FML) with a serious health condition; or to take medical leave when the employee is unable to work because of a serious health condition.

Although the FMLA allows the employers the option to require employees to use accrued paid leave for FMLA leave, Kentucky state government does not require that an employee's leave for a qualifying condition be designated as FML until that employee has utilized all of his accrued sick and annual leave (with the exception that an employee may request, in writing, to retain up to 10 sick days). An employee does not have to exhaust accumulated compensatory time before requesting FML. If an employee uses paid leave for a qualifying condition, the up to 12 weeks of FML is not taken from that employee's FML availability until the leave is designated as FML. It is important to note that an employee may request qualifying leave to be designated FML at any time (even if the employee is still using paid leave). The employer is responsible for designating if an employee's use of paid leave counts as FMLA leave, based on information from the employee.

### **ADVANCE NOTICE AND MEDICAL CERTIFICATION:**

The employee may be required to provide advance leave notice and medical certification or other supporting documentation. Request for leave may be denied if requirements are not met.

- The employee ordinarily must provide advance notice when the leave is "foreseeable."

- An employer may require medical certification to support a request for leave because of a serious health condition, and may require second or third opinions (at the employer's expense) and a fitness for duty report to return to work.

Under certain circumstances, employees may take FMLA leave intermittently—which means taking leave in blocks of time, or by reducing their normal weekly or daily work schedule.

- If FMLA leave is for the birth or placement for adoption or foster care, use of intermittent leave is subject to the employer's approval.
- FMLA leave may be taken intermittently whenever medically necessary for a seriously ill family member, or because the employee is seriously ill and unable to work.

### **JOB BENEFITS AND PROTECTION:**

- A covered employer is required to maintain group health insurance coverage for an employee on FMLA leave whenever such insurance was provided before the leave was taken and on the same terms as if the employee had continued to work. As a State employee you will also have the State's share of your group life insurance provided while you are on FML. If applicable, arrangements will need to be made for employees to pay their share of health insurance premiums while on leave.
- Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.
- The use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

### **UNLAWFUL ACTS BY EMPLOYERS:**

FMLA makes it unlawful for any employer to:

- interfere with, restrain, or deny the exercise of any right provided under FMLA;
- discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.

### **ENFORCEMENT:**

- The U.S. Department of Labor is authorized to investigate and resolve complaints of violations.
- An eligible employee may file an appeal with the Personnel Board.

With the exception of the enhancements listed, Kentucky state government will follow all federal regulations and guidelines.

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