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Illinois Supreme Court comes down hard on employer's sexual harassment liability

by Ericka J. Thomas

The Illinois Supreme Court recently issued a ruling that broadens an employer's liability for sexual harassment. In *Sangamon County v. Illinois Human Rights Commission*, 233 Ill.2d 125 (2009), the court held that an employer can be held strictly liable for a co-worker's harassment. In *Sangamon County,* a records clerk with the Sangamon County Sheriff's Department filed charges of sexual harassment and retaliation against the Sheriff's Department and a sergeant, who was a supervisor within the department but not the plaintiff's supervisor.

The harassment began when the plaintiff received a letter in her office mail on Illinois Department of Public Health stationery stating the she may have been exposed to a sexually transmitted disease and should be tested immediately. The plaintiff became extremely upset after reading the letter and showed it to her supervisor. Although the plaintiff and her supervisors did not discuss the letter with other employees, gossip nevertheless spread that she had a disease. The plaintiff and her supervisor contacted the Illinois Department of Public Health, which determined that the letter was a forgery. Upon returning to the department, they gave the letter to the chief deputy, who started an investigation.

Ultimately, the investigation revealed the sergeant's fingerprints on the letter. When confronted with the evidence, he admitted to typing the letter on obsolete Public Health Department stationery as a practical joke. The sheriff suspended the sergeant without pay for four days and instructed him to have no further contact with the plaintiff. In his written notice of suspension to the sergeant, the sheriff wrote "I cannot express enough my disappointment in you, especially representing me and this office in your capacity as a supervisor."

The sheriff informed the plaintiff that he suspended the sergeant for "...as many days as he could without the merit board finding out...." and requested she not contact the media or file sexual harassment charges. The sheriff also informed the plaintiff that the Illinois Department of Public Health declined to pursue criminal charges against the sergeant. About a month later, the plaintiff met with the deputy chief to express her concerns and the fact that employees continued to gossip about the incident. At that time she informed the deputy chief that the sergeant had sexually harassed her on prior occasions. The deputy chief told the plaintiff to document the incidents in writing and forward them to him, but the plaintiff never did.

During her testimony, the plaintiff stated she was alarmed at the way the department dealt with the sergeant's

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Legislation loosens prohibited interest in not-for-profit organizations' contracts

by Timothy J. Hoppa

For years, Illinois public officials and employees faced the simple fact that they could not generally hold a financial interest in any contract or work awarded by a public body for which they served. In Illinois, many statutes, including the Public Officers Prohibited Activities Act (50 ILCS 105/0.01 *et seq.*), contain provisions specifically prohibiting public officials from having financial interests or other interests in contracts that would influence -- and potentially corrupt -- their duties as public officials. These laws carry substantial criminal liability with the potential for severe penalties and imprisonment. For example, the Illinois Municipal Code states that an "officer who violates this Section" is (1) guilty of a Class 4 felony and (2) forfeits his or her office (65 ILCS 5/3.1-55-10).

The impact of these laws is obvious for public officials who own or operate private business enterprises; however, many public officials are appointed to serve on not-for-profit corporation boards that may serve the public body or the public interest. By their very nature, these organizations have interests in government contracts. Examples include mutual aid divisions, emergency telephone system and dispatch boards and other not-for-profits geared to serve

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Thwarting: When local governments cease to co-exist in harmony

by Robert J. Britz

In Illinois, there is a legal principle that one unit of local government may not "thwart" a co-existing unit of local government in the exercise of its fundamental statutory powers. Generally, the many units of government in Illinois co-exist fairly well. There are times, however, when a unit of local government's action, or failure to act, may directly impact another unit of local government. If that action or inaction frustrates the basic statutory purposes and functions of the other, the action is precluded.

This principle was enunciated in the 1985 First District Illinois Appellate Court decision of *Wilmette Park District v. Village of Wilmette,* 134 Ill.App.3d 657 (1st Dist. 1985). In *Wilmette Park District*, the Park District questioned the necessity of obtaining a special use permit from the Village of Wilmette for the purpose of installing and operating outdoor lighting for the Park District's athletic fields. The Park District filed suit requesting the court to find that it was not subject to the Village's zoning ordinance and did not need to obtain a special use permit from the Village to install and operate the outdoor lighting.

The court stated in part:

> One local government may not thwart a co-existing unit of local government in the exercise of its fundamental powers, notwithstanding that the first is a home rule entity," nor with the tendered corollary: "when there is a confrontation between two local jurisdictions, the respective powers of each are to be given effect as fully as possible, but one government unit may not enforce its laws so as to frustrate basic statutory purposes and functions of the other.

The court could find nothing in the record showing that the Village's adminis-

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police, fire, school, and other municipal entities. In many cases, the public body itself appoints the public official to the not-for-profit corporation board. In these situations, often the sole reason for the public official's appointment to the board is to protect the public body's interest.

To ensure that public officials may lawfully serve on these boards, recently the Illinois General Assembly adopted Public Act 96-0277 that allows public officials who sit on not-for-profit boards to vote on contracts, under certain conditions.

In Illinois, P. A. 96-0277 allows public officials serving on not-for-profit boards to vote on contracts, under certain conditions.

Effective January 1, 2010, the following language was added to both the Municipal Code and the Public Officers Prohibited Activities Act:

> Under either of the following circumstances, a municipal officer may hold a position on a not-for-profit corporation board that is financially interested in a contract, work, or business of the municipality:
>
> (1) If the municipal officer is appointed by the governing body of the municipality to represent the interests of the municipality on a not-for-profit corporation's board, then the municipal officer may actively vote on matters involving either that board or the municipality, at any time, so long as the membership on the not-for-profit board is not a paid position, except that the municipal officer may be reimbursed by the not-for-profit board for expenses incurred as the result of membership on the not-for-profit board.
>
> (2) If the municipal officer is not appointed to the governing body of a not-for-profit corporation by the governing body of the municipality, then the municipal officer may continue to serve; however, the municipal officer shall abstain from voting on any proposition before the municipal governing body directly involving the not-for-profit corporation and, for those matters, shall not be counted as present for the purposes of a quorum of the municipal governing body. (50 ILCS 105/3, 65 ILCS 5/3.1-55-10)

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tration of its zoning law had in any way hampered, thwarted or frustrated the Park District in its statutory duty to maintain and operate parks. The court stated it could not hold, as the Park District urged, that the Park District was not subject to the Village's zoning ordinance. Before the parties or the court could determine if the application of the Village's zoning ordinance would frustrate and contravene the Park District's statutory purposes, it was necessary that the special use process be followed. That process, the court stated, would "flesh out facts upon which the court could determine if in fact the Park District was frustrated in the performance of its statutory duties…and whether there has been an abuse of power by either the Village or the Park District."

As indicated, the *Wilmette Park District* case addressed the applicability of the Village's zoning use permit process. There is no reason to believe that the Court's holding would be any different were it analyzing the Village's zoning map amendment or variance process. In such case, a hearing process is afforded whereby facts could be flushed out upon which a determination could be made if in fact a unit of government is frustrated into performance of its statutory duties.

One unit of local government may not thwart a co-existing unit of local government in the exercise of its fundamental statutory powers.

Whether one unit of local government's enforcement of its ordinances and regulation against another unit of local government frustrates the others statutory duties are fact driven. Certainly, the application of a village's zoning laws against another unit of local government is not *per se* illegal. ■

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The addition of this language creates a two-tiered system to determine whether the public official can vote. It should relieve any apprehension a public official has regarding voting on a contract for the public body as a member of the not-for-profit board.

The broadest authority is with not-for-profit board positions appointed by the public body. In order to eliminate any misunderstandings, the public body should adopt an ordinance or resolution appointing the public official to the not-for-profit board. The ordinance should include the name of the not-for-profit organization and the position to which the public official has been appointed by the public body. By doing this, as long as the official is not paid to serve on the not-for-profit board, he or she will be able to vote on contracts between the public body and the not-for-profit corporation.

When public officials sit on a not-for-profit board but have not been appointed by the public body they serve, the amendment allows the public official to hold both offices. However, the official must abstain from voting on any contract between the public body and the not-for-profit corporation. Procedurally, it is recommended that public officials announce their intent to abstain and the reason for abstaining when the public body discusses the contract. In addition, the amendment provides that the official's abstention shall not be counted as present for the purposes of establishing a quorum for that matter. For example, a public body with seven trustees must have at least five non-public official board members present for contract discussions.

Hopefully, this new legislation will ease any concerns that public officials and employees, who serve in a dual capacity as a voting member of a not-for-profit board, might have when voting on contracts concerning the public entities they serve. Any public employee or official with questions regarding the new amendments should contact the attorney for their public body. ■

Attorney Notes

■ **OBKC&G, Ltd.** is pleased to announce that **W. Anthony Andrews** has joined the firm as a partner. Tony will primarily represent business owners, local governments, and EMS providers in tort liability actions and employment law matters from the firm's Naperville office.

■ **Robert Britz** received accreditation from the United States Department of Veterans Affairs. The purpose of the VA's accreditation program is to ensure that claimants for VA benefits receive qualified assistance in preparing and presenting their claims. Only attorneys accredited by the VA may represent claimants.

■ **Karl Ottosen** participated in the 25th Annual Chicago-Kent College of Law Illinois Public Sector Labor Relations Law Conference held on Friday, November 13, 2009 in Chicago. Karl was a member of the Police & Firefighter Forum workshop. ■

Employer liable for employee sexual harassment

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actions – the minor punishment he received made her feel degraded and insignificant. The plaintiff testified about other incidents during her administrative hearing, describing an off-duty incident where the sergeant grabbed her by the arm and asked for a kiss. The plaintiff testified she felt threatened and finally kissed him because he would not release her arm until she complied with his demands. She also testified that the sergeant unexpectedly showed up at her home to give her a Christmas gift. Another off-duty incident occurred at a local bar. The sergeant arrived at the bar and glared at her continuously, until she felt forced to leave. Finally, the sergeant approached the plaintiff at work and asked her if she would like to go with him to a motel.

The Illinois Human Rights Commission determined that the plaintiff had established sexual harassment based on a hostile work environment and specifically found, as a matter of law, that the Sheriff's Department was strictly liable for the sergeant's harassment of the plaintiff because he was a supervisory employee. However, the appellate court reversed the Commission's decision. Ultimately, the Illinois Supreme Court upheld the Commission's finding and ruled an employer could be held strictly liable for a co-worker's harassment.

The court focused its analysis on Section 2-102(D) of the Illinois Human Rights Act which states:

> It is a civil rights violation…for any employer, employee, agent of any employer, employment agency or labor organization to engage in sexual harassment; provided, that an employer shall be responsible for sexual harassment of the employer's employees by nonemployees or nonmanagerial and nonsupervisory employees only if the employer becomes aware of the conduct and fails to take reasonable corrective measures. (775 ILCS 5/2-102(D))

Historically, Illinois courts have interpreted this section to impose strict liability on an employer for sexual harassment of an employee by the employee's direct supervisor. However, the Illinois Supreme Court noted that the language of Section 2-102(d) is unambiguous. The court stated that since the sergeant was neither a "nonemployee" nor a "nonmanagerial or nonsupervisory employee" the Sheriff's Department was liable for the sergeant's harassment regardless of whether it was aware of the harassment or took measures to correct the harassment. The court further stated that Section 2-102(D) does not contain language that limits the employer's liability based on the harasser's relationship to the victim.

In responding to the Sheriff's Department's arguments, the court refused to examine federal Title VII cases to aid its interpretation of Section 2-102 (D). The court stated that the language of the Act was clear enough that it did not need to look to federal cases for interpretative guidance. The court also noted that "…it is not unfair to hold employers responsible for sexual harassment by supervisory employees…" because a supervisor is entitled to act on the employer's behalf. Finally, the court pointed out that the purpose of the Illinois Human Rights Act is remedial and should be construed liberally to prevent sexual harassment in employment for all individuals.

The ramifications of the Illinois Supreme Court's ruling in *Sangamon County* are far reaching. Employers can be held liable for sexually harassing conduct of senior employees even when the employees are on different shifts, in different departments or at different worksites as long as the employee can establish the offensive conduct. Now, more than ever, it is incumbent on employers to establish zero tolerance sexual harassment policies and thoroughly train all upper level employees on adhering to and enforcing these policies. ■

Ottosen Britz Kelly Cooper & Gilbert, Ltd.'s newsletter, ***Legal Insights for Local Governments,*** is issued periodically to keep clients and other interested parties informed of legal developments that may affect or otherwise be of interest to its readers. Due to the general nature of its contents, the comments herein do not constitute legal advice and should not be regarded as a substitute for detailed advice regarding a specific set of facts. Questions regarding any items should be directed to:

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