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SPEAKERS' FORUM

April 23, 2004:
Town Veto Powers
25th Annual Town Law Institute
Madison, WI
Richard A. Lehmann

Governor Vetoes Bill Limiting Municipal Liability For Highway Defects

Under current Wisconsin law, a municipality can be sued for damages caused by the insufficiency or want of repairs of any highway the municipality is bound to keep in repair. The word "highway" is broadly defined to mean all public ways and thoroughfares and bridges, plus the shoulder adjacent to the paved portion of the roadway. The municipality's liability is secondary to the liability of any other person or entity responsible for the same damages. This municipal liability derives from §§81.15 and 81.17 of the Wisconsin Statutes. Together, these statutes create an exception to the general grant of municipal immunity for discretionary actions under §893.80(4), Wis. Stats.

In 1998, the Wisconsin Supreme Court issued a decision in *Morris v. Juneau County*, 219 Wis.2d 543, 579 N.W.2d 690 (1998), making it clear that the defense of governmental immunity is not available in a case against a municipality premised on highway defects. The Court recognized that the statutory cause of action under §81.15 conflicted with the general grant of

immunity for discretionary actions under §893.80(4). The Court went so far as to recommend that the Legislature consider repealing §81.15.

In April, 2003, the Assembly introduced a bill designed to do precisely what the Court had suggested; that is, to take out of §81.15 the statutory cause of action against a municipality for damages caused by insufficient highway repairs. The bill, known as AB 255, passed the Assembly on September 25, 2003. The Senate concurred in November and the bill was presented to the Governor on December 11, 2003. Governor Doyle vetoed the bill six days later, on December 17, 2003. Therefore, the existing version of §81.15 remains in effect, subject to the notice requirements and the \$50,000 damage limits set forth in §893.80. In vetoing the bill, Governor Doyle said: "Drivers should be able to expect that roads will be kept in good repair and that local governments will pay them damages when they fail to make repairs on a timely basis."

— Cathy M. Rottier

Court Finds Personal Liability Under ADA

(Mayor, Council Member and City Attorney Can be Sued Personally)

The 11th Circuit Federal Court of Appeals has ruled that officials can be **personally** liable for retaliation under Title II of the Americans With Disabilities Act (ADA). *Schotz v. City of Plantation, Florida, Jacobs, et al.*, (11th Cir., September 8, 2003). In *Schotz*, the plaintiff sued not only the city, but also, in their individual capacity, the mayor, a council member, the city attorney and a private investigator hired by the

city. The defendants sought an order dismissing the lawsuit on the basis that a public employee cannot be personally liable under the ADA. The 11th Circuit rejected this argument.

Schotz was an ADA expert who was retained to inspect a newly-constructed city community center. He sent a letter to the City Council pointing out several

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Court Finds Personal Liability Under ADA (Mayor, Council Member and City Attorney Can be Sued Personally)

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violations of the ADA in the facility. Not thrilled with this report, a City Council member hired a private investigator, paid by the city, to do an in-depth background review of Schotz, including his criminal, credit, driving and medical records. The investigator also engaged in video surveillance of Schotz. The city then released the information to the media and the public.

Schotz sued the city and the individuals alleged to be involved for retaliation under Title II of the ADA. The court found that Schotz' acts created a *prima facie* case of retaliation and were outside any legitimate scope of governmental interest. The tougher issue, however, was **who is liable**. Whether an individual can be liable under the anti-retaliation provisions of the ADA is an issue which has not been subject to much judicial interpretation.

The court interpreted the ADA's anti-retaliation provision to allow for personal liability. The court found there was insufficient evidence to show the Mayor or City Attorney knew the purpose of the investigation and dismissed them from the case. The appellate court remanded the case to the trial court to proceed against the City and the other named individuals in their personal capacity.

What is Personal Liability?

If an individual is named in a lawsuit in his/her individual capacity, damages can be collected from that individual's personal assets even though the individual was acting in the role of an official, manager or employee of an organization or municipality.

What is ADA's Title II - "Public Services?"

The ADA is comprised of four subtitles which cover employment, the provision of public services, public accommodations and miscellaneous circumstances. *Schotz v. City of Plantation* involves the public service portion of the ADA.

Title II prohibits disability discrimination by public entities "in the services, programs, or activities of all state and local governments," whether or not they receive federal funding for those programs. Title II has a broad scope, including building accessibility, interpreters, communications, equality of service delivery, eligibility or admission criteria.

The Basis of the Decision

All of the federal and state laws which prohibit discrimination also have provisions which prohibit retaliation against someone for exercising rights under those discriminatory laws.

Courts have previously held that the anti-retaliation provisions of other sections of the ADA do not permit suits against individuals. For example, the employment section prohibits discrimination and retaliation by an "employer," not a "person." *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276 (7th Cir., 1995); *Silk v. City of Chicago*, 194 F.3d 788 (7th Cir., 1999).

Title II's anti-discrimination provision, 42 U.S. Code §12132, also does not allow suit against individuals for substantive acts of discrimination.

The **anti-retaliation** part of Title II, however, is *different*. It states:

No person shall discriminate against any individual because

such individual has opposed any act or practice made unlawful by this chapter, or because such individual made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this chapter. 42 U.S.C. §12203(a). [Emphasis added.]

The court emphasized that the use of the word "person" was a significant factor in deciding that Title II allows for suits against individuals who retaliate in violation of Title II. The court also looked to administrative interpretations of Title II. These administrative regulations are "persuasive" and given some "deference" by the courts and state:

The section applies not only to public entities subject to this part, but also to persons acting in an individual capacity or to private entities. *Schotz at fn. 24*.

Based upon the language of the statutes and the Department of Justice's interpretive regulations, the 11th Circuit Court held that:

in the context of public services, the ADA's anti-retaliation provision permits personal capacity suits against individuals.

This Is Not the End of the Story

The *Schotz* decision should be a warning! There is, however, a split of authority in courts around the nation. The 6th Circuit Court of Appeals, in a 1999 decision, rejected the concept of personal liability for Title II retaliation. *Hiler v. Brown*, 177 F.3d 542 (6th Cir., 1999), as did a Michigan District Court. *Key v. Grayson*, 163 F. Supp. 697 (E.D. Mich., 2001).

This split of opinion will likely generate further litigation and ultimately an appeal to the U.S. Supreme Court to resolve the conflict.

— Robert E. Gregg

Manitowoc Gets Approval For New Power Plant

In an order issued on December 3, 2003, the Public Service Commission of Wisconsin (PSC) approved the application by Manitowoc Public Utilities (MPU) to construct a new generating plant.

The new generating plant will be a cogeneration facility located in the City of Manitowoc, right next to MPU's existing power plant. The plant will provide electric power to MPU's customers and steam to downtown Manitowoc's commercial, governmental and industrial facilities. The new plant will have a nominal output of 63 MW.

The new facility is to be fueled primarily by petroleum coke, and supplemented with coal and paper pellets. The estimated cost of the plant is approximately \$71 million.

One interesting aspect of the proposal by Manitowoc is that the construction of the new plant will significantly increase MPU's available electric capacity, but will not increase total air pollutants in the vicinity. MPU is retiring an older coal-burning plant at the site and converting it to a natural gas peaking facility. Because of the clean burning technology in the new facility, there will be no negative impact on air quality, while additional capacity will be available for MPU and its customers. (PSC Docket No. 3220-CE-110).

—Michael P. May

Some Clarification Emerges on Equitable Estoppel Issues

A business with two sets of underground tanks was ordered to remediate contamination, subject to partial reimbursement of costs under the Petroleum Environment Cleanup Fund Act (PECFA.) More reimbursement was available if the two sets of tanks were treated separately. Initially, the state agency did exactly that. Later, they changed their mind, finding that the two plumes of contaminated water had merged.

The business said it had relied on the separate treatment in investing in remediation. The agency defended itself by saying the facts had changed and the rules of the program allow it to change its mind.

The Wisconsin courts have been greatly interested lately in instances where enforcement agencies say, "go," and the property owner relies on the signal, then the government changes its mind and takes a different position. See, e.g., *Snyder v. Waukesha County Zoning Board*, 74 Wis. 2d 468, 247 N.W.2d 98 (1976) (permission to build porch revoked

after construction underway); *Willow Creek Ranch v. Town of Shelby*, 2000 WI 56, 235 Wis. 2d 409, 611 N.W.2d 693 (permission to operate game farm revoked after operations underway); *State v. Outagamie County Board of Adjustment*, 2001 WI 78, 244 Wis. 2d 613, 628 N.W.2d 376 (permission to build sun porch effectively revoked when the government decided a different set of regulations disallowed the permission).

The legal term applied when property owners say the government should not be able to pull the rug out after giving initial "go" signals is equitable estoppel.

The decision in this case declines to protect the property owner on the grounds that the signal changed in the middle of the project because of changed circumstances, not just because the government changed its mind on what rule should be applied to a fixed set of circumstances.

The case is *Mews v. Wisconsin Department of Commerce*, Appeal No. 03-0055, decided January 7, 2004. This decision has been recommended for publication.

—Dick Lehmann

Utilities May Face Risk For Failure To Maintain Street Lights

In a pair of decisions from the Supreme Court of Florida, utilities and their subcontractors may face additional risks for failure to maintain street lights.

In each case, individuals were injured by automobiles in an area where street lights had burned out, creating dark roadways.

The Florida Supreme Court held that the utility, or in one case a contractor who had agreed to maintain the lights for the utility, could be held liable for the injuries suffered by the individuals.

The Florida court found that either the utility itself, or a

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subcontractor who had agreed with the utility that it would maintain street lights in an area, had undertaken an obligation to the general public to maintain those lights in a reasonable and prudent manner. When the cases were presented to the trial courts, the courts dismissed the cases on the grounds that establishing street lighting was a benefit conferred on the public and did not impose any obligation on the street lighter to maintain the lights in any manner. The Supreme Court of Florida disagreed, finding that once the decision to provide street lighting in an area had been made, the person or entity agreeing to

provide the lighting was under an obligation to do so in a reasonable and prudent manner. The Florida Court held that whether the utility or the subcontractor had met that obligation was a question for the jury and that the cases should go to trial.

The Florida Supreme Court made a distinction between the decision to establish street lighting in an area, which it termed “discretionary,” and not the type of decision that would subject a utility to liability, and the obligation to adequately maintain the lights once they were placed in service. It was the latter duty which the court found existed, and that a failure to maintain those lights presented a jury question as to the negligence of the utility or its subcontractor.

The majority of the court rejected arguments made by the dissent that the ruling would expose utilities to significant liabilities that would naturally be passed on to ratepayers. The court also rejected contrary rulings from other jurisdictions that the provision of street lighting does not impose liabilities on the provider.

Although the Florida decisions are not applicable in other jurisdictions, they demonstrate that utilities may face similar arguments, and similar risks, for failure to maintain street lighting.

The cases are *Clay Electric Cooperative, Inc. v. Johnson* (Case No. SC01-1955, December 18, 2003) and *Martinez v. Florida Power & Light Co.* (Case No. SC01-1505, December 18, 2003).

— Michael P. May

Well Established Zoning Rules Applied in Gravel Pit Case

A county granted conditional use approval for a proposed gravel pit within an agricultural zoning district. Neighbors sued raising two issues.

First, they argued that the approval should be overturned because the Zoning Committee failed to make findings on several factors that the ordinance directed the Committee to “consider.” These were similar to the factors that state law requires a community to consider in making findings in support of rezonings that remove property from exclusive agricultural zoning districts (Wis. Stats. §91.77(1)). The Zoning Committee made no findings on the factors and the min-

utes showed no discussion of the factors. The Committee urged the court to rely on the presumption that a lot of thought went into the approval evidenced by the crafting of sixty-one conditions. The court refused to do so, saying that the ordinance requires that a record be made that the factors were discussed.

Second, the neighbors alleged bias on the part of two Committee members. One member was a town chairman whose Town had a gravel pit owned by the same company seeking approval for the pit. The Chair wrote a letter endorsing the company as a good operator and the company included the letter with the application. The other

member owned a farm that was leased to the same company for a gravel pit. Neither abstained.

The Court of Appeals held that the town chair who wrote the glowing endorsement letter should have abstained. The endorsement went beyond demonstrating having an opinion on the applicant into the realm of active advocacy. But, the member who had a business relation with the company could participate. The lease was in place before this case arose. The *Marris* case (*Marris v. City of Cedarburg*, 176 Wis.2d 14, 498 N.W.2d 842(1993)) does not forbid a member from having had business relations with an applicant.

The case is *Keen v. Dane County Board of Supervisors*, Appeal No. 03-0734, decided December 23, 2003. The opinion is not recommended for publication.

— Dick Lehmann

Police Allowed To Withhold Internal Investigation Reports In Open Records Request

The Court of Appeals affirmed the withholding of documents from an internal investigation of a complaint of sexual harassment within the City of Baraboo Police Department in *Hempel v. City of Baraboo*, Appeal No. 03-0500 (Nov. 20, 2003).

Hempel has been a Baraboo police officer for 22 years. Fellow officer, Kay Howver, filed a complaint accusing him of sexual harassment. Hempel was given a copy of the complaint and invited to an interview to respond. Subsequently, the Department gave Hempel a memo detailing the disposition of the complaint. The memo stated that it was “documentary only” and not disciplinary in nature. The memo would remain in Hempel’s file for three years. If another complaint of a similar nature were received in that time, the complaint would then be considered. Hempel served an open records request for the investigation files on the City under section 19.35, Stats., and section 103.13(2), Stats., which allows an employee access to certain personnel documents, including documents relating to disciplinary actions. The Department responded that no disclosure was warranted under section 103.13(2), because there had been no disciplinary action taken. In a separate letter sent a week later, the Department denied access under section 19.35, Stats., on grounds that the public interest in withholding the documents outweighed the public interest in disclosure.

The Department cited a number of reasons purportedly justifying

nondisclosure. These included: (1) disclosure would interfere with the Department’s ability to conduct thorough internal investigations, (2) disclosure would interfere with the City’s ability to ensure employees an opportunity for satisfying careers, (3) disclosure might subject witnesses, employees, and their families to harassment, and (4) disclosure could cause individuals not to go into police work and make it difficult for the City to attract and retain qualified officers. The circuit court granted summary judgment in favor of the Department.

The Court of Appeals affirmed by a 2-1 margin. Judge Higginbotham wrote the majority opinion, while Judge Dykman issued a strong dissent. The majority began by addressing the two-prong analysis for reviewing the decision: (1) was the custodian’s denial made with the requisite specificity and, (2) were the stated reasons sufficient to permit withholding. The second prong, in turn, depended on a determination of: (a) whether the facts of record supported the asserted public interest in secrecy, and (b) whether they outweigh the countervailing public interest in disclosure.

The majority rejected the claims by the City that releasing the documents would lead to a loss of morale within the Department and result in police officers leaving the field of law enforcement. An opinion to this effect by the record custodian was considered conclusory and insufficient. However, the majority agreed that there

were significant privacy issues at stake. It found sufficient evidence within the investigation reports on the court’s own inspection that disclosure would interfere with the Department’s ability to conduct a thorough investigation, that it would discourage victims and witnesses from being candid and that it was necessary to shield victims and witnesses from the risk of harassment.

In dissent, Judge Dykman pointed out that this was not an exceptional case. He noted that reluctant witnesses “are an everyday occurrence in court proceedings” (*Id.* ¶ 31) and pointed to the availability of “John Doe” proceedings and subpoenas as methods for obtaining information from reluctant witnesses. Moreover, in the instant case, he noted that one informant refused to give information even when promised secrecy. Ultimately, Judge Dykman came down much more strongly on the side of the public interest in disclosure of information relating to sexual harassment claims in weighing the factors.

The decision is recommended for publication. This case provides support for withholding records based on the privacy interests of victims and witnesses. However, records custodians should be careful not to consider the Baraboo case a blanket exception for internal investigation documents. The majority took pains to ground its decision in the facts of the particular case. Moreover, each case will still be subject to a balancing of the competing interests.

— Mark J. Steichen

MUNICIPAL LAW NEWSLETTER

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