

Local Government Law News

Salmon P. Chase College of Law ♦ Northern Kentucky University

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LOCAL GOVERNMENT LIABILITY FOR ENFORCING STATE STATUTES

Enforcing a state law sometimes presents a local government with a Hobson's choice – to risk civil rights liability for enforcing it or to risk dereliction of duty for not enforcing it. Whether, and under what circumstances, a local government can be liable for its enforcement of a state law is an issue that divides the federal courts.

A provision of the Civil Rights Act, 42 U.S.C. § 1983,¹ affords a civil cause of action against any “person” who, under color of state law, deprives someone of rights, privileges, or immunities secured by the Constitution or laws of the United States. Under the holding of *Monell v. Department of Social Services*,² local governments are persons within the meaning of § 1983. *Monell* also holds that, while Congress intended § 1983 to apply to units of local government, Congress did not intend them to be liable unless an official policy of some nature caused the deprivation.³ *Monell*, however, left open exactly what types of actions or inactions were official policy for purposes of § 1983 liability.

The term “policy” has caused confusion in the courts in part because it does not appear in the text of § 1983. Naturally, a local government's legislative body may make policy,⁴ but policy is not limited to legislative action. A local government official can also make policy if that official possesses final authority with respect to the action ordered.⁵ Thus, even a single decision of a particular official can be policy in this sense. In addition, a municipality may be liable for a municipal “custom” having the force and effect of municipal law, such as where municipal policy makers have tolerated widespread practices that clearly endanger constitutional rights.⁶

The U.S. Supreme Court tells us that “policy” generally implies a course of action consciously chosen from among various alternatives.⁷ This leads courts to ask whether a local government makes policy when it decides to enforce a state law and, if so, whether the local government should be liable if that enforcement causes a constitutional injury. *Vives v. City of New York*,⁸ a recent decision of the U.S. Court of Appeals for the Second Circuit, illustrates the problem.

Over a period of years, Carlos Vives mailed religious and political materials to “people of the Jewish faith with the intent to alarm them about current world events that have been prophesied in the Bible, including the unification of the European countries into a single political and military entity.”⁹ Vives succeeded in his intent when he sent his materials to Jane Hoffman, then a candidate for New York lieutenant governor. Her campaign notified the police, who investigated and found no threatening wording in the material. Nevertheless, the police arrested Vives at his home, took him to the precinct, placed him in a holding cell, and charged him with aggravated harassment¹⁰ for sending the materials to Hoffman. Ultimately, the district attorney declined to prosecute.

Vives then sued the city, the detectives who arrested him, and the police commissioner. He claimed that the statute under which he was arrested unconstitutionally proscribed protected speech, that he was arrested for exercising his right to engage in protected speech, and that his arrest lacked probable cause. He sought damages and a declaration that the statute was unconstitutional. The parties cross-moved for summary judgment.

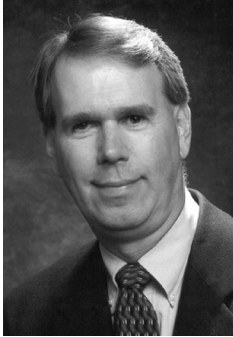
After reviewing the “dubious history” of the aggravated harassment statute in the courts, the district court declared it unconstitutional to the extent it prohibited communications made with the intent to annoy or alarm.¹¹ Because this aspect of the statute was unconstitutional, the district court held that any ar-

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DIRECTOR'S DESK



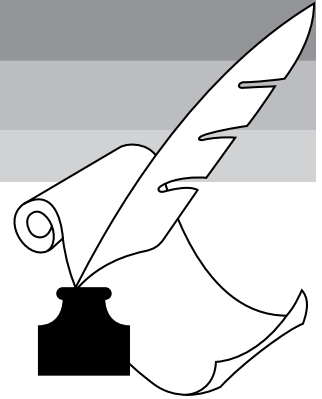
Over the past several decades, the county has emerged as one of the more significant political units in the American federal system. Despite this, modernization of county government has been slow in coming. In Kentucky, as well as in the rest of the country, the need for modernization is becoming increasingly evident.

In 2006, the Vision 2015 initiative in northern Kentucky recognized the changing role of counties and found them ill equipped to cope with the pressures to provide the services demanded of them. The project's six strategies for effective governance included several recommended improvements to county government. (In the interest of full disclosure, I played a small part in the work of the task force that developed those recommendations.) More recently, Executive Director Bob Arnold of the Kentucky Association of Counties wrote in his organization's publication about the handicaps confronting Kentucky's county governments. In his opinion, the time has come to reassess the role of the county and to bring it into the 21st century.

More than 30 years ago, in a case involving county "home rule," the Kentucky Supreme Court explained the present position of the county in the structure of Kentucky government. "Historically, counties ... have existed primarily to perform state functions, such as law enforcement, public welfare, and the administration of justice, and to provide governmental services for rural areas." While that is an accurate statement of history, as a purely legal matter the constitution is largely silent about the exact powers and duties of counties. The court's opinion in *Fiscal Court v. City of Louisville* never successfully explains why the General Assembly could not envision a role for counties different from the historical role.

Throughout the opinion, the court struggles to explain the result. To justify its conclusion, the court resorts to baseball metaphors, quotations from Shakespeare, and hyperbole – for example, describing the attempted grant of home rule as a "quit claim deed" of all the General Assembly's powers. Ultimately, the

court tells us, "Tradition establishes that county government in Kentucky is based on the premise that all power exercised by the fiscal court must be expressly delegated to it by statute.... The metallic thread which history and tradition weave through the warp and woof of our Constitution is that while the General Assembly may grant governmental powers to counties it must do so with the precision of a rifle shot and not with the casualness of a shotgun blast." As an exposition of constitutional law, this is unsatisfactory; a constitution does not derive from the metaphysics of tradition, the art of textiles, or one's choice of weaponry.



Kentucky's constitution is far more concerned with a county's organization than it is with a county's purposes. The fragmented structure of county government with its multiple elected officials often hampers effective administration; it inhibits the adaptation of businesslike or professional management practices and principles to the day-to-day operation of county government. Recent scholarship in this area suggests that modernizing the organization of counties enables them to become more entrepreneurial, that is to say better able to develop a comprehensive management system for local policies and to improve government performance capabilities. In turn, this makes it easier for county governments to respond to escalating demands for service within existing budgetary constraints. Still, as Bob Arnold pointed out, modernization must address those constraints as well.

The current edition of the *Municipal Year Book* published by the International City/County Management Association reports on ICMA's most recent survey of the county form of government. It affirms that throughout the United States counties are developing institutional arrangements that can let them be more responsive, effective, and efficient in delivering the non-traditional public services now expected of them. Kentucky, likewise, could profit from such an approach. Thirty years ago the Kentucky Supreme Court characterized the role of counties by looking backward. It is time to be looking forward instead.

rest and detention premised on it violated the Fourth Amendment's protection against unlawful seizures. In light of the statute's history and of the country's long history of protecting free speech, the district court held as a matter of law that the arresting officers did not act in good faith in making the arrest. Therefore, the arresting officers were not entitled to qualified immunity.¹²

Further, the court enjoined the police department from enforcing the statute against Vives to the extent that enforcement was based on his intentionally communicating in a manner likely to cause and intended to cause annoyance or alarm. The court directed the department to return to Vives all documents reflecting his arrest and detention and expunge all computer information reflecting the arrest and detention.¹³ At this stage of the proceedings, the court did not address the issue of the city's liability for damages.

The city and the other defendants appealed to the Second Circuit Court of Appeals, which reversed the district court on the issue of the arresting officers' qualified immunity. The appeals court disagreed with the lower court that the officers were on notice as to the infirmity of the statute. Citing an earlier decision, the appeals court said that, absent contrary direction, the officers were entitled to rely on a presumptively valid state statute until and unless the statute was declared unconstitutional.¹⁴ Here the police did not have fair notice of the purported unconstitutionality of the statute, and therefore the district court erred in denying the officers qualified immunity on that ground.

Before the Second Circuit had decided the question of qualified immunity, the city moved to dismiss the complaint with respect to damages against the city. It contended that Vives could not show that any city policy caused him harm because the state had enacted the statute at issue. The city argued that municipal liability under § 1983 did not attach because in arresting Vives the city was merely enforcing existing New York state law.¹⁵ The district court denied the city's motion. It ruled that a municipality does not have liability for actions required by state law, but may have *Monell* liability for actions permitted, but not required, by state law.¹⁶ The matter proceeded to discovery on the issue of whether the city enforced the law "at the *command* of state law, or as a matter of policy."¹⁷

Following discovery, the city admitted that it was not aware of any specific command or directive from the state to the city or its police department concerning enforcement of the particular section of the Penal Law.¹⁸ Instead, the city argued that the fact that the state of New York enacted the section was itself a command that

the city enforce the statute. The city asserted that "there can be no greater command than that of the State to its municipalities to enforce its criminal code."¹⁹

The district court rejected that view, holding that there was a dispositive difference between state statutes that a municipality is required to enforce and state statutes that a municipality is merely authorized to enforce. It granted summary judgment to Vives because there was no dispute that the city had a practice and policy of enforcing the statute and because the city offered no evidence that it was mandated to enforce it.²⁰ Following a jury trial on damages, the city appealed the district court's ruling that the city's enforcement of the law was a municipal policy within the meaning of *Monell*.

The Court of Appeals approached the issue saying that in situations such as this, the law could allocate blame three ways: first to the state that enacted the statute, second to the municipality that chose to enforce it, and third to the individual employees who directly violated an individual's rights.²¹ As to the first option, damages are not normally available against the state because it is not a person within the meaning of § 1983. The Eleventh Amendment precludes citizens from suing a state for damages unless Congress has abrogated the state's sovereign immunity, which it has not done for § 1983 claims. As to the third option, government officials can often successfully assert qualified immunity to protect themselves from personal liability, as they did in this case. Therefore, the local government is often the only entity liable for damages.

In determining whether local governments should be liable under § 1983 when enforcing state law, three approaches are possible. One approach is that they should be; this is the approach adopted by the Ninth Circuit.²² Another approach is that they should not be; this is the approach adopted by the Seventh Circuit.²³ The Second Circuit, however, took the third approach – local governments are liable when they act in accordance with state laws that simply authorize the conduct; they are not liable when acting under state laws that mandate the conduct. In *Vives* the Second Circuit aligned itself with the Sixth Circuit's decision in *Garner v. Memphis Police Department*.²⁴

Garner involved the fatal shooting by a Memphis police officer of a fifteen-year-old unarmed boy who attempted to flee from police after committing a residential burglary. The officer had been taught that under Tennessee law it was proper to kill a fleeing felon rather than run the risk of allowing him to escape.²⁵ The police department's policy on the use of deadly force was slightly more restrictive but still allowed its use under the circumstances. The Court of Appeals

IN THE LEGISLATURES

2009 Kentucky General Assembly: A Topical Review of Selected Acts Affecting Local Government

A Note on Effective Dates

Legislation passed during the 2009 Regular Session of the Kentucky General Assembly, other than general appropriation measures and those containing emergency or delayed effective date provisions, takes effect June 25, 2009. Ky. Op. Atty. Gen. 09-003.

Commonwealth

AN ACT relating to the purchase of flags by public institutions. Amends KRS 2.030 and 2.040 to require official flags of the United States and the Commonwealth of Kentucky purchased by public institutions to be manufactured in the United States; amends KRS 118.045 to require the United States flag purchased by the fiscal court for voting locations to be manufactured in the United States. SB 33 (Acts ch. 4).

AN ACT relating to the Kentucky Capitol centennial celebration. Creates new sections of KRS Chapter 171 to establish the Kentucky Capitol Centennial Commission and prescribe its duties and responsibilities. HB 337 (Acts ch. 43).

Counties

AN ACT relating to county agricultural development councils. Amends KRS 248.721 to expand the size of county agricultural development councils, establish term limits for council members, and provide procedures for replacement of council members; and amends KRS 248.723 to conform. SB 83 (Acts ch. 36).

County Attorneys

AN ACT relating to donations. Creates a new section of KRS 367.170 to 367.300 to require for-profit entities that collect donated items for resale to affix a permanent sign on the collection bins that states that the collections are not charitable in nature and do not qualify for a charitable deduction and gives the attorney general and county attorneys concurrent jurisdiction to enforce the provisions. SB 8 (Acts ch. 28).

Education, Schools, and School Districts

AN ACT relating to education assessment and declar-

ing an emergency. Amends numerous provisions of KRS to overhaul the Commonwealth Accountability Testing System. SB 1 (Act ch. 101), effective March 25, 2009.

AN ACT relating to students of civilian military employees. Creates a new section of KRS Chapter 156 to provide students of civilian military employees the same rights as students of military families under KRS 156.730 if the parents are required to move to perform their job responsibilities, resulting in the students changing schools. SB 39 (Acts ch. 31).

AN ACT relating to excused school absence. Amends KRS 159.035 to grant students excused absences for up to 10 days to visit a parent or legal guardian serving in the United States military, stationed out of the country, and on leave granted by the military. HB 124 (Acts ch. 18).

AN ACT relating to public school facilities. Amends KRS 157.420 to allow school districts to submit a request to the commissioner of education to use funds from the per pupil capital outlay allotment to purchase land for a new school or to modify an existing school; amends KRS 157.440 to allow the levy for school facilities currently dedicated for the Facilities Support Program of Kentucky to be used to purchase land if approved by the commissioner of education. HB 295 (Acts ch. 53).

AN ACT relating to school calendars and declaring an emergency. Allows a local board of education to request the commissioner of education to waive the makeup of up to 10 instructional days missed due to Tropical Storm Ike and the severe weather storms of January and February 2009. HB 322 (Acts ch. 88), effective March 24, 2009.

AN ACT relating to interscholastic athletics and declaring an emergency. Directs that the Kentucky High School Athletics Association, with assistance from the Kentucky Department of Education, shall staff and coordinate a study of sports safety to be completed no later than October 1, 2009; creates a new section of KRS Chapter 160 to direct the Kentucky Board of Education to require high school coaches to complete a sports safety course. HB 383 (Acts ch. 90), effective March 24, 2009.

AN ACT relating to state funds allocations to local school districts. Amends KRS 157.360 to permit growth districts to request adjustments in the Support Education Excellence in Kentucky (SEEK) funds in certain instances; amends KRS 157.420 to permit a local school

district in certain instances to request approval from the commissioner of education to use capital outlay funds for the purchase of school buses or to use the funds for increased operational expenses. HB 408 (Acts ch. 74).

Environment

AN ACT relating to brownfield redevelopment and making an appropriation therefor. Creates a new section of KRS Chapter 224 to establish the brownfield redevelopment fund, a dedicated fund to be used solely to provide financial assistance to governmental agencies to perform brownfield assessments, corrective action, and demolition or other similar actions necessary to prepare a property for a beneficial use. SB 27 (Acts ch. 30).

Fire Service

AN ACT relating to supplemental payments to local governments for qualified professional firefighters and declaring an emergency. Amends KRS 95A.210, 95A.250, 95A.260, 337.010, and 337.285 with respect to the manner of calculating pay for scheduled overtime. SB 46 (Acts ch. 33), effective March 20, 2009.

AN ACT relating to firefighters. Amends KRS 95A.040 to require the Commission of Fire Protection Personnel Standards and Education to establish a candidate physical agility test for professional firefighters. HB 150 (Acts ch. 41).

Law Enforcement

AN ACT relating to firearms certification. Amends KRS 237.140 to permit any peace officer who has successfully completed a Kentucky Law Enforcement Council-approved firearms instructor course to certify retired peace officers who desire to carry concealed deadly weapons. HB 55 (Acts ch. 47).

Motor Vehicles

AN ACT relating to motor vehicles. Creates two new sections of KRS Chapter 189 pertaining to “low-speed vehicles” and “alternative-speed motorcycles” respectively to allow their use on Kentucky highways under certain conditions; amends other provisions of KRS to conform. HB 21 (Acts ch. 103).

AN ACT relating to assessments on motor vehicles. Amends KRS 132.485 to clarify procedures for assessments on vehicles purchased prior to January 1 but that were registered after January 1 through no fault of the owner. HB 340 (Acts ch. 56).

Public Officers and Employees

AN ACT relating to retirement. Amends KRS 61.565 to establish a 10-year, rather than 5-year, phase-in of the actuarially required employer contribution to the County Employees Retirement System for funding of retiree health benefits; directs that the amendment apply to contribution rates paid by employers on or after July 1, 2009. HB 117 (Acts ch. 65).

AN ACT relating to officers and declaring an emergency. Amends KRS 62.990 to provide that before January 1, 2010, should a person fail to take the oath of office required by KRS 61.010, the office is considered vacant and to provide that after January 1, 2010, should a person fail to take the oath of office, the office will be considered vacant and the person becomes ineligible for the same office for two years. HB 161 (Acts ch. 7), effective March 13, 2009.

AN ACT relating to the county employees retirement system. Amends KRS 78.510 to increase to nine months the period for which an employee, other than a school board employee, qualifies as being in a seasonal position for purposes of the County Employees Retirement System. HB 204 (Acts ch. 71).

Taxes and Fees

AN ACT relating to occupational taxes. Amends KRS 67.750 to update references to the Internal Revenue Code and to incorporate future amendments to the code. HB 87 (Acts ch. 49).

AN ACT relating to real property taxation. Amends KRS 132.0225 to exempt a city that elects to collect its own taxes without the assistance of the sheriff from the deadline associated with the certification of the county’s property tax roll; amends KRS 132.285 to require the property valuation administrator to provide copies of recapitulations of property assessments to a city when the city uses the county assessments for its tax collection; and amends KRS 133.040 to require the PVA to provide copies of property recapitulations to the chief executive officers of charter counties, unified local governments, consolidated local governments, and mayors of cities. HB 186 (Acts ch. 69).

AN ACT relating to property taxes and declaring an emergency. Amends numerous provisions, especially to KRS Chapter 134, to revise the process for the collection of property taxes in general and the process for sale of delinquent property taxes in particular. HB 262 (Acts ch. 10), portions effective March 17, 2009.

IN THE COURTS

Kentucky

Res judicata, a judicial concept, has no application to a request for a zoning map amendment, which involves a legislative function.

In 1997, the owners of a parcel of property applied for a zone change, which the fiscal court approved based on the planning commission's recommendation. Neighbors appealed to the circuit court, which reversed and remanded the matter to the fiscal court. Without conducting a new hearing, the fiscal court reconsidered the findings of fact and conclusions of law and again approved the change. Once more the neighbors appealed to the circuit court, which reversed without remanding. The owners appealed to the court of appeals, which dismissed the appeal for failure to name a necessary party.

In 2001, the property owners made another application to the planning commission for a zoning change, which the fiscal court approved based on the planning commission's recommendation. As before, the neighbors appealed to the circuit court, which affirmed the fiscal court. The neighbors appealed to the court of appeals, which reversed the fiscal court.

In late 2003, while the matter was still pending in the courts, the property owners filed a new request for a zone change. The fiscal court granted the change, and the neighbors appealed to the circuit court. The circuit court reversed, reasoning that this latest request should not have been filed while the earlier request was pending in the courts. It based its decision on res judicata and the "time-honored doctrine that the same case cannot be pending in two different tribunals at the same time." The court of appeals agreed in part, holding that res judicata could apply to administrative zoning matters if there are no changes, and remanded the matter to the fiscal court. The Kentucky Supreme Court granted review to discuss the application of res judicata to applications for zoning change map amendments.

The Supreme Court opined that adopting the doctrine of res judicata is not appropriate because res judicata is a judicial doctrine while rezoning is a legislative function. Although res judicata may apply to subsequent litigations of a zone change application, it does not apply to a subsequent map amendment application. Communities change, sometimes quickly, so legislatures must have the opportunity to reexamine their prior decisions. Through the zoning ordinance, the fiscal court could have limited the submission of a new application during the pendency of another and could have

imposed other time limitations. Here it chose not to, which was its right to do. *Hume v. Franklin County Fiscal Court*, 276 S.W.3d 748 (Ky. 2008).

Kentucky

Whistleblower Act protects disclosures to any public body or authority with the power to remedy or report the perceived misconduct.

From 1972 until her retirement, Mary Gaines worked for the Jefferson County office of the Division of Unemployment Insurance in the Kentucky Workforce Development Cabinet. Gaines claimed to have had difficulty in a department dominated by men, including being paid less than men and asked to do menial tasks. This resulted in her filing a gender discrimination and retaliation suit against the cabinet in 1998, which she and the cabinet eventually settled. According to Gaines, afterward her work environment deteriorated.

In 2002 the cabinet informed Gaines that she would be among some auditors being transferred from the downtown Louisville office to the Preston Highway office, an office colloquially known among the auditors as the "penal colony." Gaines objected. She filed a second lawsuit against the cabinet claiming gender discrimination and retaliation because of her deteriorating work environment.

According to Gaines, in February 2003 she witnessed two employees throwing documents into a publicly accessible dumpster. Standard procedure was to send documents to Frankfort to be shredded and destroyed. Gaines suspected that the documents were confidential and bore on pending gender discrimination litigation. Gaines contacted her attorney and asked him to report the document purge. Acting on the report, the Commissioner of the Department for Employment Services conducted an investigation but concluded that there was no wrongdoing. Two working days later, Gaines received notice of her transfer to the Preston Highway office. Gaines then amended her complaint to include a whistleblower claim, asserting that the transfer to the Preston Highway office was retaliation for reporting the document purge.

The Franklin Circuit Court granted summary judgment to the cabinet on the whistleblower claim and the gender discrimination claim; a jury found for the cabinet on the retaliation claim. Gaines appealed from the circuit court's grant of summary judgment on the whistleblower claim, and the Court of Appeals reversed.

It held that an internal report to the cabinet qualified as a report to “any other appropriate body or authority” under the Kentucky Whistleblower Act. The cabinet appealed, and the Supreme Court granted discretionary review to decide whether the phrase included the whistleblower’s own agency.

It does, said a divided court. The purpose of the Whistleblower Act “is to protect employees who possess knowledge of wrongdoing that is concealed or not publicly known and who step forward to help uncover and disclose that information.” The act serves to discourage wrongdoing in government and to protect those who make it public. The act specifically lists a number of bodies and agencies to whom employees may make a protected disclosure, but it also protects disclosures to “any other appropriate body or authority.” The court rejected the cabinet’s limited interpretation of the language, reasoning that the phrase should be read to include any public body or authority with the power to remedy or report the perceived misconduct. Doing so serves the goals of liberally construing the Whistleblower Act in favor of its remedial purpose and of giving words their plain meaning. In the court’s opinion, the cabinet’s interpretation would reward an employee who made a report to an “appropriate” outside entity but would punish the employee who reports internally. The court viewed this as an absurd result. *Workforce Development Cabinet v. Gaines*, 276 S.W.3d 789 (Ky. 2008).

Kentucky

Statute of limitations in Whistleblower Act applies only to claims for punitive damages and injunctive relief, not to claims for compensatory damages.

In 2000, the city of Russellville hired Thomas Allen as a Safety Director. The following year Russellville and the city of Auburn formed the Consolidated Infrastructure Management Authority, Inc. to administer water and sewer services for the two cities. Thereupon, Allen became the safety director for the authority. Shortly thereafter, on a walk-through of the Auburn facility, Allen found numerous safety violations and reported them to his superiors who said no money was available to remedy the violations. Later, Allen sent a letter to the authority’s chairman and to its financial director reporting the violations and his attempts to fix the problems. The letter announced Allen’s intention to conduct a repeat inspection and the possibility of his requesting a state inspection. Subsequently, he met with the authority’s board of directors, who voted to undertake some remedial measures. In February 2002, the authority informed Allen that it was reducing its workforce due to

financial constraints and that he would be among those laid off. A week later, Allen sent a letter to the Kentucky Labor Cabinet describing the violations, enclosing photographs, and asking for an unannounced inspection. A surprise inspection ensued, which resulted in violation notices and penalties.

Approximately one year later, Allen sued the authority alleging a violation of Kentucky’s Whistleblower Act, wrongful termination, and intentional infliction of emotional distress. Only the whistleblower claim went to trial. The trial court refused to instruct the jury on punitive damages or injunctive relief, determining that the applicable statute of limitations barred the claim. The jury found in Allen’s favor and awarded him \$40,000 in compensatory damages; the court awarded attorney’s fees and expenses but reduced the \$40,000 award by the amount that Allen had received in unemployment benefits. Shortly after the trial concluded, the authority announced its dissolution. Allen then asked the trial court to require the authority to post a bond, but the court denied the motion. Thereafter, the authority appealed the judgment and Allen filed a cross-appeal. The court of appeals affirmed the judgment, rejecting the authority’s primary contention that the statute of limitations barred Allen’s whistleblower claim. The court also rejected the authority’s claim that Allen’s actions fell outside the Whistleblower Act. However, the court of appeals affirmed the trial court’s refusal to require a bond.

In the Supreme Court, the authority argued that it was entitled to a directed verdict because the statute of limitation in the Whistleblower Act barred Allen’s claim. The trial was wrong to conclude that the limitation applied only to claims for punitive damages and injunctive relief, not to claims for compensatory damages. The Supreme Court, however, agreed with the trial court. The 90-day limitation applies only to claims for injunctive relief and punitive damages; claims for compensatory damages are governed by another section of law.

In addition, the authority argued that Allen failed to establish that he engaged in activity protected by the Whistleblower Act. It pointed to the fact that Allen did not contact Kentucky OSHA until after he was notified of his lay-off. The Supreme Court answered that KRS 61.102(1) and 61.103(1), when read together, “indicate that disclosure not only occurs when a report is *actually* made, but also when *the threat* of a report is made.” Allen’s letter to the authority including his intention to contact the state and to report the safety violations if they were not timely corrected was a disclosure within the meaning of the act.

With respect to the posting of a bond, the court observed that governmental entities are exempt from the requirement to post a bond pending appeal. The fact

that the authority dissolved did not change the rule. Upon dissolution of the authority, the judgment remains enforceable against the cities that created it. *Consolidated Infrastructure Management Authority, Inc. v. Allen*, 269 S.W.3d 852 (Ky. 2008).

Michigan

Methods employed by county treasurer to notify property owner of tax foreclosure proceedings did not satisfy due process.

Helen Krist owned a two-family dwelling for several decades, which she used as rental property. In 1979, Krist executed a quitclaim deed conveying the property to herself and her daughter as joint tenants. In 1998, Krist moved in with her daughter and son-in-law. The county was unaware of the move, and it continued to send the tax bills for the rental property to Krist's former address. In time, the property became delinquent and was forfeited to the county treasurer. The county commenced foreclosure proceedings, sent notices to the address it had on record, posted notice on the property, and published notice in the papers. However, it did not send any notices to the daughter at the address on the recorded deed. After a judgment of foreclosure, the county sold the property. The daughter and son-in-law learned of the sale from a tenant who contacted them after the new owner attempted to collect rent. The daughter then filed suit, alleging a wrongful deprivation of her property without proper notice in violation of the Due Process Clause of the Michigan Constitution. After extended proceedings in the trial and appellate courts, the Supreme Court granted leave to appeal.

The court explained that, under the constitutions of Michigan and the United States, proceedings that seek to take property from its owner must comport with due process. A fundamental requirement of due process is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." The court concluded that the methods employed by the county treasurer in this case were insufficient to satisfy these requirements. When there are multiple owners of a piece of property, due process entitles each owner to notice of foreclosure proceedings. The county treasurer consulted the deed and discovered the daughter's interest in the property. The deed disclosed two property holders with different last names and referenced two separate addresses. Thus, to use the mother's address to contact both property owners was not reasonable in light of the information known to the county treasurer.

The court regarded as insufficient the follow-up measures – posting notice and publishing notice – taken by the county treasurer once the treasurer learned that the notices sent by certified mail had been returned. The county treasurer knew that there were two owners and two addresses listed on the deed. A reasonable additional step would have been to attempt sending notice to the other address in the deed. An official who actually desired to inform a real property owner of an impending tax sale of a house she owned would not fail to send notice to the second of two addresses on the recorded deed that the official had in his possession. *Sidun v. Wayne County Treasurer*, 751 N.W.2d 453 (Mich. 2008).

Michigan

Passage of time and course of events had no bearing on whether university properly denied news organization's Freedom of Information Act request.

Following a notorious assault on several Michigan State University students in a dormitory room, a news organization submitted to MSU a Freedom of Information Act request for the incident report. MSU resisted the request, claiming that the privacy and law-enforcement-purposes exemptions allowed it to withhold the requested report. The newspaper filed a complaint in circuit court to compel disclosure of the report. The circuit court found that the report was exempt in its entirety under both exemptions. The organization appealed to the Court of Appeals, which remanded the matter to the circuit court with instructions. MSU then appealed to the Supreme Court, which granted leave to appeal limited to the issue of whether the contemporaneous or later public status of some or all of the information affected the status of the request.

The lower court observed that the passage of time "may well strengthen or weaken the arguments of the parties to a FOIA dispute regarding the applicability of the privacy exemption and the law-enforcement-purpose exemption." To this the Supreme Court responded, "We disagree ... that the passage of time and subsequent events could negate the applicability of a FOIA exemption. Rather, we hold that, unless the FOIA exemption provides otherwise, the appropriate time to measure whether a public record is exempt under a particular FOIA exemption is the time when the public body asserts the exemption." The proper question is whether the public body erred when it denied the request. Subsequent developments are irrelevant to that inquiry. A party that unsuccessfully requested a public record can submit another FOIA request for the public record if it believes that, because of changed circum-

stances, an agency can no longer withhold the record from disclosure. *State News v. Michigan State University*, 753 N.W.2d 20 (Mich. 2008).

Ohio

Property owner could not establish a compensable temporary regulatory taking based on a delay in the permitting process.

Richard Duncan owned real property in an area zoned for general commercial use, including his planned use of the property for a tavern and pool hall. In July 2001, Duncan applied for a zoning permit for the property and was initially referred to the board of zoning appeals. The board granted him variances after a hearing in October. In November, the Planning and Zoning Commission considered a preliminary site plan submitted by Duncan and identified several deficiencies. Not until the following June were all the issues resolved, a site plan approved, and a zoning permit issued. Pursuant to ordinance, Duncan then had two and one-half years in which to complete construction.

In December 2004, just days before the permit was to expire, Duncan requested a nine-month extension of the time in which to complete construction. At the time of the request, Duncan had not yet started any of the site work. He received an extension and, when the work was still not complete, received a second extension and a third. The permit expired without completion of the project. In January 2006, Duncan reapplied for a zoning permit to construct the tavern and pool hall on the property. The village zoning inspector issued a zoning permit in March and an occupancy permit in June.

In September 2005, after his first zoning permit had expired and before he applied for a new zoning permit, Duncan filed a complaint in the Court of Appeals seeking to compel the village to commence appropriation proceedings. He asserted that the unnecessary delays in the process to obtain the zoning and occupancy permits resulted in the village's temporary taking of his property. The court granted summary judgment to the village and Duncan appealed. The Supreme Court affirmed.

In cases asserting a claim for a temporary taking, explained the Supreme Court, courts apply the test set forth by the United States Supreme Court in *Penn Central Transportation Co. v. New York City*. The test requires the examination of three factors to determine whether a regulatory taking occurred: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action. Under the test, courts consider

normal delays in obtaining building permits, changes in zoning ordinances, variances, and similar land-use devices as permissible exercises of police power.

In assessing Duncan's claim of a taking based on an unreasonable delay, the Supreme Court considered the length of the delay. In its opinion, the six-month period between submission of the initial site plan and the issuance of the zoning permit was not extraordinary. Any delay was attributable to Duncan and his engineers' inability to submit compliant site plans for the proposed construction. The delay between the expiration of the original permit and the issuance of an occupancy permit was likewise attributable to Duncan's own actions. Therefore, Duncan could not establish a compensable temporary regulatory taking. *State ex rel. Duncan v. Middlefield*, 898 N.E.2d 952 (Ohio 2008).

Ohio

In personal injury action brought by deputy sheriff against homeowner and contractor for injuries he sustained when deck steps collapsed while deputy was investigating a burglar alarm, "fireman's rule" did not relieve independent contractor of alleged negligence in constructing steps.

Ricky Torchik, a deputy sheriff, was investigating a sounding home burglar alarm at a residence. After finding the front door locked, he went to the back of the house and climbed the steps of a wooden deck to check the rear windows and doors. As Torchik walked down a second set of deck steps, the steps collapsed and he sustained an injury. Torchik filed a complaint against the owner of the property and the contractor who had built the house, deck, and stairs. The owner and contractor filed motions for summary judgment, arguing that Torchik's claims were barred by the fireman's rule.

The trial court granted the motion despite being unable to find any authority extending the fireman's rule to a contractor. Torchik appealed the order granting summary judgment to the independent contractor, but the court of appeals affirmed the trial court's judgment. It reasoned that Torchik's injuries were better compensated through the workers' compensation system. The Supreme Court accepted Torchik's discretionary appeal on the issue of whether the fireman's rule should be extended to independent contractors to bar negligence claims for injuries that firefighters and police officers sustain while in the scope of their employment.

The Supreme Court began its analysis by tracing its earlier cases involving the fireman's rule. The court explained that it had changed the focus of the rule altogether in its decision in *Hack v. Gillespie*. In *Hack* the

court set out four policy considerations underlying the rule. First, fire fighters and police officers can enter the premises of a private property owner or occupant under authority of law. Second, landowners or occupiers cannot anticipate the presence of safety officers on the premises and would be too burdened if they owed them a duty of reasonable care. Third, all citizens share the benefits provided by firefighters and police officers and, therefore, should share in the cost of workers' compensation provided to police officers and firefighters injured on the job. Fourth, firefighters and police officers assume the risk of injury by the very nature of their chosen profession and are trained to expect the unexpected. In the instant case, the court considered whether these reasons applied with equal force to insulate independent contractors from liability. It concluded they did not. *Torchik v. Boyce*, 905 N.E.2d 179 (Ohio 2009).

Ohio

Operation of a public housing authority is a governmental rather than a proprietary function within the meaning of Ohio's sovereign immunity statutes, resolving a split in the lower courts.

After two of her children died in a fire in an apartment owned by the Lorain Metropolitan Housing Authority, the mother sued the authority and its employees for wrongful death. She claimed that because the authority removed the apartment's only working smoke detector and negligently failed to replace it, the children's father did not wake in time to rescue them. The trial court granted summary judgment to the authority and its employees because LMHA was a political subdivision entitled to immunity under Ohio law. The court found that the operation of a public housing authority is a governmental function and that none of the exceptions to immunity applied. The court of appeals reversed, and the Supreme Court granted discretionary review to resolve a conflict among the courts of appeals.

The Political Subdivision Tort Liability Act sets forth the defenses and immunities available to political subdivisions in civil actions for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision in connection with a governmental or proprietary function. The act also provides exceptions to immunity in specified circumstances.

Whether a political subdivision (there was no dispute that LMHA was a political subdivision) is protected against tort liability under the act involves a three-tiered analysis. "First, R.C. 2744.02(A)(1) sets out a general rule that political subdivisions are not liable in damages. In setting out this rule, R.C. 2744.02(A)(1) classifies

the functions of political subdivisions into governmental and proprietary functions and states that the general rule of immunity is not absolute, but is limited by the provisions of R.C. 2744.02(B), which details when a political subdivision is not immune. Thus, the relevant point of analysis (the second tier) then becomes whether any of the exceptions in R.C. 2744.02(B) apply. Furthermore, if any of R.C. 2744.02(B)'s exceptions are found to apply, a consideration of the application of R.C. 2744.03 becomes relevant, as the third tier of analysis."

For a function to qualify as governmental, it must either fall within a list of "specified" functions in the act or meet one of three independent standards set out in the act. The court found that LMHA, as a metropolitan housing authority, performed a specified "governmental function" – urban renewal projects and the elimination of slum conditions. The court then considered whether any exceptions to political subdivision immunity applied. One exception applies where the injury, death, or loss is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function. The court read this to include the provision of public housing. In this case, the question then became whether absence of a required smoke detector is a "physical defect" occurring on the grounds of LMHA's property. The court remanded that issue to the trial court for further proceedings. *Moore v. Lorain Metropolitan Housing Authority*, 905 N.E.2d 606 (Ohio 2009).

Tennessee

City housing authority owed a duty of care to its tenants to take reasonable steps to prevent tenants from suffering harm.

On March 7, 2002, a tenant in one of several public housing projects owned by the Memphis Housing Authority argued with the housing project's security guard, fired shots in the direction of the guard's office, and struck and killed another tenant at the facility who happened to be in the office area at the time. The security guard, an employee of a private company that provided security at the facility at the time of the shooting, shot the gunman. The victim's survivors filed suit against the authority, alleging negligence and breach of contract for failure to provide safe premises. The trial court granted summary judgment in favor of the housing authority and the court of appeals affirmed. The Tennessee Supreme Court granted review to determine whether the housing authority owed a duty of care under the theory of negligence.

Stating that the element of duty was the dispositive issue in the case, the court began by noting that in the law of negligence the landlord and tenant qualify as having a special relationship. This special relationship imposes an obligation on landlords to use reasonable care to protect tenants against unreasonable risk of foreseeable harm. Landlords must take precautions either to control the source of the danger or to protect an endangered tenant. In this case the landlord took some measures to guard against violence. The question for the court was whether the authority, with some general knowledge of criminal activity within its housing complexes, could have reasonably foreseen the probability of a violent act.

While acknowledging the competing social concerns, the court answered the question in the affirmative. In doing so the court balanced the “relevant public policy considerations” laid out in its earlier decision in *McCall v. Wilder*. These are the foreseeable probability of the harm or injury occurring; the possible magnitude of the potential harm or injury; the importance or social value of the activity engaged in by defendant; the usefulness of the conduct to defendant; the feasibility of alternative, safer conduct; the relative costs and burdens associated with that conduct; the relative usefulness of the safer conduct; and the relative safety of alternative conduct. The court thought that the first, second, fifth, and sixth factors supported finding a duty here, the third factor did not, and the fourth, seventh, and eighth factors were essentially neutral.

In summary, said the court, “All landlords, whether public housing authorities or the owners of luxury high-rises, have a duty to use reasonable care to protect their tenants from unreasonable risks of physically injurious attacks by third parties, if those risks are foreseeable and public policy considerations do not militate otherwise.” What steps, if any, are required will depend on the facts of individual cases and should be left to the finder of fact. The court remanded the case to the trial court for further proceedings. *Giggers v. Memphis Housing Authority*, 277 S.W.3d 359 (Tenn. 2009).

Tennessee

Administrative appeal board’s decision upholding termination of police officer was not arbitrary where introduction of positive drug test result did not comport with rules of evidence.

The Shelby County Sheriff’s Department had a Drug Free Workplace Program. As part of the program, randomly chosen department employees provided urine samples from which use of illegal drugs might be de-

tected. A sample taken from Officer Derek Davis tested positive for marijuana. After notifying Davis of the positive drug test, the department relieved him of duty with pay pending review. Following an administrative hearing, the department terminated his employment. Davis appealed the decision to the Shelby County Civil Service Merit Board, which conducted a hearing and ultimately upheld the decision to terminate. Davis appealed to the Chancery Court, which affirmed the merit board. However, on further appeal the Court of Appeals applied a different standard of review and reversed. The Supreme Court took the case to discuss the applicable standard of review.

Historically, review of decisions like that in the instant case was by the common law writ of certiorari. Under that approach, a board’s determination is arbitrary and void if it is unsupported by any material evidence. However, in 1988 the General Assembly amended the law to provide that judicial review of decisions by civil service boards would conform to the judicial review standards under the Tennessee Administrative Procedure Act. In the instant case, the intermediate appellate court erred by applying the common law standard of review.

At the root of the appeal was the officer’s claim that the urine test he took was inadmissible because the chain of custody was flawed. In essence, this was an attack on the sufficiency of the evidence supporting the decision to terminate his employment. Thus, the officer had to show that the decision was “arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted excise of discretion” or alternatively that it was “unsupported by evidence that is both substantial and material in the light of the entire record.”

In support of his position, the officer pointed to the Tennessee Rules of Evidence relevant to the admission of physical evidence. However, the rules of evidence are not automatically applicable to administrative proceedings, and the merit board had not adopted them for its proceedings. Accordingly, in reviewing these “less than legally formal hearings” appellate courts are guided, not by the Rules of Evidence, but instead “by a sense of fair play and the avoidance of undue prejudice to either side of the controversy.” In this case, the officer had the opportunity to attack the positive test result and to proffer evidence supporting his argument that he did not have marijuana in his system. Admitting the sample was not unduly prejudicial, unreasonable, or arbitrary. *Davis v. Shelby County Sheriff’s Department*, 278 S.W.3d 256 (Tenn. 2009).

Sixth Circuit

Due process requires that to be constitutional a name-clearing hearing must include a public component in order to serve its function of curing the public stigma that necessitated the hearing.

In 2004, a student alleged widespread plagiarism in mechanical engineering graduate student theses at Ohio University. Following two internal probes, the provost of Ohio University instructed the dean of the college of engineering to take further action. This resulted in a report that confirmed rampant and flagrant plagiarism in theses and which singled out three faculty members, including the chair of the mechanical engineering department, for ignoring their ethical responsibilities. In response to the report, the university suspended the chair's status as a member of the graduate faculty for three years and prohibited him from advising graduate students.

The chair then filed a lawsuit against the provost and the dean. He claimed a deprivation of his property interest in his graduate faculty status when the dean suspended him without notice and a meaningful opportunity to be heard. In addition, the chair claimed that the dean and provost deprived him of his liberty in violation of his due process rights when they publicized accusations about his role in plagiarism by his graduate student advisees without providing him with a meaningful opportunity to clear his name. The district court granted a motion to dismiss for failure to state a claim, finding that the chair had no property interest in his graduate faculty status and finding that the chair had no right to a name-clearing hearing beyond that already offered.

In claiming that he had a property interest in his graduate faculty status, the chair argued that, provided they satisfied four criteria set by the university, it was university practice for professors to retain that status. In the Sixth Circuit an employer's custom and practice can form the basis for a protected property interest, and the court believed that the chair sufficiently alleged that university custom gave him the claimed property interest. Because the chair asserted that he was never given any opportunity to be heard either before or after he was deprived of his property interest in his graduate faculty status, the district court's dismissal of the claim was improper.

The dean and provost conceded the chair's claimed liberty interest in his reputation. At issue was what process was due and whether a name-clearing hearing had to be public, an issue the court had yet to address. Applying the balancing test from *Mathews v. Eldridge*, the

court agreed with the Second Circuit that an unpublicized, internal name-clearing hearing was insufficient. "[W]e believe that it is clear that where, as here, the employer has inflicted a public stigma on an employee, the only way that an employee can clear his name of the public stigma is through publicity. ... [P]ublicity adds a significant benefit to the hearing, and without publicity the hearing cannot perform its name-clearing function." To require a name-clearing hearing to involve some form of publicity would not put an undue burden on the government. *Gunasekera v. Irwin*, 551 F.3d 461 (6th Cir. 2009).

Sixth Circuit

City's scrap metal ordinance requiring dealers to "tag and hold" scrap metal for a period of ten days was constitutional.

The city of Memphis enacted an ordinance requiring scrap metal dealers to "tag and hold" the scrap metal they acquired for a period of ten days. The Tennessee Scrap Recyclers Association challenged the ordinance, arguing that it was unconstitutional in four ways: it violated the dormant commerce clause, it took property without just compensation, it took property without procedural due process, and it violated federal law by restricting the use of legal tender and infringing upon the federal power to coin money. The district court denied the dealers' motion for a preliminary injunction against enforcement of the ordinance, and the dealers appealed.

The scrap dealers offered two theories of why the "tag and hold" law violates the dormant commerce clause. First, they argued that it is a "direct" local regulation of interstate commerce that is *per se* invalid under the dormant commerce clause. Second, they argue that under the balancing test of *Pike v. Bruce Church*, the burdens that "tag and hold" imposed on interstate commerce clearly exceed the putative local benefits. The court found neither theory persuasive. On the first point, the ordinance was not the sort of protectionist local legislation that is invalid under the dormant commerce clause. On the second point, the scrap dealers did not show that Memphis's regulation burdened the national scrap metal market. Contrary to the dealers' assertion, the "tag and hold" requirement produced local benefits as a law enforcement device. The court concluded that the burden the ordinance imposed upon interstate commerce was not "clearly excessive in relation to the putative local benefits."

The scrap dealers also claimed that the “tag and hold” law was either a physical taking or a regulatory taking. As to the physical taking, they argued that the ten-day holding period was a temporary physical taking and that the inspection requirement in the ordinance granted a permanent easement upon their premises and forced them to disclose their trade secrets to their competitors. The holding period, said the court, did not physically appropriate the dealers’ property; it simply limited the scrap dealers’ use of their scrap metal for a period of ten days. Regulations of a party’s use of its property are not physical takings. The inspection requirement did not physically take the scrap dealers’ property either. The inspection provision does not authorize an easement; instead, it authorizes a brief inspection of a specific part of the scrap dealers’ inventory and premises.

The court also rejected the regulatory taking argument. The ordinance was not a categorical regulatory taking under *Lucas v. South Carolina Coastal Council* because the metal could be sold during the holding period and had resale value when the holding period ended. Nor was it a regulatory taking under *Penn Central Transportation Co. v. City of New York* because the scrap dealers failed to show that the holding period would decrease the value of their scrap metal or interfere with distinct investment-backed expectations. The procedural due process claim the court dismissed as a “nonstarter.”

The final challenge was to the ordinance’s requirements that dealers pay for air conditioning coils (a common target for thieves) with a check or money order mailed to a licensed HVAC contractor after a three-day wait and that they pay for other purchases of scrap metal with a payment voucher redeemable after three days. They argued that these provisions infringe upon federal authority to coin money under Art. I, § 8 of the Constitution and on the status of U.S. currency as legal tender for all debts in violation of 31 U.S.C. § 5103. The court disagreed. Because the law does not make any of the various instruments themselves legal tender, it implicates neither the legal tender statute nor the constitutional power to coin money. *Tennessee Scrap Recyclers Association v. Bredesen*, 556 F.3d 442 (6th Cir. 2009).

Sixth Circuit

To sustain a conviction for bribery or under the Hobbs Act, government need not prove a direct link between a specific gift given to a public official and an explicit promise by that official to perform a specific, identifiable official act in return.

The former city administrator of Burton, Mich., was indicted for accepting a free subdivision lot from a developer in return for unspecified future official favors. The government did not introduce any evidence establishing that, when the lot was transferred, the developer and the city administrator had an express agreement for a specific official act to be done in return for the gift. The government did assert, however, that the administrator used his influence and position to assist the developer with several land developments. A jury found the administrator guilty of conspiracy to bribe a public official, solicitation of a bribe by a public official, and extortion under color of right under the Hobbs Act. On appeal, the administrator challenged his conviction, contending that the Hobbs Act required the government to prove that he made an express promise to perform a specific, identifiable official act in return when the land was given to him.

In the Sixth Circuit, the Hobbs Act requires the government to prove the existence of a quid pro quo. However, noted the court, “not all quid pro quos are made of the same stuff.” The showing necessary may still vary based on context, though all cases require the existence of some kind of agreement between briber and official. The benefits received need not have some explicit, direct link with a promise to perform a particular, identifiable act when the illegal gift is given to the official. Instead, it is sufficient if the public official understood that he or she was expected to exercise some influence on the giver’s behalf as opportunities arose.

The jury also convicted the administrator of conspiracy to bribe a public official and corrupt solicitation of a bribe by a public official. The relevant statutes say nothing of a quid pro quo requirement to sustain a conviction. It is enough if a defendant corruptly solicits anything of value with the intent to be influenced or rewarded in connection with some transaction involving property or services worth \$5,000 or more. *U.S. v. Abbey*, 560 F.3d 513 (6th Cir. 2009).



held that the deadly force policy, as applied, violated the Fourth Amendment right to be free from unreasonable seizures.²⁶

Subsequently, the district court granted summary judgment in favor of the city and the other defendants, reasoning that they were justified in relying on previous judicial determinations that the fleeing felon policy was constitutional. On further appeal, the Sixth Circuit overruled the district court²⁷ and addressed the issue of the city's liability under the statute and the policy.

First, explained the court, it was clear that the city had a policy authorizing use of deadly force when necessary to apprehend a fleeing burglary suspect. The court rejected the city's argument that, because it did not represent a "deliberate choice to follow a course of action ... from among various alternatives," it was not a policy within the meaning of *Monell*.²⁸ The city claimed it had no choice but to follow the controlling statute, a claim the court found meritless. The statute was permissive; it did not prevent the city from adopting a more restrictive deadly force policy, as the city had done. The decision to authorize the use of deadly force to apprehend non-dangerous fleeing burglary suspects was, therefore, a deliberate choice from among alternatives.

To some it may seem unfair to hold local governments responsible with respect to "constitutionally risky" state statutes like those in *Vives* and *Garner*. In *Owen v. City of Independence*,²⁹ the Supreme Court offered two rationales for doing so. First is the compensatory purpose underlying § 1983. Justice Brennan wrote that a damages remedy is a vital component of any scheme for vindicating constitutional guarantees. Second is the element of deterrence. The prospect of liability creates an incentive for officials who have doubts about their intended actions to err on the side of protecting citizens' constitutional rights. The decision in *Vives*, like the decision in *Garner*, is consistent with the view expressed in *Owen*.

Endnotes

1 As codified today, the section reads: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

- 2 436 U.S. 658 (1978).
- 3 *Monell v. Department of Social Services*, 436 U.S. at 691.
- 4 *Vives v. City of New York*, 524 F.3d 346, 350 (2d. Cir. 2008), citing *Owen v. City of Independence*, 445 U.S. 622, 628-29 (1980).
- 5 *Vives*, 524 F.3d at 350, citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986).
- 6 Brian J. Serr, *Turning Section 1983's Protection of Civil Rights into an Attractive Nuisance: Extra-Textual Barriers to Municipal Liability under Monell*, 35 Ga. L. Rev. 881, 891 (2001). One can think of policy as coming from the top down and custom as coming from the bottom up.
- 7 *Vives*, 524 F.3d at 350, citing *Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985).
- 8 524 F.3d 346 (2d. Cir. 2008).
- 9 *Vives v. City of New York* 305 F.Supp.2d 289, 294 (S.D.N.Y. 2003) ("*Vives I*").
- 10 N.Y. Penal Law § 240.30. "A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he or she: 1. Either (a) communicates with a person, anonymously or otherwise, by telephone, by telegraph, or by mail, or by transmitting or delivering any other form of written communication, in a manner likely to cause annoyance or alarm.... Aggravated harassment in the second degree is a class A misdemeanor."
- 11 *Vives I*, 305 F.Supp.2d at 300-02.
- 12 *Id.* at 302-03.
- 13 *Id.* at 303-04.
- 14 *Vives v. City of New York*, 405 F.3d 115, 117 (2d Cir. 2004) ("*Vives II*").
- 15 *Vives v. City of New York*, 2004 WL 2997947 at *1 (S.D.N.Y. Dec. 27, 2004) ("*Vives III*").
- 16 *Id.*
- 17 *Id.* (emphasis in the original).
- 18 *Id.* at *2.
- 19 *Id.*
- 20 *Id.* at *2-3.
- 21 *Vives*, 524 F.3d at 349-50.
- 22 See *Evers v. County of Custer*, 745 F.2d 1196 (9th Cir. 1984), cited in Jessica R. Manley, Comment, *A Common Field of Vision: Municipal Liability for State Law Enforcement and Principles of Federalism in Section 1983 Actions*, 100 Nw. U. L. Rev. 967, 978-80 (2006). See also, Dina Mishra, *Municipal Interpretation of State Law as "Conscious Choice": Municipal Liability in State Law Enforcement*, 27 Yale L. & Pol'y Rev. 249 (2008).
- 23 See *Surplus Store & Exchange v. City of Dephi*, 928 F.2d 788 (7th Cir. 1991) and *Bethesda Lutheran Homes & Services v. Llean*, 154 F.3d 716 (7th Cir. 1998); Manley, *supra*, at 980-82.
- 24 8 F.3d 358 (6th Cir. 1993), *cert. denied*, *Memphis Police Dept. v. Garner*, 510 U.S. 1177 (1994).
- 25 Tenn. Code Ann. § 40-808 provided, "If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest." 8 F.3d at 360-61.
- 26 *Garner v. Memphis Police Dept.*, 710 F.2d 240 (6th Cir. 1983), *aff'd* *Tennessee v. Garner*, 471 U.S. 1 (1985). "[P]olice officers cannot resort to deadly force to apprehend fleeing felons unless they have 'probable cause - an objective reasonable basis in fact to believe that the felon is dangerous or has committed a violent crime.'" 710 F.2d at 246. "A police officer may not seize an unarmed, non-dangerous suspect by shooting him dead." 471 U.S. at 11.
- 27 8 F.3d at 362-63.
- 28 8 F.3d at 364, citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986).
- 29 445 U.S. 622 (1980).

ETHICS SPOTLIGHT

Hatch Act

The Hatch Act is a federal law that limits the partisan political activity of most federal government employees and of state and local government employees employed in connection with federal loans and grants. Congress enacted the Hatch Act in 1939, naming it for the long-time civil service reform advocate Sen. Carl Hatch of New Mexico. It banned nearly all federal employees from taking an active part in political management or political campaigns. The following year Congress amended the act to limit the political activity of federally funded state and local government employees.

In its application to state and local government employees, the Hatch Act is less restrictive than in its application to federal employees. It imposes three restrictions on covered state and local employees: they may not run for partisan office; they may not coerce donations from other covered employees; and they may not use their official authority to influence the results of an election. Covered employees are executive branch state and local employees who, as a normal and foreseeable incident of their principal positions or jobs, perform duties in connection with an activity financed in whole or in part by federal loans or grants. 5 U.S.C. § 1501. The bulk of Hatch Act offenses at the state and local level involve candidacy in a partisan election. A recent decision of the Sixth Circuit Court of Appeals involved such a situation. *Molena-Crespo v. United States Merit Systems Protection Board*, 547 F.3d 651 (6th Cir. 2008).

Juan Molina-Crespo was the executive director of the Lorain County Children and Families First Council, an Ohio government agency financed in part by the federal government. In December 2003, while serving as executive director, he officially declared his candidacy in the Democratic primary election for the office of Lorain County Commissioner. The following month he received a phone call from the United States Office for Special Counsel, the independent federal investigatory and prosecutorial agency charged with enforcing the Hatch Act. The office advised him that his candidacy violated the Hatch Act and informed him that he would have to resign his position as executive director or withdraw his candidacy to comply with the act. Molina-Crespo responded that he did not consider himself a covered employee because the federal funding first passed through various state agencies.

In February 2004, the OSC sent a letter to Molina-Crespo asserting that his candidacy violated the Hatch Act. The letter explained the basis for that conclusion: the Hatch Act covers an employee even if the agency received federal funds indirectly through a state agency.

The office reiterated that Molina-Crespo could come into compliance by resigning his position or withdrawing his candidacy. He responded by requesting a hearing before the Merit Systems Protection Board, the federal agency charged to adjudicate cases arising under the Hatch Act.

Molina's candidacy ended in March 2004 when he failed to win the primary. In October 2004, the Office of Special Counsel filed a formal complaint with the MSPB alleging that Molina-Crespo violated the Hatch Act by being a candidate for elective office. After a hearing in March 2005, an administrative law judge decided that Molina-Crespo had violated the act and that the violation warranted his removal from his position. The MSPB denied Molina's petition for review, ordered the council to remove him from his position as executive director, and warned the council that if it failed to do so it would lose federal funds equal to two years of Molina-Crespo's pay.

Molina-Crespo resigned in December 2005 and sought review of the MSPB decision in the United States District Court. The district court upheld the board's conclusion that Molina-Crespo violated the Hatch Act. Further, the district court held that the board did not abuse its discretion in concluding that the violation warranted removal. *Crespo v. U.S. Merit Sys. Protection Bd.*, 486 F.Supp.2d 680 (N.D. Ohio 2007). Molina-Crespo appealed to the Sixth Circuit Court of Appeals, which affirmed the district court.

The appeal attacked the constitutionality of the Hatch Act on multiple grounds. Addressing the claim that the act impermissibly infringed on First Amendment rights, the appeals court noted that the U.S. Supreme Court has concluded that the Hatch Act and its state-level counterparts are constitutional. Citing *Murphy v. Cockrell*, the court said "there is no protected right to candidacy under the First Amendment, and a public employee may be terminated because of the fact of that employee's candidacy."

Molina-Crespo also argued that the Hatch Act violated the Equal Protection Clause by creating an irrational classification and by discriminating based on wealth. The classification argument derived from a provision in the Hatch Act that exempts some employees like mayors and governors holding an elected partisan office while covering other employees holding appointed positions. The court reasoned that the legitimate interest in preventing partisan influence in administering federal funds provided a rational basis for the Hatch Act's distinction between appointed and elected officials. Molina-Crespo premised the wealth-based discrimination

argument on the claim that to force a choice between running for elective office and keeping one's job was a wealth-based restraint on the exercise of his constitutional rights. The court said he failed to show that the Hatch Act implicated those rights.

Molina-Crespo also argued that the Hatch Act deprived him of his right to due process. The court responded that he had ample due process protection. The OSC notified him by telephone and letter explaining the basis for the conclusion that the candidacy violated the act. Then, prior to filing a formal complaint, the office gave him an opportunity to come into compliance by resigning his position or withdrawing his candidacy. Further, after the filing of a formal complaint, he requested and received a full hearing before an administrative law judge, availed himself of the opportunity to petition the MSPB Board for a review of that deci-

sion, and obtained judicial review of the administrative proceedings. Finally, despite his assertion to the contrary, the fact that Molina-Crespo did not learn of the prohibition on candidacy for elective office until he was already serving as executive director did not violate due process.

The court then turned to the question of whether the conduct justified removal from the position of executive director. The court noted that removal is the only penalty authorized for violation of the Hatch Act. Whether removal is appropriate depends on the seriousness of the violation, taking into account all relevant mitigating and aggravating factors. This was a substantial and conspicuous violation. Because the conduct was a deliberate disregard of the law, the board's decision had a reasonable basis.

BE IT ORDAINED ...

Elsewhere in this issue is a summary of the decision in *Tennessee Scrap Recyclers Ass'n v. Bredesen*, 556 F.3d 442 (6th Cir. 2009). It upholds an ordinance of the city of Memphis that requires scrap metal dealers to "tag and hold" the scrap metal they acquired for a period of ten days. The problem described in the court's opinion is receiving widespread attention.

The scrap metal industry is composed of dealers of various sizes, and it operates in a pyramid structure, with small dealers purchasing scrap metal and reselling it to larger dealers up the chain of distribution, where the scrap metal is eventually baled and shipped to be "processed" (i.e. melted down). To resell scrap metal, individual dealers first sort the different metals in their inventory into piles, then they bundle the individual piles together for resale in unprocessed form. To reduce their risk from volatile metal prices, scrap metal dealers prefer to bundle and resell purchased scrap as quickly as possible.

A regrettable corollary of the scrap metal market is metal theft. Much like pawn shops, used jewelry stores, and other purchasers in secondary markets, scrap metal dealers can serve as fences for individuals seeking to sell stolen goods. As a result, many cities and states regulate scrap metal dealers to deter metal theft and aid law enforcement in prosecuting metal theft. Both the City of Memphis and the State of Tennessee have scrap dealer laws. The Tennessee law has been on the books since 1968; however, it was substantially revised in 2008 and the provisions that were the sub-

ject of this lawsuit were removed. The Memphis scrap dealer ordinance was passed in December 2007, amidst a historic wave of scrap metal theft in Memphis – reported metal thefts for the first five months of 2007 were 821.7% higher than the same period the previous year. The burden of this increase fell largely upon urban businesses, utilities, and community organizations, who lobbied local government for stricter regulation of scrap metal dealers. In response, the City of Memphis passed an ordinance providing for comprehensive regulation of scrap dealers. Its provisions include a permit requirement, screening and record-keeping requirements for all scrap metal purchases, mandatory delays on cash payment for certain frequently stolen metals, and a ten-day waiting period wherein scrap metal dealers must "tag and hold" purchased metal so that victims of metal theft and law enforcement can inspect it.

Tennessee Scrap Recyclers Ass'n v. Bredesen, 556 F.3d 442, 446-47 (6th Cir. 2009).

Here is an edited version of the Memphis ordinance upheld by the court.

Chapter 6-40 JUNK AND SCRAP METAL DEALERS

- 6-40-1 Definitions.
- 6-40-2 Permits – Required. [omitted]
- 6-40-3 Application – Contents. [omitted]

- 6-40-4 Investigation of applicant. [omitted]
- 6-40-5 Standards of issuance. [omitted]
- 6-40-6 Appeal of denial. [omitted]
- 6-40-7 Fee. [omitted]
- 6-40-8 Conditions. [omitted]
- 6-40-9 Standards applicable to employees of permittee – Employee list to be on file with division of police services.
- 6-40-10 Business to be conducted in enclosed building.
- 6-40-11 Business hours.
- 6-40-12 Record of purchases.
- 6-40-13 Daily report of purchases.
- 6-40-14 Retention period for articles purchased.
- 6-40-15 Dealing with minors.
- 6-40-16 Dealing with strangers prohibited – Duty to give information relative to sellers.

Sec. 6-40-1 Definitions.

For the purposes of this chapter, the following definitions shall apply:

“Junk dealer” means any person in any way buying, selling, exchanging, trading or dealing in scrap iron, brass, empty bottles or secondhand metals of any sort or kind, including automobile accessories and automobile parts, within the city.

“Junk shop” or “junkyard” means any place where odds and ends, old rags, ropes, cordage, old metals, secondhand machinery parts, worn-out motor vehicles and parts thereof, and the like, are bought, sold or stored.

“Licensed HVAC Contractor” or “contractor” means any person who holds and maintains a valid license to obtain a permit from the Memphis and Shelby County Office of Construction Code Enforcement pursuant to the Memphis and Shelby County Mechanical Code Contractor Licensing Chapter sections 106 and 112, in order to perform mechanical work on HVAC equipment, including all manner of repair, installation and removal of such equipment.

“Scrap metal” means any ferrous or nonferrous metal that is no longer used for its original purpose and is capable of being processed for reuse by a metal recycling facility, including, but not limited to, iron, brass, wire, cable, copper, bronze, aluminum, platinum, lead, solder, steel, stainless steel, catalytic converters, or other similar obsolete ferrous or nonferrous metals, but shall not include recyclable aluminum cans; and

“Scrap metal dealer” means a person who buys, exchanges, or deals in scrap metal, or an employee or agent of that dealer who has the express or implied authority to buy, exchange or deal in scrap metal on behalf of the dealer.

Sec. 6-40-9 Standards applicable to employees of permittee – Employee list to be on file with division of police services.

All employees of any person and/or business entity having or applying for a permit under this article shall meet the requirements of not having been convicted of any felony or any offense relating to theft of goods within the last five years. It shall be further required that any person and/or business entity having a permit under this chapter shall keep on file with the division of police services a list of those persons currently employed by him or her in his junk or scrap metal operation.

Sec. 6-40-10 Business to be conducted in enclosed building.

It is unlawful for any person to locate, operate, maintain or carry on any business in connection with a junk shop or junkyard in the city unless it is conducted in an enclosed building. It is unlawful to conduct or carry on the business of maintaining or operating a junk shop or junkyard within the city in any open or unenclosed space or lot.

Sec. 6-40-11 Business hours.

It is unlawful for any junk and scrap metal dealer to open his or her place of business for the transaction of business before 6:00 a.m., or to keep his or her place of business open for the transaction of business after 8:00 p.m., on any day, except Saturday, on which day it shall be lawful for any such junk and scrap metal dealer to keep his or her place of business open not later than 11:00 p.m.

Sec. 6-40-12 Record of purchases.

Every junk and scrap metal dealer shall keep a book in which he or she shall promptly enter the names of all persons from whom he or she buys or gets iron, brass or other metals of any sort, bottles or other articles of any nature whatsoever, followed by the date of purchase, the amount paid therefor, the kind of metals purchased or received, the number of pounds of each kind and a description of all other articles purchased. These entries shall be made in chronological order from day to day, as business is transacted. This book shall at all times be open to the inspection of the police or other officers, who may desire to see it, and shall be kept in good faith and preserved by such dealer for convenient inspection.

Sec. 6-40-13 Daily report of purchases.

- A. Every junk and scrap metal dealer shall keep a book containing a consecutively numbered record of each and every purchase which shall correspond in all es-

- sentential particulars to the detachable transaction ticket attached thereto.
- B. Any person selling, exchanging or trading catalytic converters, scrap iron, brass, wire, cable, copper, lead, solder or second-hand metals of any sort shall present a valid driver's license and/or any other acceptable form of picture identification from a state or federal issuing agency (i.e., state issued ID or passport) to the junk or scrap metal dealer.
- C. The junk or scrap metal dealer shall, at the time of making the purchase, enter in the book as well as on the transaction ticket, which shall be typed or written in ink and in the English language:
1. The name, race, sex, date of birth, and residential address of the seller.
 2. The date of the scrap metal purchase.
 3. The driver's license number or other acceptable identification card from a state or federal issuing agency (i.e., state issued ID or passport) capable of identifying the seller.
 4. The amount paid therefore.
 5. The kind of metals purchased or received.
 6. The number of pounds of each kind.
- D. The seller shall sign the transaction ticket and shall receive a detached copy. The junk or scrap metal dealer shall also sign the transaction ticket. On the junk or scrap metal dealer's copy of the record of the transaction, the seller shall reproduce his or her right thumbprint. In the event the right thumb is amputated, then such other fingerprint as required by the junk or scrap metal dealer shall be taken and such fingerprint fully described on such record. This thumbprint shall be reproduced and taken in the usually approved manner and shall not be blurred or obliterated. The book shall at all times be open to the inspection of the police or other officer, or any person who may desire to see it, during normal business hours without warrant or subpoena and shall be kept in good faith and preserved on site by such dealer for convenient inspection for a period of three years from the date of the scrap metal sale.
- E. The junk or scrap metal dealer shall inquire as to where the scrap metal was obtained for the purpose of determining if purchasing scrap metal from that person is a lawful transaction. If the seller presents a bill of sale, receipt or other document indicating that the person is in lawful possession of the scrap metal, or was otherwise lawfully acquired, the dealer shall photocopy such document and maintain it with the transaction information otherwise required by this section.
- F. (a) It is an offense for a scrap metal dealer to knowingly accept any portion of an air conditioner evaporator coil or condenser unless it is accompanied by a statement and appropriate documentation from a licensed HVAC contractor evidencing that the coil or condenser has been decommissioned and removed from an appliance in compliance with the Federal Clean Air Act and its regulations.
- (b) It is an offense for a scrap metal dealer to pay cash to a person who presents an air conditioner evaporator coil or condenser or any portion of an air conditioner coil or condenser for sale as scrap, nor may such dealer make payment at the time of the transaction.
- (c) Payment for scrap metal described in subparagraph (a) shall be:
1. Made by check or money order to a licensed HVAC contractor named by the seller;
 2. After a period of three business days from the date of the scrap transaction such check or money order shall be mailed to the business address of the licensed HVAC contractor; and
 3. The payee on the check shall be the name of such licensed HVAC contractor.
- (d) 1. A violation of this section shall be punishable by a fine not to exceed fifty dollars (\$50.00) for each coil or portion of a coil offered or accepted.
2. Nothing in this section shall be construed to preclude a person violating this section from also being prosecuted for any applicable criminal offense.
- G. (a) Except as provided in subparagraph (b) of this subsection, it is an offense to knowingly sell or attempt to sell to a scrap metal dealer or for a scrap metal dealer to knowingly purchase or attempt to purchase the following types of scrap metal:
1. Scrap metal marked with the initials of an electrical, a telephone, a cable, or other public utility;
 2. Utility access covers;
 3. Street light poles and fixtures;
 4. Road and bridge guard rails;
 5. Highway or street signs;
 6. Water meter covers;
 7. Traffic directional and control signs;
 8. Traffic light signals;
 9. Any scrap metal visibly marked or painted

with the name of a governmental entity, business, company or the name of the owner of such metal;

10. Property owned by a telephone, a cable, an electric, a water, or other utility or by a railroad and marked or otherwise identified as such; and

11. Unused and undamaged historical markers, or grave markers and vases.

(b) It is an exception to application of this section that the person attempting to sell the scrap metal provides reasonable, written documentation that the seller is the owner of the scrap metal or is an employee, agent, or other person authorized to sell the scrap metal on behalf of the owner. The dealer shall make a photocopy of any documentation provided pursuant to this subsection, retain the copy as part of the transaction record, and maintain such photocopy for a period of three years following the transaction. All photocopies shall be made available for inspection upon request by law enforcement officials.

(c) 1. A violation of this section shall be punishable by a fine not to exceed fifty dollars (\$50.00) for each transaction offered or accepted.

2. Nothing in this section shall be construed to preclude a person violating this section from also being prosecuted for any applicable criminal offense.

H. The junk or scrap metal dealer shall keep on hand and in separate packages, and not allow to be mixed or confused with other purchases, in order that identification may be easy, all air conditioner evaporator coils and condensers or any portion of an air conditioner coil or condenser, catalytic converters, copper and all other metals (except scrap brass, steel wire, steel cable, solder, lead, iron and castings), bought or gotten from any person, the same to be kept on site, separate and subject to easy and convenient inspection during normal business hours without warrant or subpoena by anyone desiring to investigate for a period of not less than ten (10) days after purchase or in any way acquired; provided, that this section does not apply to scrap brass, steel wire, steel cable, solder, lead, iron and castings.

I. If it appears from the requirements of this section that the seller is in lawful possession of the scrap metal and buying or otherwise receiving the metal from the seller would not violate this chapter, the dealer shall give the seller a voucher for the amount of metal purchased. Such voucher shall include the same information required under subsection (C) of this section, the date on which the voucher can be

redeemed and a reference number as to where the metal purchased is stored. The voucher can only be redeemed by the person whose name appears on the voucher as the seller at the location the voucher was issued. No voucher may be redeemed by the voucher holder for a period of three business days from the date of the scrap metal transaction. Payment for air conditioner evaporator coils or condensers or any portion of an air conditioner coil or condenser shall be made as provided in subsection (F). All other parts of air conditioner systems offered for disposition to a junk or scrap metal dealer shall be required to comply with the voucher payment requirements of this subsection. No voucher shall be required for the sale and purchase of scrap brass, steel wire, steel cable, solder, lead, iron and castings.

Sec. 6-40-14 Retention period for articles purchased.

A. No property purchased by any junk and scrap metal dealer shall be sold, disposed of or removed from the place of business of such dealer until at least forty-eight (48) hours after the required reports have been delivered to the director of police services pursuant to Section 6-40-5.

B. Notwithstanding the provisions of subsection (A) of this section, junk and scrap metal dealers shall keep on hand and in separate packages, and not allow to be mixed or confused with the other purchases, in order that identification may be made of all scrap brass, copper, lead, and all other metals including automobile accessories, except scrap iron and castings, and bottles and merchandise bought or received from any person. This material shall be kept separate and subject to easy and convenient inspection of anyone desiring to investigate, for a period of not less than ten (10) days after purchase or other acquisition. This subsection shall not apply to scrap iron or iron castings.

Sec. 6-40-15 Dealing with minors.

No junk or scrap metal dealer shall purchase or otherwise receive from a minor under the age of eighteen (18) any personal property of any kind with the exception of aluminum cans. No voucher shall be required for the sale and purchase of aluminum cans.

Sec. 6-40-16 Dealing with strangers prohibited – Duty to give information relative to sellers.

Junk and scrap metal dealers shall deal only with persons to them personally known, and of whose identification they are certain. Such dealers shall promptly give to any officer, upon request, information to enable the seller to be identified. Dealing with strangers or failing to give such information on demand shall render such dealer guilty of a violation of this chapter.

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