

# Local Government Law News

Salmon P. Chase College of Law ♦ Northern Kentucky University

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## ADA AMENDMENTS ACT OF 2008: REINSTATING A BROAD SCOPE OF PROTECTION

“A 20th century emancipation proclamation for the disabled” was how Sen. Tom Harkin described the Americans with Disabilities Act of 1990. Signed into law by the first President Bush, the act addressed discrimination against individuals with disabilities in public and private employment, exclusion from public services, access to places of public accommodation, and availability of telecommunications services.

Over the years, supporters’ expectations for the ADA went unfulfilled, especially in the employment context. In part, that was due to a line of U.S. Supreme Court decisions that narrowly interpreted its reach. Commentators wrote of a judicial backlash against the act emblematic of a broader hostility on the part of the judiciary toward the disabled.<sup>1</sup> The case generally identified as the “critical backbone”<sup>2</sup> of the judicial backlash is *Sutton v. United Airlines*, 527 U.S. 471 (1999).

*Sutton* involved twin sisters who wanted to fly commercial planes for United. They suffered from severe myopia and did not meet United’s minimum vision requirement. When United rejected them based on their poor eyesight, the sisters sued. They argued that their condition rendered them disabled under the ADA. Therefore, they claimed, the statute required the airline to provide them a reasonable accommodation, presumably allowing them to wear corrective lenses while flying. The *Sutton* court ruled that the sisters were not disabled. “[W]e hold that the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual’s impairment, including, in this instance, eyeglasses and contact lenses.”<sup>3</sup> The effect was to reduce coverage for individuals with impairments that could be well controlled or alleviated by medication or other measures.

Another frequently criticized case is *Toyota Motor Manufacturing, Inc. v. Williams*, 534 U.S. 134 (2002). The employee in *Toyota* worked on an assembly line and suffered injuries to her hands, wrists, and arms owing to the repetitive motion of the tasks. Ultimately discharged, she sued the company for failing to provide her with a reasonable accommodation. At issue was whether her carpal tunnel syndrome was a “physical or mental im-

pairment that substantially limits one or more major life activities.” A unanimous court said it was not.

It was necessary, said the *Toyota* court, “to create a demanding standard for qualifying as disabled.”<sup>4</sup> It was not enough, in the court’s opinion, for an individual to be severely limited in her ability to perform an activity in the workplace; the individual had to be severely limited or unable to participate in that major life activity outside the workplace as well. “We therefore hold that to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives. The impairment’s impact must also be permanent or long term.”<sup>5</sup>

Congress responded to the judicial narrowing of the ADA in the ADA Amendments Act of 2008, styled “an act to restore the intent and protections of the Americans with Disabilities Act of 1990.”<sup>6</sup> Signed into law by the second President Bush, the act took effect January 1, 2009. A compromise between the interests of the disabled and of the business community,<sup>7</sup> the new law will protect a larger percentage of the workforce.

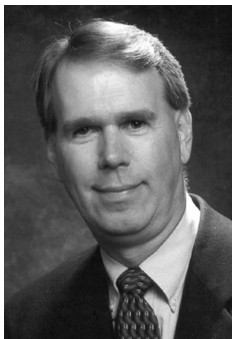
The ADAAA retains the original, three-prong definition of disability: “The term ‘disability’ means, with respect to an individual – (A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment ....”<sup>8</sup> However, the act makes important

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# DIRECTOR'S DESK



Longtime readers may notice the recent change in the masthead of this newsletter. From its first issue in 1987 until now, it carried the name of the Department for Local Government. For more than 20 years, the department provided grant support to the Local Government Law Center to underwrite this newsletter and the technical support the center provided to Kentucky local governments. Regrettably, that partnership could not continue in the face of the budget situation confronting the department and the state.

Despite that loss of support, we are not going away. In truth, Northern Kentucky University and Chase College of Law have borne an increasing share of the cost of the center for more than a decade. This is a reflection of the university's commitment, expressed in a series of strategic plans, to strengthen the capacities of local governments to govern effectively and to address the critical issues facing our communities. To that end, not only will the newsletter continue, so will our provision of technical support to local governments.

Change is inevitable, and regular readers will notice other changes in this issue as well. First, our coverage is expanding. Our regular feature on recent court decisions now includes not only decisions of the Sixth Circuit Court of Appeals, but also of state supreme courts in the circuit. In addition, we have added two new recurring features – one focusing on developments at the federal level and one focusing on governmental ethics. Other changes are in the offing, including the possibility that like other newsletters of this kind we may be going paperless.

The economic downturn is forcing change on local governments as well, reducing revenues while increasing demands on the social safety net. Many local governments will experience severe challenges with local government finances because of the slowdowns among major economic drivers. Even as federal officials forecast a turnaround at the end of 2009, the National League of Cities reported that there is typically an 18- to 24-month lag between the change in economic conditions and the impact on municipal revenue collections. Thus, local governments now affected by reduced revenues may experience more intense pressures in the

near future. According to economic forecasts, 2010 and 2011 will be even tougher on local government fiscal health than 2009.



Although economic conditions will dampen growth, the U.S. Bureau of Labor Statistics expects the overall prospects for employment in state and local government to be favorable. It estimates that employment in state and local government will increase by 8% overall between 2006 and 2016. Within that number is an 11% growth rate in education and a 20% growth rate in health care. Other areas in which there will be job growth include protective services and information technology. Public sector occupations expected to increase by more than 10% between 2006 and 2016 include correctional and police officers, firefighters, teachers and education administrators, urban and regional planners, childcare workers, and nearly all health care occupations.

Given that the public sector workforce tends to be older than the private sector's, the looming retirement of the baby boomers will also affect the government workforce. A recent paper by the Center for State and Local Government Excellence suggests that officials should already be planning their recruitment and retention strategies. The challenges will go beyond salary decisions to competition for talent, geographic locations, and family considerations.

In the competition for talent, the report suggests that local governments will need to recruit talent into technical positions, finance and accounting, information technology, planning and development, public safety, and public health. Currently, a big help in the ability of government to recruit that talent is the provision of better health insurance, pension plans, and non-salary benefits. Yet, in many quarters one sees pressures to reduce those benefits to private sector levels coupled with an expectation that governments can continue to pay below-market salaries. That is not a viable recruitment and retention strategy.

Many important hurdles lie ahead in developing an effective and talented workforce in state and local government. How government meets these challenges will help determine its ability to manage the financial, public safety, infrastructure, and other obligations to the public.

changes to other parts of the ADA that bear upon the definition and thereby rejects *Sutton* and *Toyota*.

When the Supreme Court created a demanding standard for qualifying as disabled, it looked specifically to the legislative findings and purposes that motivated the act.

When it enacted the ADA in 1990, Congress found that “some 43,000,000 Americans have one or more physical or mental disabilities.” If Congress intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled, the number of disabled Americans would surely have been much higher. Cf. *Sutton v. United Air Lines, Inc.*, 527 U.S., at 487, 119 S.Ct. 2139 (finding that because more than 100 million people need corrective lenses to see properly, “[h]ad Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number [than 43 million] disabled persons in the findings”).<sup>9</sup>

The ADAAA strikes the findings on which the court relied to limit the ADA’s reach and replaces them with a rule of construction: “The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.”<sup>10</sup>

The original ADA did not define the term “major life activity,” leaving that responsibility to the agencies charged to enforce the act. Instead, as mentioned above, the *Toyota* court supplied a definition of major life activities consistent with its view that the ADA required a demanding standard of disability. Rejecting the court’s demanding standard, the amendments now define the term.<sup>11</sup> In general, major life activities include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. Further, the definition clarifies that major life activity includes the operation of a major bodily function, a point of dispute in some reported cases.

The amendments also expand what it means to have an impairment that “substantially limits” a major life activity. The *Toyota* court took this to mean an impairment that “prevents or severely restricts” an individual’s performance of a major life activity. In the ADAAA’s findings and purposes<sup>12</sup> and in its rules of construction,<sup>13</sup> Congress expressed a desire for a broader approach. For

example, the amendments eliminate the rule of *Sutton* regarding the ameliorative effects of mitigating measures (except for ordinary eyeglasses or contact lenses).<sup>14</sup> Further, the amendments provide that an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability. In addition, the amendments provide that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. Both *Sutton* and *Toyota* had said that courts must focus on the individual in his or her present state.<sup>15</sup>

In addition, Congress made important changes to the “regarded as” prong of the definition of disability. Under the original act, a person did not actually have to have an impairment that substantially limited a major life activity in order to have a disability. A person who was regarded as having such an impairment qualified as having a disability even if the individual had no impairment at all. As the Supreme Court wrote in *School Board of Nassau County v. Arline*, “Congress acknowledged that society’s accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.”<sup>16</sup> In practice, however, it was not enough for an ADA plaintiff to show that a defendant based an adverse decision on uninformed stereotypes about the plaintiff’s condition. Instead, a plaintiff had to prove that a defendant mistakenly believed that an impairment substantially limited a major life activity.

The ADAAA takes a new approach. It provides, “An individual meets the requirement of ‘being regarded as having such an impairment’ if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”<sup>17</sup> This shifts the focus from the employer’s misperception of the condition to the employer’s motivation for an adverse action. Put another way, the ADAAA focuses on the discrimination at issue instead of the individual’s disability. “[I]t is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.”<sup>18</sup>

The ADAAA gives to the Equal Employment Opportunity Commission, the Attorney General, and the Secretary of Transportation the express authority to issue regulations to implement the ADA. Last December the

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# WASHINGTON WATCH

## **Collective Bargaining for Public Safety Workers**

The lead story in the spring 2008 issue of this newsletter described a bill in the last Congress that would have required all state and local governments to collectively bargain with public safety employees. The bill passed in the House of Representatives but stalled in the Senate on a procedural vote after the Bush administration signaled its opposition. The bill never became law. Representatives Dale Kildee (D-Mich.) and John Duncan (R-Tenn.) recently reintroduced the bill as H.R. 413, the Public Safety Employer-Employee Cooperation Act of 2009. While a candidate, President Obama expressed support for the right of public safety workers to bargain collectively.

## **Family Medical Leave Act Regulations**

The lead story in the winter 2008 issue of this newsletter discussed the amendments to the Family and Medical Leave Act of 1993 contained in the National Defense Authorization Act for Fiscal Year 2008. Final regulations to implement the amendments, including the military family leave entitlements, took effect January 16, 2009. More information about the regulations is available at the Department of Labor's Wage and Hour Division FMLA final rule website, <http://www.dol.gov/esa/whd/fmla/finalrule.htm>. There you can find links to the final rule, fact sheets on the final rule and the military leave entitlement, posters, forms, and FMLA opinion letters.

## **Public Sector Volunteers and FLSA**

The lead story in the winter 2007 issue of this newsletter addressed the application of the Fair Labor Standards Act to people who volunteer their time to units of government and who receive some remuneration for doing so. The article particularly discussed opinions issued by the Wage and Hour Division of the U.S. Department of Labor in which the division applied a 20 percent rule in determining whether a stipend received by a volunteer was "nominal" for purposes of the FLSA. Since that article appeared, several more opinion letters have addressed the status of volunteers under section 3(e)(4)(A) of the FLSA.

Opinion FLSA2008-13 held that EMTs employed by a county may volunteer their services to a not-for-profit local volunteer emergency crew operating in the county. Under the FLSA a person cannot volunteer his or her services to the same public agency that employs him or

her to perform those same services. Looking at the situation as a whole, the division concluded that the crew remained separate and independent of the county and that there was no evidence that the crew operated as a "sham" corporation designed to avoid the compensation provisions of the FLSA. Therefore, EMTs employed by the county could volunteer to serve with the crew.

Opinion FLSA2008-15 addressed stipends paid to volunteer firefighters. A fire protection district that used both paid and volunteer firefighters proposed to offer the volunteers a monthly stipend to reimburse them for expenses and provide a nominal fee in accordance with the FLSA volunteer provisions. To receive the stipend, the volunteers had to perform a threshold amount of service each month. FLSA regulations allow for volunteer firefighters to receive a nominal fee for their services, but the fee cannot be a substitute for compensation or tied to productivity. As mentioned above, a fee is nominal as long as it does not exceed 20 percent of the amount that would be required to hire a permanent employee to provide the same service. In the end, the division had insufficient information to determine whether the proposed stipends, although relatively small, qualified as nominal.

Opinion FLSA 2008-16 considered whether a civilian victim specialist could serve as a reserve police officer in the same police department. Under the FLSA, individuals can qualify as volunteers if they volunteer to perform different services than they are employed to perform for the same public agency. The opinion concluded that a victim specialist and a reserve police officer do not perform the same duties – the latter is engaged in law enforcement, the former is not. However, the opinion went on to discuss the amounts paid to reserve police officers and concluded that they appeared not to constitute a "nominal fee" as defined by the statute and regulations. Therefore, work as a reserve police officer would not qualify as work performed as a volunteer.

## **IRS Withholding Regulations**

Section 3402(t) of the Internal Revenue Code was added by section 511 of the Tax Increase Prevention and Reconciliation Act of 2005. It requires federal, state, and local government entities to withhold income tax when making payments to persons providing property or services in an amount equal to three percent of the payment. Under the statute, the section applies to payments made after December 31, 2010. In December 2008, the IRS announced proposed rules to implement

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# IN THE COURTS

## *Kentucky*

**Privacy exemption in Open Records Act protects anonymity of past donors who mistakenly believed public university's foundation was a private entity, but future donations are subject to disclosure because it is a public entity subject to the act.**

The *Courier-Journal* made an open records request of the University of Louisville Foundation, Inc., a fundraising arm of the University of Louisville. It sought disclosure of the identities of certain donors and the amounts of the donations. The foundation rejected the request, claiming that it was a private corporation not subject to the Kentucky Open Records Act. It also asserted that disclosure would constitute an unwarranted invasion of personal privacy of the donors. Thereafter, the newspaper sued the foundation to compel release of the records.

The trial court entered two orders. In the first order, the court held that the foundation was a public agency under the Open Records Act and that records pertaining to corporate and private foundation donors were not exempt under the personal privacy exemption. The foundation disagreed and appealed the portion of the order declaring it a public agency. However, the Court of Appeals affirmed. As to the applicability of the personal privacy exception to corporate donors, the appeals court remanded the issue to the trial court for further fact-finding regarding the specific circumstances of the donations. Meanwhile, the newspaper and the foundation continued to litigate the applicability of the personal privacy exemption to individual donors. In its second order, the trial court held that the exemption protected only the names of the individual donors who requested anonymity. On appeal, the Court of Appeals found the donors' interest in personal privacy superior to the public's interest in disclosure. Thus, the foundation could withhold the identities of all donors. The Kentucky Supreme Court granted discretionary review.

The Supreme Court began its analysis by restating the applicable test. It must first determine if the information sought is of a personal nature; then, it must determine whether disclosure would constitute a clearly unwarranted invasion of personal privacy. The nature of the information sought – the identity of each donor, that person's address, the amount of the donation, and any conditions placed upon the gift – the court held were “undoubtedly” of a personal nature. It had previously held addresses and telephone numbers were generally accepted by society as details in which an individual has at least some ex-

pectation of privacy. As to the amount and circumstances of the donation, the court noted that there “is a widely held societal belief that matters of personal finance are intensely private and closely guarded.”

Turning to the issue of whether disclosure of that information would constitute a clearly unwarranted invasion of personal privacy, the court said that “the policy of disclosure is purposed to subserve the public interest, not to satisfy the public's curiosity.” The public has a legitimate interest in the university's operations that extends to the operations of its foundation. Donations may be attempts to influence university decisions or to procure some benefit from the university such as tickets to athletic functions. Looking then to the privacy interest at stake, the court found that the privacy interests of donors who did not request anonymity was minimal and reversed the Court of Appeals on this point. The donors who requested anonymity had a heightened expectation of privacy. Until the Court of Appeals decision established the foundation's status as a public entity, it was reasonable for those donors to believe that the donation was being made to a private entity. Their privacy interest is superior to the public interest in this instance. Future donors, however, are on notice that gifts to the foundation are gifts to a public institution and are, therefore, subject to disclosure regardless of any request for anonymity. *Cape Publications, Inc. v. University of Louisville Foundation, Inc.*, 260 S.W.3d 818 (Ky. 2008).

## *Kentucky*

**Equitable estoppel does not prevent a governmental entity, which previously permitted development of a subdivision in a manner contrary to applicable zoning laws and regulations, from denying further improper development.**

Before the advent of Kentucky's current zoning enabling act and the applicable local zoning ordinance, a developer began development of a residential subdivision consisting of one-acre lots. When enacted, the zoning ordinance set the minimum lot size at 10 acres. Nevertheless, over the course of many years and contrary to the applicable regulations, the authorities continued to approve additional one-acre lots in the subdivision. When the developer submitted its latest plan, the authorities denied approval because the original plan had long since expired and was ineligible for reapproval.

The developer then sued, contending that the local government was estopped to deny the request because of the prior approvals. The trial court disagreed. On appeal,

the Court of Appeals held that the doctrine of equitable estoppel may be invoked against a governmental entity only under exceptional circumstances, but the facts of this case did not rise to that level. The Kentucky Supreme Court granted discretionary review and affirmed.

In Kentucky, one can invoke equitable estoppel against a governmental entity in unique circumstances, but a court must find that the matter involves exceptional and extraordinary equities. The party claiming the estoppel must show a lack of knowledge of the truth as to the facts in question, good faith reliance upon the conduct or statements of the other party, and a detrimental change in position or status.

Here, the nearly four-decade delay in developing portions of the subdivision created a foreseeable possibility that zoning regulations, governmental personnel, and attitudes would change. Further, the slow pace of development was directly attributable to the developer. Moreover, improper approval cannot bind current authorities; a current governmental official is not duty bound to continue the improper acts of predecessors. The developer's proposed plan did not fit within the current zoning ordinance. Therefore, the denial was not arbitrary. Without grounds for the development, the developer's remedy is to seek an amendment. *Sebastian-Voor Properties, LLC v. Lexington-Fayette Urban County Government*, 265 S.W.3d 190 (Ky. 2008).

### **Kentucky**

#### **Pervasive fraud with respect to walk-in absentee ballots requires setting aside mayoral election.**

A mayoral election in Tompkinsville, Ky., in 2006 resulted in a one-vote margin of victory. The loser petitioned the circuit court for a recount and contested the election. A recount by the county board of elections verified the election results. In the election contest, the unsuccessful candidate alleged that the prevailing candidate conducted election activities within the protected zone around a polling place. He also alleged fraud in the conduct of walk-in absentee voting in one district.

At trial, the court found no proof of specific acts of misconduct by the prevailing candidate. However, the trial court found "pervasive" fraud with respect to the walk-in absentee voting and that a "clear majority" of those votes were tainted. In the opinion of the court, although confined to one district the taint called into question the results of the entire election. The court set the election aside, and the prevailing candidate appealed. The Court of Appeals did not agree that the fraud was so pervasive as to require setting aside the election. It directed that the court deduct the walk-in absentee votes from the total votes received by each can-

didate. The Supreme Court granted discretionary review and reinstated the judgment of the circuit court.

The Supreme Court agreed with the lower courts that fraud was present. The question for the court was whether the fraud so permeated the entire election that a winner could not fairly be determined. Taking issue with the approach of the Court of Appeals, the Supreme Court stated that the focus is not on the breadth of the fraud itself, but on its effect on the entire election. Here, although limited to one district, the fraud cast doubt on the whole. The court could not fairly identify which votes to disregard in order to declare a winner. *McClendon v. Hodges*, 272 S.W.3d 188 (Ky. 2008).

### **Michigan**

#### **Private company is a limited federal instrumentality and is immune from provisions in a city zoning ordinance that would preclude the construction of projects that further company's limited federal purpose.**

The Ambassador Bridge is an international bridge that connects Detroit, Mich., and Windsor, Ont. In 1921 Congress gave the Detroit International Bridge Company, a for-profit private company, the authority to construct, maintain, and operate the Ambassador Bridge and its approaches. When the company began to install new tollbooths and construct other improvements on the Ambassador Bridge Plaza to alleviate traffic congestion and facilitate interstate and foreign commerce, the city of Detroit sought to enforce its zoning ordinance to stop the construction. The company claimed it was immune from the zoning ordinance because it was a federal instrumentality.

The city filed for injunctive relief, which the trial court denied. It ruled that the bridge company was an instrumentality of the federal government and that the city's zoning ordinance was preempted by the federal government's demonstrated intent to control the entire bridge complex. The city appealed, and the appeals court reversed on both issues. It ruled that the bridge company could not be a federal instrumentality and that federal law did not preempt the city's zoning ordinance because the federal government did not intend to exercise exclusive control over the bridge.

The Michigan Supreme Court began its analysis by noting that being a federal instrumentality is not an all-or-nothing status. A private actor may be a federal instrumentality for one set of actions while not being a federal instrumentality for a separate set of actions. These limited federal instrumentalities are immune from state laws and local regulations only when they are acting in furtherance of the limited federal purpose assigned by Congress in instances where the state law or

local regulation, if applied, would sufficiently restrict the private entity's federal purpose.

The court acknowledged that the Ambassador Bridge was distinctly related to the federal purpose of free-flowing interstate and federal commerce. After accepting the facts as determined by the trial court, the question for the Supreme Court was whether the bridge company had been tasked to further that purpose to the extent necessary for it to be recognized as a federal instrumentality. Fashioning a test derived from *United States v. Michigan*, 851 F.2d 803, 806 (6th Cir. 1988), and *Name Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573 (2d Cir. 2000), the court concluded that it was. The court noted, however, that federal instrumentality status was limited to actions that were clearly and directly associated with the facilitation of traffic across the Ambassador Bridge. It then proceeded to hold that because the city's zoning ordinance would have completely stopped the bridge company's construction project, which was within the scope of its federal purpose, the company was immune from that particular application of the ordinance. *City of Detroit v. Ambassador Bridge Co.*, 748 N.W.2d 221 (Mich. 2008).

## Michigan

### **Marriage amendment prohibits public employers from providing health insurance benefits to their employees' qualified same-sex domestic partners.**

In 2004, Michigan voters approved a constitutional amendment providing, "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose." When the amendment took effect, several public employers already had policies or agreements in effect that extended health insurance benefits to their employees' qualified same-sex domestic partners. In response to a request for an opinion, the Michigan Attorney General concluded that these policies violated the amendment. Afterward, nonprofit organizations, unions, and public employees sought a declaratory judgment that the amendment did not bar public employers from providing the benefit.

The trial court declared that the marriage amendment did not bar the provision of health insurance benefits. They were not, the court held, "benefits of marriage." The Attorney General appealed, and the Court of Appeals reversed. The court said that a publicly recognized domestic partnership need not mirror a marriage in every respect in order to run afoul of the amendment because the amendment precludes recognition of a similar union for any purpose. The criteria

for participation in the health insurance plans were similar to those for marriage, and the public employer's recognition of a domestic partnership agreement constituted recognition of a union similar to marriage. The Michigan Supreme Court granted leave to appeal.

In the Supreme Court, the plaintiffs argued that the amendment prohibited only the recognition of a same-sex relationship as a marriage. A divided court disagreed. In the majority's view, the amendment prohibited recognition of a domestic partnership as a marriage or as a union that is similar to a marriage. A domestic partnership was a "union" within the meaning of the amendment, and it was "similar" to that of marriage even though it did not possess all the same rights and responsibilities. The important question was not whether domestic partnership and marriage gave rise to the same legal effects but whether the public employers recognized the union as similar to marriage "for any purpose." The majority concluded that they did. Two members of the court dissented, arguing that the amendment prohibited nothing more than the recognition of same-sex marriages or similar unions and that the amendment did not intend to prohibit public employers from offering health care benefits to the same-sex partners of their employees. *National Pride at Work, Inc. v. Governor of Michigan*, 748 N.W.2d 524 (Mich. 2008).

## Michigan

### **County's use of land does not take priority over township ordinances where use is ancillary to, but not encompassed in, the use of county's building on the land.**

Berrien County leased a property for a 20-year term with the intention of using it for a firearms training facility. The plan included a building, parking lot, light poles, and driveway. The facility would also have numerous outdoor shooting ranges, the operation of which would contravene the local township zoning and noise ordinances. Owners of property close to the shooting ranges sought a declaratory judgment to stop operation of the facility. The trial court granted the county's motion for summary disposition; the Court of Appeals affirmed in a split decision.

The Michigan Supreme Court viewed the subsequent appeal as a case of first impression. The court explained that the case required it to analyze a conflict between the powers given to intermediate government entities and the powers given to local government entities, specifically a county's power under the County Commissioners Act and the township's power under the Township Zoning Act and Township Ordinance Act.

Under Michigan law, the test for whether a govern-

mental unit is immune from the provisions of a local zoning ordinance depends upon legislative intent. Relying on *Pittsfield Charter Twp. v. Washtenaw Co.*, the county claimed that it had priority over the township's regulations. *Pittsfield* held that the County Commissioners Act gives counties priority over local regulations that inhibit a county's power to site and erect county buildings. However, *Pittsfield* did not decide the scope of that priority. That was the question before the court, *i.e.*, whether the priority extended to ancillary uses such as the shooting ranges. In this instance, the court ruled, the priority is limited to the siting of county buildings.

In so holding the court found it necessary to "articulate a standard to test whether a particular ancillary land use is encompassed in the use of the building such that it is given priority under the [County Commissioners Act]." In the court's view, that turned on whether the ancillary use was indispensable to the building's normal use. Here the court found that the outdoor shooting ranges complemented the building's use (classroom training and indoor practice), but were not indispensable. The outdoor ranges did not have to be located next to the building. *Herman v. Berrien County*, 750 N.W.2d 570 (Mich. 2008).

## Michigan

### **Public employees' home addresses and telephone numbers are exempt from disclosure under privacy exemption in state's Freedom of Information Act.**

The Michigan Federation of Teachers submitted to the University of Michigan a request under the state Freedom of Information Act. With respect to every university employee, it asked for their first and last names, job titles, compensation rates, work addresses and work phone numbers, and home addresses and home phone numbers. The university provided nearly all of the information sought by the federation, including the home addresses and telephone numbers of its employees who had given the university permission to publish that information in the faculty and staff directory. The university did not turn over the home addresses and telephone numbers of those employees who had withheld permission to publish that information in the directory. The university claimed that release of those addresses and numbers would constitute an unwarranted invasion of the privacy of those employees. The federation sued the university to compel the release of the remaining home addresses and telephone numbers.

The trial court granted summary disposition in favor of the university saying, "one would be hard pressed to argue that disclosure 'contributes significantly to public understanding of the operations or activities of the gov-

ernment.'" The Michigan Court of Appeals reversed, holding that the addresses and numbers were not of a personal nature because they did not reveal "intimate or embarrassing details of an individual's private life." In granting leave to appeal, the Michigan Supreme Court asked the parties to address whether it should reconsider its construction of the statute in light of changing circumstances such as the advent of a national do-not-call registry and the rising problem of identity theft.

The court began its analysis with a review of the Freedom of Information Act and its privacy exemption, which permits a public body to withhold information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy. Invocation of the privacy exemption required first that the information had to be of a personal nature, *i.e.*, information that was embarrassing, intimate, private, or confidential. Then, its disclosure had to constitute a clearly unwarranted invasion of an individual's privacy when balanced against the core purpose of the law – contributing significantly to public understanding of the operations or activities of the government.

In the instant case, the court noted that the "potential abuses of an individual's identifying information, including his home address and telephone number, are legion." Offering a number of illustrations why, the court concluded that an individual's home address and telephone number were "information of a personal nature." The court also concluded that disclosure would be an unwarranted invasion of an individual's privacy under the core-purpose test. Disclosure of employees' home addresses and telephone numbers to plaintiff would reveal little or nothing about a governmental agency's conduct, nor would it further the stated public policy undergirding the Michigan FOIA. *Michigan Federation of Teachers & School Related Personnel, AFT, AFL-CIO v. University of Michigan*, 753 N.W.2d 28 (Mich. 2008).

## Ohio

### **Statute prohibiting sex offenders of residing within 1,000 feet of any school premises did not apply retroactively to offender who committed offenses prior to statute's effective date.**

In 2003, the Ohio General Assembly enacted a law prohibiting a sexual offender from residing within 1,000 feet of a school. After the law took effect, a prosecutor sought an injunction against a man convicted of sexual imposition in 1995 and of sexual battery in 1999. The prosecutor alleged that the offender's residence was within 1,000 feet of a school and asked the court to enjoin him from continuing to occupy the house the offender and his wife co-owned and had lived in since 1991.



The trial court permanently enjoined the offender from occupying his home. Affirming, an appellate court held that the statute could be applied to an offender who bought his home and committed his offense before the effective date of the statute. The decision conflicted with that of another appellate court, and the Ohio Supreme Court agreed to resolve the conflict.

By statute in Ohio, a statute is presumed to be prospective in its operation unless it is expressly retrospective. Under the Ohio constitution, a retroactive statute is unconstitutional if it impairs vested substantive rights, but not if it is merely remedial in nature. When measuring a statute against these provisions, the courts first consider whether the law is expressly retroactive. If the statute is silent on the question of its retroactive application, it applies prospectively only. The court ultimately rejected the readings advanced by the prosecutor and the Attorney General. Acknowledging that the language of the statute in question was ambiguous as to its retroactive application, ambiguous language is insufficient to overcome the presumption of prospective application. That made it unnecessary to address the constitutional prohibition against retroactivity. Because the law was not expressly made retroactive, it did not apply to an offender who bought his home and committed his offense before the effective date of the statute. *Hyle v. Porter*, 882 N.E.2d 899 (Ohio 2008).

## Ohio

### **Ordinance prohibiting harboring of unreasonably loud or disturbing animals is constitutional.**

A dog owner was convicted of harboring an unreasonably loud or disturbing animal in violation of a city ordinance. The ordinance provided: “No person shall keep or harbor any animal which howls, barks, or emits audible sounds that are unreasonably loud or disturbing and which are of such character, intensity and duration as to disturb the peace and quiet of the neighborhood or to be detrimental to life and health of any individual.”

The owner appealed her conviction, alleging that the ordinance was unconstitutionally vague. The court of appeals upheld the ordinance and the conviction. The decision, however, gave rise to a conflict with the judgment of another appeals court. The Supreme Court granted review.

To prevail against the ordinance, the challenger had to show that a person of ordinary intelligence would not understand what she was required to do and had to prove beyond a reasonable doubt that she could not reasonably understand that it prohibited the acts in question. Here, the owner urged the court to adopt the

reasoning of the appeals court that struck down a nearly identical ordinance of another city. All dogs will bark, she argued, and the reasonableness of the noise is a subjective matter. No one can know if a dog’s barks are of such intensity and duration as to disturb the peace and quiet of the neighborhood.

The court instead concluded that the ordinance before it contained an objective standard, prohibiting on those noises that were “unreasonably loud or disturbing.” The ordinance provided specific factors to be considered to gauge the level of the disturbance. “We recognize,” said the court citing the U.S. Supreme Court, “that there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with.” *Columbus v. Kim*, 886 N.E.2d 217 (Ohio 2008).

## Ohio

### **“Special relationship” exception does not operate independent of tort liability act so as to subject political subdivision to liability for injury allegedly caused by its operation of a public children services agency.**

Pursuant to court order, a minor child was in the temporary custody of the Cuyahoga Department of Children and Family Services. While in the department’s custody, the child’s father was allowed to have limited, supervised visits with the child. During one of the supervised visits, the father allegedly assaulted the child. Indicted in connection with the assault, the father pleaded guilty to a charge of gross sexual imposition and stipulated that he was a sexually oriented offender. The child’s mother and grandmother sued the department, its director, and its employees, alleging that they had breached their duty to protect the child from the father’s sexual abuse during the supervised visit.

The trial court granted summary judgment to the defendants, who had argued they had statutory immunity. The court of appeals reversed, holding that there were genuine issues of material facts pertaining to all of the defendants. The court determined that the “special relationship” exception created an issue of fact regarding the government’s immunity. In addition, the court held that reasonable minds could conclude that the individuals involved acted recklessly when the visit was conducted in a way that allowed the father to sexually assault his daughter. If an individual’s actions were proven reckless, individual immunity would not apply. The Supreme Court accepted a discretionary appeal.

The court first addressed the liability of the department and held that the common law special relationship exception did not apply. In this instance, the court found the department to be a political subdivision performing a governmental function. Political subdivisions generally are not liable in damages for causing personal injuries, subject to five exceptions in the Political Subdivision Tort Liability Act. The court found none of the exceptions applicable. The special relationship exception is not among the codified exceptions to a political subdivision's general immunity and does not operate as an independent exception to the rule. The exception, and the public-duty rule of which it is a part, is irrelevant unless the act permits the claim.

Turning to the individual defendants, the statute confers immunity unless the employee's actions are "manifestly outside the scope of employment" or are "malicious, in bad faith, or wanton or reckless." Reckless in this context means "knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent." The court remanded the case for further proceedings regarding what involvement the employees had in the supervised visit. *Rankin v. Cuyahoga County Dept. of Children and Family Services*, 889 N.E.2d 521 (Ohio 2008).

## Ohio

### **Landlord is not liable for failing to take corrective action against a tenant whose racial harassment of another tenant created a hostile housing environment.**

Fontella Harper and Beverly Kask lived in neighboring apartments in a public housing development in Akron, Ohio. After a series of confrontations between the Harper and Kask families, the Ohio Civil Rights Commission filed a complaint in the Court of Common Pleas against the Akron Metropolitan Housing Authority. The complaint alleged that the authority engaged in unlawful discrimination based on race because it failed to take corrective action against the harassment of Harper's family by Kask's family. The trial court granted summary judgment in favor of the authority. Reversing, the court of appeals held that the trial court erred in not recognizing a cause of action for hostile housing environment. Describing the case as one of first impression, the Supreme Court reversed the court of appeals.

The court began by distinguishing the case from a claim in which the tenant alleged that the landlord by its own actions created the hostile housing environment. The issue before the court was whether the landlord could

be liable for failing to take action against a tenant whose racial harassment of another tenant caused the hostile housing environment. The court noted that Ohio's anti-discrimination statute, Ohio Revised Code § 4112.02(H) (4), does not expressly recognize such a cause of action against a landlord. Nevertheless, the appeals court found support for the cause of action in federal housing discrimination and Ohio workplace harassment cases.

The Supreme Court disagreed with the lower court that the federal housing cases it relied upon supported this kind of hostile housing environment claim either because they were factually distinct or because their rationales were unconvincing. Similarly, the Supreme Court thought the lower court's reliance on hostile work environment cases was misplaced. The court rejected the argument that its precedents in the employment context required it to recognize the cause of action in the landlord-tenant circumstances of this case. The agency principles that govern employer-employee liability have no parallel in the context of landlord-tenant disputes. Further, the amount of control that a landlord exercises over a tenant is not comparable to that which an employer exercises over an employee. *Ohio Civil Rights Commission v. Akron Metro Housing Authority*, 892 N.E.2d 415 (Ohio 2008).

## Ohio

### **Employees of a city police department are entitled to a writ of quo warranto to oust a police chief and a writ of mandamus to compel a competitive promotional examination for police chief.**

In 2004 the city of Fostoria, Ohio, terminated the employment of its police chief. It conducted a competitive promotional examination to fill the position. Two men took the test and one passed it. The city appointed that individual as acting police chief, but he declined appointment to the vacant, full-time position. The city's civil service commission then suspended the competitive examination requirement and adopted revised job criteria for the position. That led the collective bargaining representative for the department's officers to sue, asking that the civil service commission conduct a competitive promotional examination to fill the position. The court denied the request on the ground that an exam was impracticable and that the position could best be filled by a "designated person of high and recognized attainments in qualities of scientific, managerial, professional or educational character," which justified suspension of the competitive-examination requirements. Shortly thereafter, the city hired someone from outside its police department as chief of police.

The association subsequently appealed, and the court

of appeals held that the civil service commission had not demonstrated the “exceptional circumstances” necessary to justify a suspension of the competitive examination requirement. On remand, the trial court held that there was no authority by which it could remove the new police chief, but that the city had to hold a competitive examination to fill the position. Subsequently, the association asked the civil service commission to remove the incumbent chief and offer an examination to the department’s current officers. The commission refused, interpreting the court’s decision to allow it to do nothing and continue the chief in his position.

Thereafter, officers of the department filed a petition in the court of appeals seeking a writ of quo warranto to oust the chief and a writ of mandamus to compel the commission to offer a competitive examination for promotion. The city and the commission moved to dismiss on the grounds that the officers lacked standing to bring their quo warranto claim and that their mandamus claim lacked merit because of a recent charter amendment that superseded the examination requirement. The court of appeals granted the motion, and the officers appealed as of right.

The Supreme Court explained that writs like quo warranto and mandamus provide extraordinary remedies where there is no adequate remedy in the course of law. The court disagreed with the court below that the association’s action for injunctive and declaratory relief provided an adequate remedy because those proceedings would not have resulted in the ouster of the chief. Quo warranto was appropriate in this instance. Similarly, the Supreme Court disagreed with the lower court’s dismissal of the mandamus claim. Injunctive and declaratory relief would not have compelled the city to administer a competitive promotional examination. Subsequent amendments to the city charter did not apply to the vacancy that should have been filled in accordance with prior law. *State ex rel. Deiter v. McGuire*, 894 N.E.2d 680 (Ohio 2008).

## Ohio

### **City ordinance prohibiting licensed owners from carrying concealed handguns in city parks conflicted with general law governing licenses to carry concealed handguns and was not a valid exercise of its power of home rule.**

Under Ohio law, a licensed handgun owner “may carry a concealed handgun anywhere in this state.” The licensing statute provides a list of exceptions to this general right that specifies locations where a licensed handgun owner may not carry a concealed handgun. These

include airport passenger terminals, school safety zones, courthouses, colleges and universities, and churches, among others. Public and private employers may also restrict gun possession on their property.

Not long after the licensing statute took effect, the city of Clyde passed an ordinance making it a misdemeanor to carry a concealed handgun within a city park. A citizens’ group then filed an action challenging the ordinance. The trial court granted summary judgment to the city on the authority of *Toledo v. Beatty*, a court of appeals decision upholding a similar ordinance as a valid exercise of the city’s power of home rule. While that decision was on appellate review, the Ohio General Assembly enacted a law that gave Ohioans the right to carry a handgun unless federal or state law prohibited them from doing so. The court of appeals concluded that the statute preempted the city ordinance; a municipal ordinance could not infringe on that broad statutory right. The city appealed.

The Supreme Court analyzed the ordinance for consistency with the Home Rule Amendment to the Ohio Constitution. The analysis involved three steps. The first step is to determine if the ordinance involved an exercise of local self-government or an exercise of local police power. If the ordinance involves an exercise of local self-government, the analysis stops. If the ordinance is an exercise of police power, the second step requires a determination of whether a statute is a general law. If so, the ordinance must give way if it conflicts. The third step is to determine whether there is a conflict.

The city argued that regulation of city parks was a matter of local self-government. However, the Supreme Court held that the ordinance did not relate solely to the government and administration of the internal affairs of the city. Rather, the plain language of the ordinance suggested that it related to health, safety, and general welfare of the public. As further evidence of this, the court pointed to the fact that the ordinance imposed a penalty for its violation “aimed at curbing the regulated behavior for the general welfare of a municipality’s citizens.”

The city argued in the alternative that, even if the ordinance was an exercise of police power, the statute at issue was not a general law. The Supreme Court disagreed. The state law in question was part of a statewide comprehensive legislative enactment, and it applied uniformly throughout the state. Further, it represented both an exercise of the state’s police power and was an attempt to limit the legislative power of a municipality. In addition, it prescribed a rule of conduct for the citizens of the state. From there the court had no difficulty concluding that the ordinance was in conflict with the statute. The statutory list of exceptions did not include public parks. Thus, the ordinance prohibited that which the statute impliedly permitted. Three members of the

court dissented. *Ohioans for Concealed Carry, Inc. v. Clyde*, 896 N.E.2d 967 (Ohio 2008).

## Ohio

### **Statute allowing permanent designation as a sexual predator and requiring lifetime registration could apply retroactively to offender who committed offenses prior to statute's effective date.**

In 2003 Ohio amended its Sexual Offender and Registration Notification Law. The amendments modified most of the legislative findings and declarations so that they applied beyond then-covered sexual predators and habitual sex offenders to all offenders who commit sexually oriented offenses and to all offenders who commit a child-victim oriented offense. A person subject to the amendments must verify his residential, school, and work addresses every 90 days for life. The amendments also require information on the person to be a public record available on a law-enforcement database and restrict where the person may live. Designation as a sexual predator is permanent.

After the amendments took effect, a court classified as a sexual predator a prisoner who in 1990 had been convicted of and was serving time for three counts of rape and one count of kidnapping. The prisoner appealed the classification, arguing that as applied to him the amendments violated the Ex Post Facto Clause of the United States Constitution and the retroactivity clause of the Ohio Constitution because the amendments were enacted after he committed his crimes and after his adjudication. The court of appeals rejected his claim and affirmed the classification. The Supreme Court asserted discretionary jurisdiction over the appeal.

The prisoner first challenged the statutory provision making the designation as a sexual predator and the duty to register permanent for the life of the person. An earlier version of the statute allowed for review of the designation by a judge and the possible removal of the classification. Second, the prisoner challenged the statutory provision requiring that offenders personally register with the sheriff of the county in which they resided, the county in which they attended school, and the county in which they worked. Previous statutes required registration only in the county of residence. Third, the prisoner challenged the statutes that expanded the community notification requirements. After the amendments, any statements, information, photographs, and fingerprints provided by the offender were public records and included in the Internet database maintained by the Attorney General.

The court began with a review of its test of retroactivity – it first decides if the General Assembly expressly

made the statute retroactive, then it asks whether the statute restricts a substantive right or is remedial. If it affects a substantive right, the statute offends the state constitution. The court concluded, particularly in light of its earlier decision in *State v. Cook*, that the General Assembly intended the amendments to apply retroactively. Then, looking to the legislative intent, the court held the statute to be remedial rather than punitive. Even though for offenders the consequences of the amendments are harsh and burdensome, the changes were not enough to transform the statute into a punitive one. Classification as a sexual predator, for example, the court saw as a consequence of the offender's criminal acts rather than as a form of punishment for them, a view confirmed by rulings of the U.S. Supreme Court and appellate courts in other states. "The sting of public censure does not convert a remedial statute into a punitive one," said the court.

Neither did the amendments offend the Ex Post Facto Clause of the U.S. Constitution. Relying on a recent U.S. Supreme Court case, *Seling v. Young*, the court noted that the constitutional prohibition against ex post facto laws concerns criminal matters only and has no application to civil laws. Since the amendments were civil, remedial statutes, they was no basis for the prisoner's ex post facto claim. *State v. Ferguson*, 896 N.E.2d 110 (Ohio 2008).

## Ohio

### **County board must make reasonable efforts at its expense to recover e-mails requested under the Public Records Act and deleted in violation of records retention policy.**

Prompted by a comment following a meeting at which the Seneca County Board of Commissioners approved a plan for demolition of the county courthouse, the Toledo Blade Company asked to see all incoming and outgoing e-mails for the commissioners within a stated timeframe. The response from the county contained noticeable gaps because the commissioners admittedly deleted the e-mails despite the fact that the county records retention schedule required that they be saved. Later, with the help of a contractor, the board was able to recover additional responsive e-mails and provide them to the company. However, the board did not provide e-mails that, according to the contractor, it might also be possible to retrieve using expensive forensic tools. The paper then filed a mandamus action asserting that, when a public office unlawfully destroys public records the contents of which can be recovered or restored, the office has an obligation to take the steps necessary to do so and make them available under the Public Records Act.

The Supreme Court described the case as presenting

a novel public records claim, *i.e.*, the obligation under the Public Records Act of a public office that deletes records in violation of a records retention policy. In the context of a public records claim, said the court, it is manifest that a public office violates the act by deleting e-mails that it has a statutory obligation to maintain. Thus, the court had to determine the appropriate factors governing when a public office had a duty to recover the content of the e-mails and provide access.

First, said the court, one must determine if the e-mails have been destroyed since there is no duty to create records that no longer exist. Although deleted by the user, data and files on a computer are frequently recoverable. As long as they are on the computer drives, these deleted files retain their status as public records. Second, said the court, the company had to make a *prima facie* showing that the county deleted the records in violation of the records retention policy. Here, the gaps in the responsive e-mails provided by the board raised a reasonable inference to that effect. So, too, did a commissioner's admission that he had only recently begun keeping work-related e-mails. The board offered nothing to rebut the inference of a violation.

Third, said the court, there must be some evidence that recovery of the deleted records may be successful. Here, expert testimony established that recovery was frequently possible by scanning a hard drive with the appropriate forensic data software and hardware. Fourth, said the court, the mere fact that the cost of the recovery services may be expensive does not bar the court from ordering that recovery be attempted. Insofar as the e-mails still exist on the commissioners' computers, they remain public records.

That left for the court the question of who should bear the expense of the forensic analysis. The board asserted that the Public Records Act required the company to pay the cost. The court, however, recognized that several factors supported placing the expense on the board. These included that under the act requestors need not pay a fee to inspect, the board failed in its duty to maintain the records, public policy favors liberal disclosure, expense does not justify noncompliance, and the strength of the public right to access. On balance, the court thought these factors outweighed the factors supporting having the company bear the cost. The board must make a reasonable effort to recover the deleted e-mails at its expense. *State ex rel. Toledo Blade Co. v. Seneca County Board of Commissioners*, 899 N.E.2d 961 (Ohio 2008).

### *Sixth Circuit*

**School is not liable for peer-on-peer harassment of disabled student where student fails to show that school**

**and its administrators were deliberately indifferent to the harassment.**

A middle school student in Kentucky who suffered from several disabilities complained that he was being bullied and harassed. In response, the school administration took action it thought to be appropriate in the circumstances. The student left the school after successful completion of the sixth, seventh, and eighth grades, then filed suit against the school's operator, director, and psychologist. The suit alleged that the school and its administrators failed adequately to respond to the incidents of bullying and harassment and the resultant failure to maintain a safe educational environment for him amounted to discrimination based on his disability. After the district court dismissed his claims, the student appealed.

The Court of Appeals explained that the student's claims under the Americans with Disabilities Act and the Rehabilitation Act asserted two types of violations. First was the claim that the school's actions in responding to and investigating his complaints of bullying and harassment were discriminatory. Second was the claim that the peer-on-peer harassment he experienced created a hostile learning environment from which the school failed adequately to protect him. In evaluating the claims, the court employed a five-part test: (1) the plaintiff is an individual with a disability, (2) he or she was harassed based on that disability, (3) the harassment was sufficiently severe or pervasive that it altered the condition of his or her education and created an abusive educational environment, (4) the defendant knew about the harassment, and (5) the defendant was deliberately indifferent to the harassment.

Here, the student failed to satisfy the fifth part of the test. The record showed that the school responded to all of the alleged incidents of which it was aware and that it took affirmative steps to address the incidents. The court found nothing in the record to suggest that the school was deliberately indifferent to the situation or that it had an attitude of permissiveness that amounted to discrimination. The school's differing responses to the student's various complaints were not evidence of disparate treatment. Instead they were evidence that the differences with respect to the level and type of harassment warranted different responses. The court affirmed summary judgment in favor of the school and the administrators. *S.S. v. Eastern Kentucky University*, 532 F.3d 445 (6th Cir. 2008).

### *Sixth Circuit*

**Warrantless searches of property out of compliance with a land use ordinance offend Fourth Amendment, and officer has no valid claim of qualified immunity.**

When a Michigan township received a complaint about the condition of a property, a township land ordinance enforcement officer investigated and discovered inoperable vehicles and “castoff material” in the yard around the house. The officer notified the property owner that the owner was in violation of a local land use ordinance. When compliance efforts failed, the township filed misdemeanor criminal charges against the owner to which the owner pleaded guilty. The township agreed that the owner would have 14 days to clean up the property or face 30 days in jail. To ascertain compliance, the officer twice entered the property without a warrant and determined that the owner remained out of compliance. The owner went to jail, during which time the officer again entered the property without a warrant and again found non-compliance. After the owner’s release from jail, the officer continued to enter the property and cite the owner for violations of the land use ordinance. The owner subsequently filed suit alleging that the warrantless inspections violated the Fourth Amendment. When the district court rejected the officer’s claim of qualified immunity, the officer appealed.

The Court of Appeals refused to consider the inspections that occurred prior to the entry of the guilty plea and the owner’s incarceration because to do so would undermine that plea and sentence. However, the court did address the subsequent searches.

At the outset of its analysis the court noted that the Fourth Amendment “provides a potent shield against warrantless searches and seizures within the curtilage of a person’s home.” [See “Residential Inspections without Warrants,” *Local Government Law News* (Spring 2006).] This is especially so where the investigation is of a criminal nature, rather than for administrative or regulatory purposes. The investigations at issue here were criminal – done, in fact, at the request of the same prosecutor who undertook the proceedings that led to the earlier incarceration. Nevertheless, the township argued that the searches were not sufficiently intrusive to fall within the protections afforded by the Fourth Amendment.

The court rejected this argument for two reasons. First, the inspections were not part of a periodic or area inspection plan. The officer targeted his investigation at the property owner after receiving a complaint about the property’s conditions and continued inspections to ascertain compliance. Second, the fact that the search was not more intrusive did not obviate the requirement of the Fourth Amendment that, absent exigent circumstances, government officials may not conduct a criminal investigation within the curtilage of a person’s home without a warrant. The court agreed with the district court that the officer had no valid claim of qualified immunity. *Jacob v. Township of West Bloomfield*, 531 F.3d 385 (6th Cir. 2008).

## *Sixth Circuit*

### **Supervisors who fired probationary employee allegedly based on employee’s political party affiliation are not entitled to qualified immunity.**

Linda Back, the incumbent grants and contracts administrator, was the only civil service system employee in the Kentucky Office of Homeland Security during the transition from a Democratic to a Republican administration. The newly appointed Executive Director gave Back, a Democrat, an increasing level of administrative responsibility and talked to her about upgrading her position. However, there was tension between her and other Republican-appointed supervisors, particularly with Joel Schrader, the Deputy Director. She objected to his partisan considerations in awarding homeland security grants, and his response was to exclude her from the process of interviewing prospective employees. The Executive Director eventually promoted Back to another civil service position, but she and Schrader continued to clash over his administration of the federal grants. After the Executive Director left the agency and while she was still in probationary status in her new position, the new Executive Director, Keith Hall, terminated her employment. Back then filed suit alleging that she was fired for her political affiliation and in retaliation for her complaints about Schrader’s use of partisan political considerations in awarding grants.

Relying on *Garcetti v. Ceballos*, the district court dismissed Back’s freedom of speech claim regarding the grant awards. [See “Supreme Court Narrows Speech Protection for Government Workers,” *Local Government Law News* (Fall 2006).] However, the district court held that Back had adequately alleged a clearly established constitutional violation on the political affiliation claim and denied the qualified immunity requested by Schrader and Hall. Schrader and Hall appealed. The Court of Appeals agreed that qualified immunity was not appropriate at this stage of the case.

Current and aspiring public employees have the First Amendment right to be free from hiring and firing practices based on political affiliation unless the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved. Based upon the complaint, the court determined that Back’s position was one for which political affiliation was irrelevant. Aside from the nature of the tasks involved, the court noted that the position was in the classified civil service. Said the court, “We have long given presumptive deference to a state legislature’s determination that a position ‘should be classified as ... nonpolitical.’”

This right to be free from termination based on her

political affiliation is well established. The court rejected the idea that to be well established required a decision about the particular position at issue. The absence of so precise a holding does not prevent the law from being clearly established. Further, while a probationary employee may be fired for no reason, he or she cannot be fired for an unconstitutional reason. No reasonable official in Hall's or Schrader's position could have believed that her firing on that basis was lawful. *Back v. Hall*, 537 F.3d 552 (6th Cir. 2008).

### *Sixth Circuit*

#### **Procedure used by police department when rehiring of officer returning from active military service violated officer's rights under Uniformed Services Employment and Reemployment Rights Act of 1994.**

A police officer who left the Metropolitan Police Department in Nashville, Tenn., for active duty with the United States Army sought reemployment with the department after completion of his military service. In his complaint, the officer alleged that the department violated his rights under USERRA because the department delayed rehiring him in order to subject him to the department's return-to-work process, did not properly rehire him because it did not place him in the position to which he was entitled, and impermissibly denied him the ability to work off-duty security jobs. After a trial, the district court entered a judgment for the department; the officer appealed.

The court noted initially that, because USERRA was enacted to protect the rights of veterans and members of the uniformed services, it must be broadly construed in favor of its military beneficiaries. For the purposes of this case, said the court, USERRA performs four key functions. First, it guarantees returning veterans a right of reemployment after military service. Second, it prescribes the position to which such veterans are entitled upon their return. Third, it prevents employers from discriminating against returning veterans because of their military service. Fourth, it prevents employers from firing without cause any returning veterans within one year of reemployment.

On the reemployment claims, the Sixth Circuit held that the officer was entitled to summary judgment. The court concluded that it would be inconsistent with the goals of USERRA to prevent the officer from exercising his right to reemployment because he failed to provide certain documentation. Having granted the employer the right to access his records, the officer complied with the documentation requirement. The employer then was not permitted to limit or delay the officer's return

to work by subjecting the officer to its return-to-work process. Not only did this employer delay reemployment, it also limited and withheld benefits to which the employee was entitled under the statute.

Regarding the discrimination claims, the court focused on the off-duty employment and reversed the trial court. The court held that the ability to engage in off-duty security work was the type of benefit protected under USERRA. The court concluded that the city's denial of permission to work off-duty was motivated by an improper purpose. In the opinion of the court, the evidence supported the conclusions that the employer's motivation concerned the officer's conduct in military service. The court remanded the matter to the district court for a determination of the claim. *Petty v. Metropolitan Government of Nashville-Davidson County*, 538 F.3d 431 (6th Cir. 2008).

### *Sixth Circuit*

#### **Sheriff's firing of deputy sheriff after deputy declared candidacy for sheriff's office did not violate deputy's First Amendment rights.**

Paul Parsley, the incumbent sheriff of Bullitt County, Ky., fired deputy sheriff David Greenwell when the sheriff learned that the deputy intended to run against him in the next election. In response, the deputy filed suit against the sheriff alleging a violation of the deputy's constitutional right to run for political office. The district court granted summary judgment to the sheriff, and the deputy appealed. The Court of Appeals affirmed on authority of its earlier decision in *Carver v. Dennis*.

*Carver* was a case in which a county clerk terminated her deputy clerk when the deputy clerk announced her intention to run in the next election. The *Carver* court described the issue in that case as whether the deputy had a First Amendment right to run against the incumbent in the next election and still retain her job. In *Carver* the court said that the First Amendment does not require an official to "nourish a viper in the nest." The First Amendment right of public employees to speak out on matters of public concern did not extend to candidacy alone. In the instant case, the court found nothing in the record to suggest that the sheriff's termination of the deputy was the result of anything other than the deputy's rival candidacy, thus *Carver* controlled. *Greenwell v. Parsley*, 541 F.3d 401 (6th Cir. 2008).

### *Sixth Circuit*

#### **Statute prohibiting telecommunications providers from separately stating tax on bill to purchaser violates providers' free speech rights.**

In 2005 Kentucky enacted a statute taxing the gross revenues of all telecommunications providers. The law also stated that the provider must not collect the tax directly from the purchaser nor separately state the tax on the bill to the purchaser. Two telecommunications providers separately sued Kentucky officials seeking a declaration that the no-stating-the-tax clause and the no-direct-collection clause violated the First Amendment. The district court granted summary judgment to the providers, and the state appealed. The Court of Appeals decided that the former clause violated the First Amendment, but the latter did not.

Conceding that the no-stating-the-tax clause restricted speech, initially the court tried to decide whether to treat the speech as commercial speech or political speech. Ultimately it could not decide, saying, "It remains difficult to pin down where the political nature of these speech restrictions ends and the commercial nature of the restrictions begins." In the end, however, it did not matter because the court found that the law did not survive even the less stringent test applicable to

commercial speech announced in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*. Saying that Kentucky had done little to justify the ban, the court reasoned that the restriction did not directly advance the state's asserted purpose of avoiding confusion over whether the consumer or the provider bore the legal responsibility for the tax. Moreover, the court criticized the state's resort to regulating speech noting that it was the first strategy the government thought to try when it should have been the last.

Turning to the no-direct-collection clause, the court concluded that it referred to non-expressive conduct rather than to speech. It was, therefore, beyond the protection of the First Amendment. That meant that the court had to decide whether the two provisions could be severed, and it decided that they could be. One barred direct collection of the tax regardless of how it was stated and the other barred separately stating the tax regardless of how it was collected. *BellSouth Telecommunications, Inc. v. Farris*, 542 F.3d 499 (6th Cir. 2008).

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the provisions of §3402(t). The proposed regulations provide rules about which government entities are subject to the requirement of withholding, which payments are subject to withholding, when withholding is required on such payments, and how government entities pay and report the tax to the IRS. The proposed regulations also include transition rules providing relief from liability for the tax imposed with respect to payments under existing contracts.

### Genetic Information Nondiscrimination Act

In May 2008 President Bush signed into law the Genetic Information Nondiscrimination Act of 2008. The act forbids insurance companies and employers from discriminating against an individual based on his or her genetic information. The law expands the anti-discrimination protections of Title VII of the Civil Rights Act to prohibit employers from discriminating in hiring, firing, and other activities based on genetic information, including a family history of a particular disease. GINA amends or touches upon many laws including the Employee Retirement Income Security Act of 1974 (ERISA), the Public Health Service Act, the Internal Revenue Code of 1986, Title XVIII (Medicare) of the Social Security Act, and the Health Insurance Portability and Accountability Act of 1996 (HIPAA). The parts of

the law relating to health insurers will take effect by May 2009, and those relating to employers will take effect by November 2009. The Equal Employment Opportunity Commission recently proposed regulations to implement Title II of the act, which pertains to employment discrimination. The proposal appeared in the Federal Register for March 2, 2009.

### Smart Planning for Smart Growth Act of 2009

Rep. Doris Matsui introduced H.R. 1780, the Smart Planning for Smart Growth Act of 2009. According to Rep. Matsui's office, the act aligns infrastructure and land use planning with greenhouse gas reduction goals to preserve resources and fight climate change. Specifically, the legislation directs and provides grants to states and metropolitan planning organizations to develop and implement land use and transportation plans that set reduction goals from mobile sources, to invest in public transit and increase ridership, and to reduce vehicle miles traveled through more coordinated land use planning. The grants would also encourage the use of retrofit technologies and early replacement of polluting vehicles, engines, and equipment, create infrastructure for intermodal freight and shipping, and implement creative telecommuting, parking, and travel demand strategies.



# ETHICS SPOTLIGHT

## Conflicts of Interest

People who enter government service bring with them their backgrounds and experiences. Implicit in this is the potential for conflicts of interest. In itself, this is neither wrong nor unusual. Still, the law does not permit a public servant to place himself or herself in a position that will expose him or her to the temptation of acting in any manner other than in the best interests of the public. 63C Am. Jur. 2d *Public Officers and Employees* § 252.

Conflicts of interest can be either direct or indirect and either financial or non-financial. The direct financial conflict of interest, such as a contract between a business owned by a public official and the government in which the official serves, is the easiest to see. It is the kind of conflict most commonly proscribed by statutes and codes of ethics and most often addressed in cases and administrative opinions. The other kinds of conflicts of interest are more subtle and more rarely addressed.

When a member of a governing body acts in a matter that directly or immediately affects him or her individually, public policy forbids sustaining the action on which the member voted. McQuillan, *The Law of Municipal Corporations* 3d § 13.35. The following case, edited for inclusion here, presented the court with a rare opportunity to apply the principle to other than a direct financial conflict of interest.

### **RANDOLPH v. CITY OF BRIGANTINE PLANNING BOARD**

963 A.2d 1224 (N.J. Super. Ct. App. Div. 2009)

[Ocean Gold Coast, a developer, submitted to the Brigantine Planning Board a preliminary site plan application to construct a hotel on property it owned. At the time, a hotel was not an allowed use under the zoning ordinance. Among those who reviewed the proposed project was Edward Stinson, a professional engineer under contract to the planning board to serve as its engineer. Concurrently, Stinson was an employee of Doran Engineering. Stinson's contract with the board contemplated that he would make use of the firm's partners and associates in providing engineering services. One of the principals of Doran Engineering was Matthew Doran, who also served as the city's zoning officer. He lived with and owned a home together with Rose Roberts, the chair of the planning board.

The planning board held two meetings on the application. Roberts chaired the first meeting, at which the board decided that the proposed hotel did not require a variance but did not decide the merits of the application. At the second meeting, William Randolph objected to Roberts continuing to participate because of her involvement with Doran. She recused herself, although she did not think their relationship to be a conflict. At the second meeting, the planning board approved the application subject to conditions.

Randolph challenged the approval, claiming in part that the board's decision should be set aside because of a conflict of interest between Roberts and Stinson. The trial court affirmed the board's approval, and Randolph appealed.]

[W]e turn to what we consider to be the dispositive issue on appeal: whether a conflict existed between Chairwoman Roberts and the Board's engineer so as to require the Board's approval to be set aside. Determining whether a conflict exists requires a case-by-case, fact-sensitive analysis.

The [Municipal Land Use Law] provides that “[n]o member of the planning board shall be permitted to act on any matter in which he has, either directly or indirectly, any personal or financial interest.” [T]he “statutory disqualification is markedly broadly couched, extending to personal as well as financial interest, ‘directly or indirectly.’” The statutory bar “is not confined to instances of possible material gain[,] but ... it extends to any situation in which the personal interest of a board member in the ‘matter’ before it, direct or indirect, may have the capacity to exert an influence on his action in the matter.”

This provision of the MLUL codifies the common-law rule that “[a] public official is disqualified from participating in judicial or quasi-judicial proceedings in which the official has a conflicting interest that may interfere with the impartial performance of his duties as a member of the public body.” [There are] four situations that require disqualification: (1) “[d]irect pecuniary interests”; (2) “[i]ndirect pecuniary interests”; (3) “[d]irect personal interest”; and (4) “[i]ndirect personal interest.”

Under both the common law and the statutory bar ..., planning board members, in their quasi-judicial capacity, may not participate in evaluating an application in any matter in which their direct or indirect private interests may be at variance with the impartial performance of their public duty. [T]he question is whether the officer, by reason of a personal interest in the mat-

ter, is placed in a situation of temptation to serve his own purposes to the prejudice of those for whom the law authorizes to act as a public official.

Under the common law, “[i]t is fundamental that the public is entitled to have its representatives perform their duties free from any personal or pecuniary interests that may affect their judgment.” In determining whether a conflict exists, “[t]he potential for psychological influences cannot be ignored.” “[I]t is the mere existence of the interest, not its actual effect, which requires the official action to be invalidated.” Whether a particular interest is sufficient to disqualify a public official is a factual determination that depends on the circumstances of the particular case.

Notably, it is not simply the existence of a conflict that may be cause to overturn an action of a public official, but also the appearance of a conflict. One leading commentator phrases the standard for assessing the appearance of a conflict as follows: “Would an impartial and concerned citizen, intelligent and apprised of all the facts in the situation, feel that there was the potential for non-objectivity on the part of the officeholder making a decision? If the answer is affirmative, the appearance of conflict exists.”

These common-law principles have been supplemented by the Ethics Law. The statute declares that “[w]henver the public perceives a conflict between the private interests and the public duties of a government officer or employee, [public] confidence [in elected and appointed representatives] is imperiled.” [The code of ethics provides in part]:

No local government officer or employee shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.

This statute refines the definition of a conflict of interest.... Instead of using the words “any personal or financial interest,” ... the Legislature instead chose to utilize the words “financial or personal involvement.” [T]he word “involvement” ... would appear to cover “such intangible relationships as friendship or being an alumnus of the same school of the applicant.”

In [an earlier case], we were asked to determine whether a township committeewoman’s vote for her husband’s appointment to the municipal planning board violated the local ethics ordinance or the Ethics Law. In finding that “when a family member’s vote results in another family member obtaining a position in a government agency ... a conflict is usually present,” we focused on the public’s perception that the commit-

teewoman had “a personal interest in the reappointment of her husband to a prestigious and potentially very influential position.” We framed the question as “whether there existed an interest creating a potential conflict and not whether [the public official] yielded to the temptation.” We found that “in the eyes of the public, the personal involvement between [the committeewoman and her husband] may reasonably be expected to impair [the committeewoman’s] objectivity or independence of judgment.” We concluded “that marriage is a direct personal involvement which might be reasonably expected to impair objectivity or independence of judgment within the meaning of [the law].”

Applying these principles here, the issue is whether “the circumstances could reasonably be interpreted to show” that Chairwoman Roberts’s relationship with Doran “had the likely capacity” to tempt her to depart from her sworn public duty, thus eroding confidence by the public that she would make her own independent judgment as to Ocean Gold Coast’s application before the Board. It is not necessary to establish that she did not exercise her independent judgment, it is only the potential that she may fail to exercise her judgment that need be shown. And that potential has been aptly demonstrated.

We readily acknowledge that the factual context in which the conflict issue arises is not typical of those in which courts have addressed conflict-of-interest claims against members of municipal boards. In general, the conflict, or perceived conflict, involves a member of the board and the applicant, where the board member could gain, financially or otherwise, from either the approval or disapproval of the application. Our research has disclosed no case law involving a similar set of facts as presented here, where the alleged conflict does not directly implicate the applicant, but involves a board member and a board professional. We have, however, addressed a somewhat analogous situation .... If, from the perspective of an informed citizen, the independent judgment of a municipal officer may be influenced by her relationship with one of the board’s professionals, “there is a reasonable basis to conclude that an appearance of impropriety exists.” And here, the public could perceive that Chairwoman Roberts’s personal involvement with Doran could reasonably be expected to impair her objectivity and independence of judgment.

Roberts and Doran have been living together for ten years. They own a home together. Stinson is employed by the Board through a series of one-year contracts, the most recent of which Roberts signed on behalf of the Board. Those contracts not only call for Stinson to provide services for the Board, but also allow those services to be performed by any partner or associate of Doran Engineering, of which Doran is a principal. Doran gen-

erally supervises Stinson. Although the record is unclear, it is reasonable for the public to assume that his supervision may include the work Stinson does for the Board.

Doran is the City zoning officer, and before Stinson became the Board engineer, Doran held that position. It would not be unreasonable for a member of the public to assume that given Doran's extensive experience, Stinson may in fact discuss issues with him that directly affect Stinson's reports and advice to the Board. Roberts has acknowledged that reports generated by the Board's engineer are given significant weight in the Board's evaluation of an application; thus, a citizen could perceive that Roberts's relationship with Doran could impair her independent judgment when considering Stinson's advice.

The public could also reasonably conclude that Roberts has a personal interest in the reappointment of Stinson as the Board's engineer, a prestigious and po-

tentially lucrative position, as that reappointment would benefit Doran's engineering firm. In other words, an informed citizen may reasonably conclude that in light of her relationship with Doran, Roberts may be tempted to support and approve Stinson's opinion in an effort to encourage the Board to reappoint Stinson and Doran's engineering firm.

In sum, because of Roberts's participation at the December Board hearing, the Board proceedings in their entirety must be voided and set aside.

We make one final observation regarding the conflict-of-interest issue. We recognize that our opinion could "reduce the number of qualified persons ... willing to serve on local boards" in small municipalities. Yet, in reconciling the competing public interests at stake, the need for unfettered objectivity by planning board members outweighs the potential difficulties small municipalities may experience in attracting people to serve on local boards.

## ADA Amendments Act of 2008 *continued from page 3*

EEOC voted on proposed regulations to implement the ADAAA, but the commission split along party lines and the vote failed. In January, the Department of Justice notified the Office of Management and Budget that it was withdrawing its draft rules from the OMB review process until the incoming administration had the opportunity to review the rulemaking record.

Employers wondering how to respond to the ADAAA in the absence of implementing regulations might consider this advice.

If confronted with a potential ADA claim after Jan. 1, 2009, employers are better off assuming the impairment is a disability and acting based upon whether or not the impairment (with a reasonable accommodation) prevents the employee from performing the essential functions of the job. In the real world, it will mean that employers will have to accommodate a significantly greater range of individuals who have impairments that impact their work or other major life activity. The sage advice to make decisions based upon sound medical opinion still holds; indeed, it holds in greater force than ever given the new definition of "regarded as" claims. All in all, the act should generate increased ADA litigation with the playing field tilted heavily toward coverage of the individual by the act. It should not impact the employer's ultimate defenses, including that the individual cannot (with or without a reasonable accommodation) perform the essential functions of the job. Finally, the act

creates as many ambiguities as Congress sought to correct, which will occupy the plaintiff and defense bar, as well as the courts, for years to come.<sup>19</sup>

### Endnotes

1. See Ruth Colker, *The Disability Pendulum: The First Decade of the Americans with Disabilities Act* (2005); Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 Berkeley J. Emp. & Lab. L. 19 (2000) cited in Michael Selmi, *Interpreting the Americans with Disabilities Act: Why the Supreme Court Rewrote the Statute, and Why Congress Did Not Care*, 76 Geo. Wash. L. Rev. 522 (2008) (contending "that it is wrong to attribute the narrow interpretations to a judicial backlash").
2. Selmi, *supra*, at 548. The "backbone" is actually a trilogy of cases: Sutton v. United Airlines, 527 U.S. 471 (1999); Murphy v. United Parcel Service, Inc., 527 U.S. 516 (1999); and Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999).
3. 527 U.S. at 475.
4. 534 U.S. at 197.
5. *Id.* at 198.
6. Pub. L. 110-325, 110 Stat. 3553.
7. See generally, Chai Feldblum *et al.*, *The ADA Amendments Act of 2008*, 13 Tex. J. on C. L. & C. R. 187 (2008).
8. 42 U.S.C. § 12102(1).
9. 534 U.S. 197.
10. 42 U.S.C. § 12102(4)(A).
11. 42 U.S.C. § 12102(2).
12. Pub. L. 110-325, § 2.
13. 42 U.S.C. § 12102(4).
14. 42 U.S.C. § 12102(4)(E).
15. 527 U.S. at 482; 534 U.S. at 198.
16. School Board of Nassau County v. Arline, 480 U.S. 273, 284 (1987).
17. 42 U.S.C. § 12102(3)(A). However, the "regarded as" prong "shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less." § 12102(3)(B).
18. Pub. L. 110-325, § 2(b)(5).
19. Edward G. Phillips, *The ADA Amendments Act of 2008: Who Isn't Disabled?*, Tennessee Bar Journal 33 (February 2009).

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