



**Ancel  
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## **CASES YOU SHOULD KNOW ABOUT**

Welcome to *Ancel Glink Defense E-News*, our electronic newsletter. In this newsletter, we focus on the latest court decisions and legislative changes in litigation which may affect you.

*Ancel Glink Defense E-News* is a publication of the defense litigation group of Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C.

### **Public Safety Employees Benefits Act**

#### **New definition of "emergency" under PSEBA.**

Gaffney v. Bd. of Trustees of Orland Fire Prot. Dist., 2012 IL 110012 (Feb. 17, 2012). We previously reported on the conflicting Appellate Court decisions in Gaffney v. Bd. of Trustees of Orland Fire Prot. Dist., 397 Ill.App.3d 679 (1<sup>st</sup> Dist. 2009) and Lemmenes v. Orland Fire Prot. Dist., 399 Ill.App.3d 644 (1<sup>st</sup> Dist. 2010). These cases involved the recovery of benefits under PSEBA when a firefighter is injured during training exercises. The appeals were consolidated and the Illinois Supreme Court reversed both decisions. In its decision, the Supreme Court clarified the definition of "emergency" under the Act, holding that emergency means "an unforeseen circumstance involving imminent danger to a person or property requiring an urgent response." Applying this definition, Gaffney was entitled to receive PSEBA benefits because he was injured when something went wrong during the training exercise, turning it into an emergency. In contrast, Lemmenes was not entitled to benefits because he was injured during a training exercise that proceeded as planned without any unforeseen developments.

### **Section 1983: Scope of Employment**

#### **Admission of criminal charges in determining scope of employment.**

Javier v. City of Milwaukee, 2012 WL 678284 (7<sup>th</sup> Cir. March 2, 2012). An off-duty police officer shot and killed Wilbert Javier Prado. The officer claimed that Prado tailed him, tried to run him over, and had a gun, despite contradicting evidence. The officer was criminally charged but committed suicide on the date of his arraignment. The City was sued under a Wisconsin statute requiring the City to pay judgments for acts committed in the scope of their employees' employment. The jury found the officer was not acting in the scope of his employment, so the City was not liable. The Seventh Circuit reversed and remanded for a new trial. The Seventh Circuit explained the admission of the criminal charges without an appropriate limiting instruction was in error, and the officer's conduct could be criminal and still in the scope of his employment.

### **Section 1983: Supervisory Liability**

#### **Consultation with emergency response team did not create supervisory liability.**

Backes v. Village of Peoria Heights, 662 F.3d 866 (7<sup>th</sup> Cir. Nov. 10, 2011).

An arrestee alleged excessive force claims against the Village and its police officers, including the police chief. The plaintiff was arrested after his wife informed the police that the plaintiff was suicidal, on medication, and had access to weapons. The Seventh Circuit found summary judgment was properly granted in favor of the Village and its police chief. The Court explained the consultation the police chief provided to the specialized inter-departmental emergency response team in formulating a plan for the arrest did not give rise to supervisory liability. Rather, there was no evidence the police chief played a role in plaintiff's arrest or supervised the arresting officers on scene.

### **Americans with Disability Act: Ministerial Exception**

#### **Religious employees cannot sue for employment discrimination under the ADA.**

Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 132 S.Ct. 694 (Jan. 11, 2012).

A "called" teacher at a Lutheran church's school sued for unlawful retaliation under the Americans with Disabilities Act ("ADA"). "Called" teachers were regarded as having been called to their vocation by God and received the title of "minister of religion, commissioned." The United States Supreme Court held that religious employees of a church can not sue for employment discrimination. The Supreme Court explained that a "called" teacher was a "minister" covered by the ministerial exception under the ADA. The ministerial exception is grounded in the Religious Clause of the First Amendment and keeps the government from interfering with church affairs, including the church's authority to select and control its ministers.

### **Governmental Immunity: Executing and Enforcing the Law**

#### **Police officer's decision to follow witness to accident "showup" was executing and enforcing the law.**

Stehlik v. Village of Orland Park, 2012 IL App (1st) 091278 (Feb. 17, 2012)

Plaintiffs were injured when their car was struck by a police squad car. The Appellate Court held the police officer was executing and enforcing the law at the time of the collision and, therefore, was entitled to immunity under Section 2-202 of the Tort Immunity Act. The Court explained the officer's decision to follow the complaining witness of another accident to participate in a "showup" identification was consistent with enforcement.

### **Governmental Immunity: Applicability of the Illinois Vehicle Code Does the Illinois Vehicle Code trump the Tort Immunity Act?**

Harris v. Thompson and Massac Co. Hospital Dist., Appellate Case No. 5-09-0625 (May 6, 2011). Petition for Leave to Appeal before the Illinois Supreme Court granted Sept. 28, 2011.

The plaintiffs' vehicle collided with an ambulance, and the plaintiffs sued the ambulance driver and hospital for negligence and willful and wanton conduct. On appeal, the defendant argued the Tort Immunity Act provided immunity from the plaintiffs' negligence claim. The Illinois Appellate Court disagreed, holding the Illinois Vehicle Code was in conflict with the Tort Immunity Act on the specific issue of an emergency vehicle driver's negligence. The Appellate Court explained that because the Vehicle Code was the more specific statute, the driver could be held liable for the negligent operation of the ambulance despite the Tort

Immunity Act. On September 28, 2011, the Illinois Supreme Court allowed a petition to appeal. We will report on the Supreme Court's decision once issued.

## **NEW LAWS THAT MAY AFFECT YOU**

### **Illinois Human Rights Act Amended to Include Pregnancy - PA 97-596**

PA 97-596, effective August 26, 2011, amended the Illinois Human Rights Act to protect pregnant employees. Employers may not segregate, refuse to hire, or act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment on the basis of pregnancy, childbirth or related medical conditions. Woman affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, including the receipt of fringe benefits as other persons not so affected but similar in their ability or inability to work.

### **School Code Amended to Permit Schools to Suspend or Expel Students for Gross Disobedience or Misconduct Committed Online - PA 97-340**

PA 97-340, effective January 1, 2012, amended the Illinois School Code to expel pupils guilty of gross disobedience or misconduct perpetuated by electronic means. A school board may suspend or authorize the superintendent or principal, assistant principal, or dean of students to suspend a student for no more than 10 school days. A student may also be expelled for a period not exceeding 2 calendar years if: (1) the student made an explicit threat on an Internet website against a school employee, a student, or any school-related personnel; (2) the internet website through which the threat was made is a site that was accessible within the school at the time the threat was made or was available to third parties who worked or studied within the school grounds at the time the threat was made; or (3) the threat could reasonably be interpreted as threatening to the safety and security of the threatened individual because of his or her duties or employment status or status as a student inside the school.

### **School Code Amended to Require School Districts to Provide Criminal Record Information Upon Request - PA 97-248**

PA 97-248, effective January 1, 2012, amended the Illinois School Code to require school districts to provide certain criminal record check results and Statewide Sex Offender Database check results that it obtained within the past year upon request by a school, school district, community college district, or private school. The required disclosure includes background check information that a district obtains of employees of persons or firms holding contracts with school districts who have direct, daily contact with children.

## **PENDING LEGISLATION THAT MAY AFFECT YOU**

### **Change to Tort Immunity Act Related to Indemnification of Municipal Employees - SB 3796**

SB 3796, introduced February 10, 2012 would amend the Tort Immunity Act to provide that, upon the request of an employee, a local public entity shall provide for the indemnification of any judgment or settlement arising out of a claim associated with the employee's employment to the fullest extent permitted by law. It would further give the employee the ability to retain legal representation of his or her choosing. The new rules would not apply if: (1) the action resulting in the litigation was not on behalf of the local public entity; (2) the litigation against the employee was initiated by the local public entity or State or Federal government; or (3) the litigation was initiated by the employee.

### **Change to Workplace Privacy Rules Make it Unlawful for Employers to Ask for Social Networking Site Information - HB 3782**

HB 3782 would make it unlawful for any employer to ask any employee or prospective employee to provide any password or other related information in order to gain access to the employee's account or profile on a social networking website

## ANCEL GLINK DEFENSE VICTORIES

Ancel Glink's litigation team recently defended and won the following notable cases:

### Employment Discrimination

#### **Attorney Darcy L. Proctor**

Chapman v. Dolton-Riverdale Sch. Dist. 148, Illinois Human Rights Commission.

The male complainant alleged that he was suspended without pay, received an unfavorable performance evaluation and terminated based on his gender. On October 20, 2011, the Illinois Human Rights Commission found the complainant failed to establish a prima facie case of gender discrimination and entered a recommended order and decision in favor of the School District.

### Employment Discrimination

#### **Attorney Thomas G. DiCianni and Michael Latz**

Small v. Village of Bellwood, Illinois Appellate Court.

The plaintiff alleged he was discharged from his employment with the Village solely as a result of his arrest for domestic battery, in violation of Section 2-103 (A) of the Illinois Human Rights Act. Section 2-103(A) prohibits employers from terminating an employee on the basis of having an arrest record. The circuit court granted the Village's motion for summary judgment, finding the Village did not violate Section 2-103(A) as there was no evidence to show plaintiff's arrest was the motivating reason for his discharge, and the Village was entitled to immunity under Section 2-201 of the Tort Immunity Act for discretionary employment decisions. On November 9, 2011, the Illinois Appellate Court affirmed the circuit court's decision granting summary judgment in favor of the Village.

### Due Process Hearing Requirements

#### **Attorneys Ellen K. Emery and Tiffany A. Nelson-Jaworski**

Musicus v. City of Kewanee, Henry County.

Plaintiff, a property owner who rented his property to CVS Pharmacy, claimed he was not given proper notice of a City's Planning Commission hearing. The hearing involved a special use permit request and rezoning for a parcel of property located across the street from his property -- where his tenant CVS planned to move. The hearing notice was sent to the property owner of record according to the county tax rolls. On December 16, 2011, the circuit court found that notice was proper and dismissed the plaintiff's complaint.

### Governmental Immunity

#### **Attorneys Darcy L. Proctor and Pedro Fregoso**

Henderson v. Matteson School District # 11, Cook County.

Plaintiff, a fifth grade student at Sauk Elementary School, alleged he was severely shocked while drinking from a school water fountain. Ancel Glink filed a motion to dismiss the complaint arguing the School District was immune from liability

under Section 3-102(a) of the Tort Immunity Act, as the District had no actual or constructive notice of a dangerous condition prior to plaintiff's accident, and no dangerous condition ever existed. After deposing seven District employees, rather than respond to the motion, on January 18, 2012, plaintiff voluntarily dismissed his suit against the School District.

#### Civil Rights - Equal Protection and Conspiracy

**Attorneys Lucy B. Bednarek and Ellen K. Emery**

**Steven White v. City of Waukegan, Seventh Circuit Court of Appeals.**

Plaintiff is the titleholder of property in Waukegan. He claimed that after a fire occurred on the property, he was unable to recover the property in order to continue to rent it out because of the City and its employees' unlawful actions. Plaintiff alleged a violation of his equal protection rights, as well as conspiracy. Plaintiff also alleged the City's policies and practice caused his constitutional violation. The district court granted defendants' motion to dismiss, holding that plaintiff failed to state a plausible claim. On February 2, 2012, the Seventh Circuit affirmed the dismissal of plaintiff's complaint.

#### Statute of Limitations

**Attorneys Darcy L. Proctor and Jody Knight**

**Nuccio v. Gray, Cook County.**

This case was dismissed with prejudice on February 8, 2012 based on the one year statute of limitations under the Tort Immunity Act. Plaintiff attempted to avoid the statute of limitations by naming only a School District employee directly. However, the court held defendants sufficiently established that the employee was acting within the scope of his duties for the District when he was involved with the traffic accident that resulted in the lawsuit. Therefore, the one year statute of limitations applied and the complaint was not timely filed.

### FIRM NEWS, BLOGS AND ARTICLES

We are pleased to report that two of our attorneys were recently appointed to the Illinois Workers' Compensation Commission. Michael Latz was appointed as a Commissioner, and Gerald Grenada was appointed as an Arbitrator.

Remember to visit our blog produced by Ancel Glink partner Julie Tappendorf - *Municipal Minute* at <http://municipalminute.ancelglink.com> The blog includes regular updates about recent cases, new and pending legislation, and other topics of interest to local governments.

### RISK MANAGEMENT SEMINARS AND EVENTS

**DuPage County Association of Chiefs of Police**

**Preventing Violence Against Public Officials**

Ellen K. Emery

Thursday, March 22, 2012

Wheaton, Illinois

**ISBA Local Government Stew Conference**

**Tweeting Into Trouble: Social Media & Local Governments**

Julie A. Tappendorf

May 17, 2012 (Springfield, Illinois)

May 24, 2012 (Chicago, Illinois)

**National Business Institute**

**Handling the Police Liability Claim**

Darcy L. Proctor and Ellen K. Emery

June 21, 2012

Chicago, Illinois

**ICLMA Summer Conference**

**A DIY Guide to Drafting Ordinances & Resolutions...Minus the Hourly Rate**

Julie A. Tappendorf

June 27-29, 2012

Eagle Ridge Galena, IL

**ABOUT ANCEL GLINK DEFENSE**

The attorneys who comprise Ancel Glink's defense litigation group are dedicated almost exclusively to defending governmental entities in tort, civil rights, employment, business and other claims and lawsuits. In addition to defending municipalities, school districts, park districts, townships and other entities in lawsuits in state and federal courts, Ancel Glink's litigation group handles appeals, administrative hearings, critical incident crisis management, loss control training and seminars, file audits, and special consultation. Visit our web-site at [www.ancelglink.com](http://www.ancelglink.com) or email us at [e-news@ancelglink.com](mailto:e-news@ancelglink.com).

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