# 2013 IAPD/IPRA
# Soaring to New Heights Conference
# January 24-26, 2013
# Hyatt Regency, Chicago


*Your Local Government Attorneys*

MAIN OFFICE:
140 S. DEARBORN STREET, 6TH FL.
CHICAGO, ILLINOIS 60603

PHONE: 312-782-7606
FAX: 312-782-0943
WWW.ANCELGLINK.COM

OTHER OFFICE LOCATIONS:
175 E. HAWTHORN PARKWAY
VERNON HILLS, ILLINOIS 60061
(847) 247-7400

4 E. TERRA COTTA AVENUE
CRYSTAL LAKE, ILLINOIS 60014
(815) 744-8980

1979 N. MILL STREET, SUITE 207
NAPERVILLE, IL 60563
(630) 596-4610

207 NORTH JEFFERSON, SUITE 402
BLOOMINGTON, ILLINOIS 61701
(309) 828-1990

Ancel Glink | DIAMOND BUSH DICIANNI & KRAFTHEFER


## FRIDAY, JANUARY 25, 2013

## 9:30 A.M. TO 10:45 A.M.

**SESSION #110**

---

# LEGAL/LEGISLATIVE

# PART I

---

## PRESENTER:

## ROBERT K. BUSH, ESQ.

**Employment Law: Dismissal Due to Political Affiliation**

*Embry v. City of Calumet City*, (7th Circuit Court of Appeals, 2012)

A commissioner of a city department of streets and alleys holds a policy making position and may be dismissed for purely political reasons. Plaintiff Jay Embry worked in Calumet City's Department of Streets and Alleys for more than ten years. In 2007, Embry was appointed by the Mayor to the position of commissioner, the highest position in that department. During the 2009 election, Embry campaigned for a team of candidates that included the mayor. The three aldermen were elected, but became opponents of the mayor. Those aldermen asked Embry to stop supporting the mayor and join their team. Embry refused. Shortly thereafter, those aldermen began to criticize Embry's performance.

A few months after the election, the Department of Streets and Alleys was merged with the Sewer and Water Department. Embry supervised the combined department for a short time. The mayor drafted a letter nominating Embry to be the head of the new department. The alderman refused to ratify Embry's appointment, and the mayor nominated someone else. The city council approved that appointment. Embry was left without a position with the city and filed suit, claiming he had been improperly terminated based on his political affiliation with the mayor. The trial court granted the city's motion for summary judgment, finding that Embry's job was a policy making position which was not protected from a political termination.

On appeal, the Seventh Circuit stated that certain governmental policy making positions require political allegiance and individuals in those positions may be fired solely because of their political affiliation. However, those employees are afforded a minimal level of First Amendment protection and cannot be terminated for speech on public matters that are not connected to political affiliation or policy views. Embry's claim specifically stated that he had been fired based on his political allegiance to the mayor and he could point to nothing that he said or did that was not related to his support of the mayor that may have caused his termination.

In analyzing whether Embry's job was a policy making decision, the Court weighed factors such as whether he had meaningful input into governmental decision making and whether he had broad discretionary power. The Court found that his duties in overseeing construction and repair of the city's public streets, supervising forty employees, and managing a budget of four million dollars, qualified the job as a policy making position. The Court affirmed the trial court's grant of summary judgment.

**Employment Law: Discrimination Based on Age, Race & Sex**

*Johnson v. Holder*, (Seventh Circuit Court of Appeals, 2012)

Reassignment of an employee for inappropriate remarks about a coworker is not, on its own, discriminatory. Plaintiff Deloria Johnson worked as a secretary and legal assistant for the U.S. Attorney's Office for the Northern District of Illinois for sixteen years and voluntarily retired in 2007. Just a few weeks before she retired, she had a verbal altercation with a co-worker. The co-worker had praised their supervisor and Johnson told the co-worker she wanted to "throw-up" when she heard the praise. The upset and embarrassed co-worker told the supervisor about the altercation. Johnson was then reassigned to another floor and was assigned to index a large number of backlogged case files. Johnson's salary and benefits did not change. She was restricted to the file room, except during breaks, could not allow other employees into the file room, and could not work overtime. She retired before the end of her assignment to the file room.

Johnson then sued the Department of Justice for discrimination based on her age, sex, and race. The trial court granted summary judgment to the Department of Justice, finding that Johnson had failed to establish a prima facie case of race, sex, or age discrimination.

On appeal, the Seventh Circuit affirmed the trial court's decision, finding that Johnson had failed to present evidence that her supervisor had engaged in prejudicial remarks or behavior and also failed to provide evidence of disparate treatment from that of employees who were similarly situated to her. While the evidence showed that some other employees who had been assigned to the file room as a disciplinary measure were not restricted in the same manner she was, Johnson failed to provide evidence that those employees had made inappropriate comments to coworkers.

**Willful and Wanton Conduct**

*Leja v. Community Unit School District 300,* (Appellate Court of Illinois, 2d District, 2012)

Instructing a student to use a piece of equipment that contains a label of risk of injury is not willful and wanton conduct. Plaintiff Allison Leja was a high school student who was injured when a volleyball net crank she was turning in the high school gym either broke loose or snapped back and struck her in the face. Plaintiff sued, alleging willful and wanton conduct. The trial court dismissed the claim. Leja appealed, arguing that a warning label on the crank put the school district on notice that the crank posed a risk of injury, and that instructing her to operate the crank that bore the warning label showed an utter indifference to or conscious disregard for her safety.

On appeal, the Court held that the warning label argument had no merit. The Court found that the presence of a warning label on the crank actually makes the product safer, and the plaintiff failed to show that the school district was on notice of any condition that created a high probability of injury. The court affirmed the trial court's dismissal of the willful and wanton claim.

**Employment Law: Confidential Medical Records**

*EEOC v. Thrivent Financial for Lutherans,* (Seventh Circuit Court of Appeals, 2012)

Gary Messier worked as a temporary programmer for Thrivent. During his time there, he was absent from work one day and his supervisor sent him an email message stating "Gary give us a call… we need to know what is going on." In his response email message, Messier revealed he suffered from a severe migraine. Messier quit his job less than a month later. After leaving Thrivent, he had difficulty getting another job and suspected Thrivent was telling prospective employers about his migraines. Messier hired a firm to request a reference from Thrivent and the Thrivent representative disclosed to that firm that Messier "has medical conditions where he gets migraines." The EEOC filed suit on his behalf, claiming Thrivent violated medical confidentiality requirements of the ADA. The trial court granted summary judgment to Thrivent.

On review, the Seventh Circuit found that the inquiry from the Thrivent supervisor stating "we need to know what is going on" was not a medical inquiry. Consequently, Messier's disclosure of the information that he suffered from migraines was not a confidential medical record. As a result, Thrivent did not violate the confidential medical records requirements of the ADA by disclosing that information. The Court affirmed the trial court's grant of summary judgment to Thrivent.

**Negligence: Open and Obvious, Deliberate Encounter Exception**

*Ballog v. City of Chicago,* (Appellate Court of Illinois, 1st District, 2012)

Pavement that has been excavated, refilled with concrete, but not resurfaced, may create an open and obvious condition. Plaintiff Eleanor Blog fractured her foot when she tripped as she stepped from a portion of a street that had been excavated, refilled with concrete, but not resurfaced. Blog had already crossed a similar condition on the other side of the same intersection without incident. Blog sued the City of Chicago for negligence. Blog argued that the City was negligent because it failed to provide a warning of the condition of the pavement. The trial court granted summary judgment for the City, finding that the condition was open and obvious.

On appeal, Blog argued that the question of whether the condition was open and obvious is a question of fact, not law, and the court should not have granted summary judgment. Additionally, Blog argued that, even if the condition of the street is a matter of law, the deliberate encounter exception would apply. The Court of Appeals relied on photographs provided by both the plaintiff and the City. The Court found that there was no dispute over the physical nature of the gap in the pavement. Consequently, the question of whether the condition was open and obvious was a question of law, and not a question of fact. Further, the Court held that the deliberate encounter exception did not apply because Blog had not deliberately encountered the gap in the pavement, and if she had, she would have been able to avoid it. The Court affirmed the trial court's decision.

**Employment Law: Religious Discrimination**

*Porter v. City of Chicago,* (Seventh Circuit Court of Appeals, 2012)

Employers are required to make reasonable accommodation for employee requests based on religion, but failure to accommodate every specific request does not constitute religious discrimination. Plaintiff Latice Porter, worked as Senior Data Entry Specialist in the Chicago Police Department's Records Services Division, Field Services Section, a section that operates twenty four hours ad day, seven days a week. Porter identifies herself as a Christian. She attends church services on Sunday, sometimes on Friday nights, and also attends bible study on Wednesday nights and prayer services on Tuesdays.

Prior to 2005, Porter worked a schedule that allowed her to have every other Saturday and Sunday off. In March 2005, Porter was assigned a schedule that switched her days off to Friday and Saturday. She sent a memo to the Sergeant in charge of scheduling, requesting to be reassigned to the Sunday/Monday days-off schedule. That request was approved. In August 2005, Porter requested to be assigned to a later shift on Saturday so she could attend classes as a student minister. That request was also approved. In October, 2005 Porter took leave under the Family Medical Leave Act for three months, followed by a six month medical leave of absence. Upon her return, she was assigned to the Friday/Saturday days-off group. Porter requested to be reassigned to the Sunday/Monday days-off schedule. She was told that request would be accommodated when an opening became available. She was also allowed to ask other employees if they would switch shifts with her. No employees volunteered. She was offered an opportunity to switch to another shift on Sunday, but did not follow up on that offer.

Porter filed a claim for religious discrimination, contenting that she was intimidated and harassed by her supervisors before and after she returned from medical leave. She claimed her supervisors yelled at her and called her "church girl", she was threatened with a write-up for coming to work on a day she was scheduled to have off, and they refused to change her schedule. The trial court granted summary judgment to the City of Chicago.

On appeal the Seventh Circuit affirmed the trial court. The Court held that the City did not fail to accommodate Porter's religious observations or practices, because it granted her initial requests and offered to allow her to switch to a later shift when she requested a schedule change after her return from leave. Such a change would have allowed Porter to attend Sunday morning church services.

Next, the Court found that the Cit had not engaged in disparate treatment of Porter because she could not show that her shift change after a nine month leave was motivated by discriminatory animus or that it was an adverse employment action. Additionally, the claims that she had been called "church girl" and yelled at by a supervisor were not actions that were severe or pervasive enough to establish a hostile work environment.

Finally, the Court held that Porter had not shown there was religious retaliation because she could not show she had been subjected to an adverse employment action. Even if she could show the shift change was an adverse employment action, the nearly one year elapse of time between her initial request and her later reassignment to a different shift was too long a time

period to be able to show a causal connection between her protected speech and any adverse action.

**Employment Law: Retaliation Discrimination**

*Anderson v. Donahoe,* (Seventh Circuit Court of Appeals, 2012)

Reasonable accommodation of Plaintiff John Anderson was a U.S. Postal Service mail processor at a postal facility in Bedford Park, Illinois. He suffered from asthma. While outside the work place, he was symptom free, but the asthma symptoms would flare up while he was at work. Over a period of seven years, Anderson filed a number of Equal Employment Opportunity (EEO) and Occupation Health Safety Administration (OSHA) complaints, as well as union grievances and requested reasonable accommodations under the ADA and the Rehabilitation Act.

During the period from 2002 through 2009 Anderson experienced asthma symptoms that caused him to be absent from work for long periods of time. From 2006 through 2009, he was able to work, at times, when wearing a dust mask, and later a gas mask. He received several removal and suspension notices. Anderson asserted that his pay was docked during this period, but the U.S.P.S. disputed that claim. Anderson filed an EEO discrimination complaint with the USPS, which was denied. Anderson then sued on a claim of retaliation discrimination. The trial court granted summary judgment to the USPS.

On review,the Seventh Circuit affirmed, holding that even if Anderson could show that the removal and suspension notices were adverse employment actions, he could not show a causal connection with those actions and his filing of an EEO claim. Further, Anderson could not show that the USPS treated similarly situated employees differently or that the USPS actions were pretextual.

**Employment: Age and Disability Discrimination**

*Fleishman v. Continental Casualty Co.,* (Seventh Circuit Court of Appeals, 2012)

A person who suffers an aneurism does not necessarily have a disability under the ADA. Plaintiff Howard Fleishman, an attorney, worked for Continental Casualty Company for twenty years. He suffered a brain aneurism that caused him to miss work intermittently between 2003 and 2005. When he returned, his supervisor received a series of performance-related complaints. His performance evaluation in 2005 was low, causing him not to receive a raise in pay. He was placed on a performance improvement plan. His supervisor continued to complain about his work. Fleishman was terminated in 2007. At the time, he was 54 years of age, most of his files were transferred to a 48 year old man who was hired to replace him. He filed suit under the Age Discrimination in Employment Act and the Americans with Disabilities Act, claiming discrimination based on age and a disability caused by the aneurism. The trial court granted Continental's motion for summary judgment.

On review, the Seventh Circuit held that Fleishman's age discrimination claim failed because he was unable to establish that Continental had engaged in a pattern of age discrimination, that a single inquiry to Fleishman by a supervisor about whether he had considered retirement did not show an effort to coerce him into retirement because of his age, and a comment by a similarly aged coworker that a supervisor was "out to get me too", which occurred ten months before his termination had no causal connection to his termination.

The Court found that the disability claim failed because he did not claim that the aneurism limited his ability to work until the appeal, which amounted to an admission that the aneurism did not limit his ability to work at the time of his termination. As a result the aneurism did not qualify as a condition that limited a major life activity. Further, he had never requested an accommodation under the ADA, and his employer never regarded him as disabled.

**Employment: Americans with Disabilities Act**

*EEOC v. United Airlines, Inc.*, (7th Circuit Court of Appeals, 2012)

Illinois employers must establish policies under which employees that will lose their current positions due to a disability must be reassigned to a vacant position for which they are qualified unless that reassignment would create an undue hardship for the employer.

In *EEOC v. United Airlines*, which was decided in August, 2012, the Seventh Circuit overturned its previous position that the ADA does not require employers to reassign employees whose disability would cause them to lose their position. The EEOC brought the suit against United Airlines in an effort to show that United's policy regarding transfers violated the ADA. That policy established Reasonable Accommodation Guidelines, which included a provision that, while, transfers may be a reasonable accommodation, individuals with disabilities who faced job loss due that disability would have to compete with others for vacant positions.

The trial court dismissed the EEOC's complaint, relying on precedent established by the Seventh Circuit in *EEOC v. Humiston-Keeling*, 227 F.3d 1024 (7th Cir. 2000). *Humiston-Keeling* involved a worker who could no longer perform her conveyor job due to an injured arm. The employee applied for a number of vacant clerical positions, but was not reassigned to any of those positions. The EEOC argued that the "reassignment form of reasonable accommodation … require[s] that the disabled person be advanced over a more qualified nondisabled person, provided only that the disabled person is at least minimally qualified to do the job, unless the employer can show undue hardship." The *Humiston-Keeling* Court rejected that argument, holding the "ADA does not require an employer to reassign a disabled employee to a job for which there is a better applicant, provided it's the employer's consistent and honest policy to hire the best applicant for the particular job in question." That decision was the rule of law in Illinois until the more recent *United Airlines* decision was handed down.

In the *United Airlines* case, the EEOC argued that the U.S. Supreme Court ruling in *US Airways v. Barnett*, 535 U.S. 391 (2002) undercut the *Humiston-Keeling* decision. *Barnett* involved reassignment under ADA in the context of a seniority system. In that case, a cargo handler who worked for US Airways injured his back. He then invoked seniority and transferred to a position in the mailroom. At least two employees with more seniority than Barnett had intended to apply for the mailroom position. Barnett argued that his assignment to the mailroom position was a reasonable accommodation mandated by the ADA. The Supreme Court established a case-specific approach, finding that "Once the plaintiff has shown he seeks a reasonable method of accommodation, "the defendant/ employer then must show special (typically case specific) circumstances that demonstrate undue hardship in the particular circumstances." The Supreme Court held that the request for reassignment to the mailroom was a reasonable accommodation, but that the violation of a seniority system would present an undue hardship to an employer. The *United Airlines* trial court disagreed, found *Humiston-Keeling* to be directly on point to *United Airlines*, and dismissed the EEOC's complaint. The EEOC appealed to the Seventh Circuit.

In an initial ruling by a three-judge panel in March, 2012, the Seventh Circuit held firmly to its position that the ADA does not require such reassignment. However, that panel recommended that the case be heard "en banc" that is, by all judges in the Seventh Circuit. Following that recommendation, all judges of the Court reviewed the cases and approved overruling the position it had taken in *Humiston-Keeling.* A new three-judge panel drafted the opinion.

In accord with U.S. Supreme Court decision, the Seventh Circuit has now overturned its position and has now ruled that, when an employee will lose his or her current job due to a disability, reassignment to a vacant position for which the employee is qualified is a reasonable accommodation. If there is a vacant position for which the person with a disability is qualified, the employer must make that reassignment, even if that person is not the most qualified candidate, unless it can show that the reassignment would create an unreasonable hardship to the employer, such as violation of an established seniority system or other provision in a collective bargaining agreement.

The Seventh Circuit's ruling in this case impacts all public employers in Illinois. Based on this ruling, public employers should review their employment policies and procedures and determine whether changes are needed to bring those practices into compliance with the law.

**Election Law: Candidate Indebtedness to Municipality**

*Jackson v. Board of Election Commissioners of the City of Chicago*, (Illinois Supreme Court, 2012)

Property taxes payable to a county do not constitute a "tax or other indebtedness due to a municipality" for the purposes of determining eligibility for municipal office. Carmelita Earls filed nomination papers on November 23, 2010 for the office of alderman in the City of Chicago. Eileen Jackson filed a petition objecting to Earls' candidacy, asserting that Earls and her husband had fraudulently obtained homeowner exemptions to which they were entitled and, as a result, Earls owed a tax to the City. Consequently, Jackson argued, Earls was not eligible for elective municipal office because she was in violation of an Illinois Municipal Code provision which states that individuals who are in arrears in payment of taxes or other indebtedness to a municipality are not eligible to run for elective office in that municipality. The Illinois Park District Code contains a similar provision.

Earls and her husband owned three homes in the City of Chicago and an investigation by the Cook County assessor's office revealed that they had claimed the homeowner exemption on all three properties. The assessor's office notified Earls of this situation in a letter which was dated after Earls had filed her nomination papers for the aldermanic election. Upon receipt of the letter, Earls paid additional amounts to the Cook County assessor. A hearing officer determined that the additional property tax paid by Earls to the Cook County treasurer based on the assessor's challenge to the homeowner's exemption were not of the type "contemplated under the Municipal Code" that should bar a candidate from seeking municipal office. The City of Chicago Board of Election Commissioners agreed and found that a debt owed to Cook County would not bar a candidate from seeking office in the City of Chicago.

The Election Board's decision was upheld by a circuit court. On review, the appellate court reversed, holding that Earls was in arrears on her taxes to the city at the time she filed her nominating papers. The Illinois Supreme Court found that property taxes are owed and payable to county, or in some instances, township tax collectors, and thus, cannot be deemed a tax or other indebtedness owed to a municipality. The Court reversed the appellate court's ruling and commented that the "statute was only intended to disqualify prospective candidates who are in arrears in the payment of personal obligations owed to a municipality."

**Employment: Bad Moon Rising: Formal Warning Agreement not a Contract**

*Selch v. Columbia Management*, (Appellate Court of Illinois, 1st District, 2012)

A warning letter issued to an employee, which provides no consideration and no promise constituting an offer of continued employment, is not an employment contract, even when signed by the employee. Plaintiff Jason Selch worked as an investment for a company that was acquired by another company. Prior to the acquisition, the original employer provided Selch and other employees with an employment agreement that included a severance package, and a provision that if he was terminated for cause or good reason, he would forfeit the severance package.

Not long after the take-over, the new company terminated Selch's friend and colleague. In response, Selch entered a meeting of the company's chief operating officer and chief investment officer and asked them if he had a non-compete agreement with the company. After being informed that he did not, Selch unbuckled his pants, pulled them down, and "mooned" the two managers.

The two managers met with the human resources executive and determined that, because Selch was a valuable employee, they would not terminate him. Instead, they developed a Formal Warning letter which stated that Selch could now be terminated if he violated any of the company's standards in any aspect of the job. Selch did not bargain or negotiate the terms of the warning letter, he simply signed it.

The company's CEO was on vacation during these events. When he returned to the office and learned of the mooning episode, he terminated Selch immediately. Selch sued, alleging breach of contract. The trial court granted summary judgment to the Defendant. The Appellate Court affirmed the trial court's decision, finding that the employer had a right to terminate Selch because his behavior was insubordinate, disruptive, unruly, and abusive and constituted willful misconduct. Further, the Court held that the Formal Warning was not a contract, but was instead a simple disciplinary letter which did not a) include a promise that could be interpreted as an offer; b) outline a specific course of action for dealing with future behavior, other than that Selch would be subject to further disciplinary action up to and including termination; c) there was no consideration or negotiation involved, as there would be if it were a contract; and d) Selch's signature on the form, indicating that he had read and understood the contents of the warning, did not transform the document into a contract.

**Due Process for Sex Offender Registrants**

*Schepers v. Commissioner, Indiana Department of Correction*, (7th Circuit Court of Appeals, 2012)

Individuals who are registered on a state's sex offender registry are entitled to a process which allows for notice of their pending listing on that registry and provides an opportunity to challenge the information posted on the registry and have errors corrected. The State of Indiana maintains an online Sex Offender and Violent Offender Registry, which is accessible via the Internet. A group of persons required to register sued the Department of Correction (DOC), claiming that the DOC's procedures fail to provide any process to give notice to current prisoners and an opportunity to challenge the information. In response, the Department of Corrections developed a new policy to give prisoners notice and an opportunity to challenge the information. A district court held that the new policy was sufficient. However, the new policy did not provide the same rights to individuals who were not, or had not been, incarcerated as it did to prisoners. Plaintiffs appealed.

On review, the 7th Circuit found that the policy failed to provide any process at all for sex offenders who are not incarcerated. The court also found that the process described in the policy failed to provide a real opportunity for registrants to bring errors to DOC's attention and have those errors corrected. The Court stopped short of mandating changes to the policy and, instead, encouraged the parties to work together to develop procedures that would result in an ability for sex offenders to identify and correct registry errors.

**Governmental Immunity: Duty of Care**

*Doe-3 v. McLean County Unit Dist. No. 5,* (Illinois Supreme Court, 2012).

A school district owes a duty to report accurate information to a second school district about a teacher accused of sexual abuse when completing an employment history verification form. A grade school teacher at McLean County District No. 5 was removed from his classroom twice during a school year for sexual abuse allegations and, ultimately, resigned before the end of the school year. The teacher moved to Urbana School District No. 116, where he abused more children. McLean County District officials failed to disclose information regarding the sexual abuse allegations to Urbana District when they filled out an employment verification form of the teacher's employment history. McLean County District falsely indicated the teacher had worked the entire school year.

Plaintiffs brought a claim for willful and wanton misconduct against McLean County District for "passing" the teacher to Urbana. The Illinois Supreme Court held there was no affirmative duty to warn Urbana about the abusive teacher or report his conduct to authorities. However, the Court held that, once McLean County District filled out the teacher's employment verification form, they had a duty of care to plaintiffs to provide accurate information on that form. The Court reversed the lower courts' rulings and remanded for further proceedings.

**Governmental Immunity: Statute of Limitations**

*Ponto v. Levan*, (Appellate Court of Illinois, 2d District, 2012).

A statute allowing third party actions does not extend the Tort Immunity Act's one year statute of limitations. An injured driver sued the oncoming driver for injuries arising out of a car accident between the two. The defendant driver filed a claim for contribution against third-party defendant, the City of Dixon, alleging the City's negligent maintenance of its water mains created an ice patch that caused the defendant's car to skid into plaintiff's car. Two years later, plaintiff moved for leave to file an amended complaint to add the City as a defendant. The trial court denied plaintiff's motion to add the City, finding the statute that allows actions against third-party defendants does not extend the Tort Immunity Act's one-year statute of limitations. At trial, the jury found the defendant 65% liable and the City 35% liable.

The Illinois Appellate Court affirmed the trial court's finding regarding the one-year statute of limitations and also held that unless the defendant paid more than 65% of verdict, the City did not owe anything. Finally, the Court held the water department superintendent's decision regarding maintenance following the water main leak was not a discretionary policy decision which would grant the City immunity under Section 2-201 of the Tort Immunity Act.

**Harassment: Duty to Investigate and Take Reasonable Action**

*May v. Chrysler Group, LLC*, (7th Circuit Court of Appeals, 2012)

Employers who fail to appropriately investigate harassment and take reasonable actions to end the harassment may be liable to pay both compensatory and punitive damages. Otto May Jr. was a pipefitter at Chrysler's Belvidere Assembly plant. For more than three years, May was the target of multiple incidents of racist, xenophobic, homophobic, and ant-Semitic graffiti, including death threats aimed at May and has family, in and around the factory's paint department. Additionally, his car was vandalized in the plant's parking lot and several replacement vehicles were also vandalized. May sued Chrysler on a hostile work environment claim. A jury decided that Chrysler's efforts to stop the harassment were substantially inadequate and awarded him $709,000 in compensatory damages and $3.5 million in punitive damages.

In response to May's reporting of the incidents to management, in the first year Chrysler held one general meeting with the employees who worked in the department, and at the end of the first year, hired a hand-writing expert, who was unable to determine the source of the graffiti. Chrysler did not interview anyone on a list of possible suspects submitted to them by May. The human resources employee handling the file was the wife of one the individuals May identified as a suspect and remained involved in the investigation even after learning her husband was a suspect. Additionally, Chrysler did not install a surveillance camera in the area where the graffiti was consistently found, even though May had requested one and the Belvidere police had recommended doing so. Chrysler also hired a psychiatrist to attempt to show that May had done it all of the harassment to himself.

The Court held that Chrysler did not take reasonable actions to end the harassment and Chrysler's long term recklessness during repeated threats of violence against May supported the award of punitive damages. The Court upheld both the compensatory and punitive damage awards.

**Worker's Compensation: Exclusive Remedy against Employer for Injuries Arising Out of Employment**

*Rodriguez v. Frankie's Beef/Pasta and Catering*, (Appellate Court of Illinois, 1st District, 2012)

An employee who is intentionally injured by a co-worker in the course of employment has no right to an action for negligence against the employer, unless the employer permitted or authorized the com-worker to inflict the injury. Jose Rodriguez worked as a cook at Frankie's Beef. He was involved in an argument with co-worker Edan Maya. The manager sent Maya home for the day. The following morning Maya returned to Frankie's and shot and killed Rodriguez, who was on duty at the time. Rodriguez's estate sued Frankie's for negligence, because it had retained Maya as an employee. At trial, the court granted summary judgment to Frankie's.

On review, the Appellate Court stated that the Workers Compensation Act provides the exclusive remedy for injuries arising out of and in the course of employment, unless the employee can demonstrate that the injury was not accidental, did not rise from his employment, was not received in the course of employment, and was not compensable under the Act. The definition of an accidental injury in the employment law context includes an injury inflicted intentionally by a co-employee, unless the employer has permitted or expressly authorized the co-employee to inflict that injury. Since Rodriguez's injury was "accidental" under that definition, his sole remedy was the compensation provided under the Act, and his negligence claim could not be sustained. The Court affirmed the trial court's decision.

**Americans with Disabilities Act: Definition of Disabled**

*Feldman v. Olin Corp.*, (7th Circuit Court of Appeals, 2012)

Severe, long-term inability to sleep caused by fibromyalgia and sleep apnea may be a disability under the ADA. David Feldman worked at a metal manufacturing facility for more than 30 years. For many years, Feldman worked a swing shift, which required him to work rotating day, afternoon, and midnight rotating shifts and overtime. Feldman was diagnosed with fibromyalgia in 2002 and was placed on a straight day shift schedule with no overtime beginning in 2005. In 2007, Olin instituted a reduction in force. Feldman was placed in a position which required rotating shifts. Feldman submitted a note from his doctor restricting him from rotating shifts and asked that he be assigned to straight day shifts. Management informed Feldman that there were no day shifts available and laid him off.

Feldman filed a charge of discrimination with the Illinois Department of Human Rights, alleging disability and age discrimination. Olin held a reasonable accommodation meeting with Feldman. Feldman's doctor stated that Feldman's fibromyalgia and sleep apnea were causing significant symptoms in terms of pain and excessive sedation. Management told him that he had been considered for a number of positions, but the company could not place him given his restrictions. Feldman did not work for most of 2007. In December, 2007, he was awarded a position working straight days as a tractor operator.

Feldman brought suit under the ADA for failure to accommodate his disability. The district court granted summary judgment to Olin. On appeal, the 7th Circuit reviewed two questions, whether Feldman is disabled under the ADA and whether Feldman is qualified to work in certain positions, given his overtime restriction. The Court found that evidence that Feldman's substantial, severe, and long-term limitation on his sleep may be enough to show that he is disabled under the ADA. Further, the Court found that there was enough evidence to establish a genuine issue of fact about Feldman's ability to work straight time positions that he was not offered. The Court reversed the trial court's grant of summary judgment and remanded the case for further proceedings.

**Negligence: Duty to Inspect Trees on Golf Course**

*Stackhouse v. Royce Realty*, (Appellate Court of Illinois, 2d District, 2012)

Golf course owners have a duty to inspect trees after receiving notice of the existence of a dangerous condition. Plaintiff Cathy Stackhouse was severely injured when, in 2008, a tree located on a golf course adjacent to her property fell and struck her. In 2006, a tree in the same area had fallen and Stackhouse noticed an unusual condition in the stump. She took photographs and presented them to the golf course superintendent. He suggested he would have someone check the adjacent trees out, but never hired an arborist or other expert to examine the trees. Stackhouse sued and a jury awarded a judgment against the country club and the golf course management company.

The Appellate Court affirmed, finding that the country club had been put on notice in 2006, and it was reasonably foreseeable that a large tree which was possibly diseased, and was located near a path, could fall and harm someone. The Court held that the club had an obligation to inspect the tree and remove it if it was rotten, and that the passage of two years between the time the club was put on notice that the tree was possibly diseased and the time it fell did not discharge the club from its duty to inspect the tree.

**First Amendment: Establishment Clause**

*Doe 3 v. Elmbrook School District*, (7th Circuit Court of Appeals, 2012)

Holding a public high school gradation at a church may violate the Establishment Clause of the First Amendment. A group of past and present students and parents brought suit, claiming the Elmbrook School District's practice of holding high school graduations and related activities at a Christian church violated the Establishment Clause of the Constitution. The trial court found that the District did not act unconstitutionally in holding the graduation ceremonies at the Church. The Plaintiffs appealed.

The 7th Circuit opened by stating that its opinion is not to be construed as a broad statement about the propriety of governmental use of church-owned facilities. Instead, every case must be judged on its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion. The church in this case featured a sizeable cross, pews filled with Bibles, hymnals and additional literature, and staffed information booths filled with religious literature and banners with appeals for students to join school ministries. The Court concluded that conducting a public school graduation at such a church is an endorsement of religion. Further, the Court held that the decision to use the church for graduation was religiously coercive because the only way a graduation attendee could avoid the religious dynamic is to leave the ceremony. The Court reversed the trial court decision and remanded the case.

**Sexual Harassment: Hostile Work Environment, Hostile Educational Environment, and Retaliation**

*Milligan v. Board of Trustees of Southern Ill. University*, (7th Circuit Court of Appeals, 2012)

Employers' actions in response to harassment claims speak louder than their words. Plaintiff Samuel Milligan was a student employee in the SIU chemistry department. While on duty in that position, Milligan was approached by Dr. Cal Meyers, a professor emeritus who had donated $2.5 million dollars to the university, for the development of a chemistry research facility. Meyers told Milligan his hair would make him a "very sexy lady" and squeezed Milligan's buttocks. Milligan reported the incident to his supervisor, who asked whether Milligan wanted to talk to someone about the incident. Milligan declined.

A week later, Milligan had a similar encounter with Meyers in a stockroom. Milligan and his mother arranged a meeting with an SIU administrator. At the meeting, they were told that Meyers was an old man with a compromised mental state and that SIU was his life. The administrator was not the supervisor of Meyers, but suggested that he could arrange a meeting with that individual. Milligan's mother then contacted SIU's Affirmative Action and Equal Employment Opportunity office. That office encouraged her to meet with Meyers' supervisor and file a formal complaint. Milligan was reassigned to work in a second floor stockroom, to avoid further contact with Meyers.

Meyers' supervisor met with Milligan and his mother. At the meeting, he told the Milligans of Meyers' stature at the university and mentioned his significant donation, giving them the impression that he was disinterested and did not believe them. The supervisor then met with Meyers and told him that a complaint had been filed and that his behavior would be monitored. Meyers received a written reprimand, was required to attend sexual harassment training, and was forbidden from contact with student workers. When SIU later learned Meyers had again contacted Milligan and had not completed the required training, the university banned Meyers from campus. When he continued to appear on campus, the university police removed him.

Meyers later changed his major, in part because he wanted to avoid seeing Meyers. Following that decision, Milligan was informed that he could no longer work in the chemical stockrooms. Milligan's supervisor testified that decision was based on Milligan's waning interest in the job and poor work performance. Milligan brought suit for hostile work environment, hostile educational environment, and retaliation. The trial court awarded summary judgment to SIU on all of the claims.

The 7th Circuit affirmed, finding that, in spite of the comments made by administrators to the Milligans about Meyers' stature at the university, the university's responses to Milligan's claims were reasonable. Further, Milligan's argument that the timing of his dismissal from the chemical lab position was suspect was not enough to establish retaliation. The Court commented that the university would be well served in any future situations to focus solely on whether the accusations are valid and not at all on the accused's stature on campus.

**Driver's Privacy Protection Act: Parking Tickets**

***Senne v. Village of Palatine,*** (7th Circuit Court of Appeals, 2012).

A parking ticket containing too much information can be a violation of the Driver's Privacy Protection Act. A Village police officer left a parking ticket on the windshield of an illegally parked car. The ticket had personal information about the car's owner, including his full name, address, driver's license number, date of birth, sex, weight and height. The car owner sued the Village, alleging the parking ticket disclosed personal information in violation of the Driver's Privacy Protection Act (DDPA). The DDPA prohibits the disclosure of certain personal information contained in a motor vehicle record. The Seventh Circuit held that placing protected personal information on a motorist's windshield in view of the public constituted a disclosure under the DDPA. The Court explained that while the statute contains various exceptions, the personal information included on the ticket contained more than was necessary

**Governmental Immunity: Applicability of the Illinois Vehicle Code**

*Harris v. Thompson and Massac Co. Hospital Dist*., 2012 IL 112525 (June 21, 2012).

The Illinois Vehicle Code does not trump the Tort Immunity Act. The plaintiffs' vehicle collided with a county ambulance in an intersection, and the plaintiffs sued the ambulance driver and hospital for negligence and willful and wanton conduct. On June 21, 2012, the Illinois Supreme Court held the Illinois Vehicle Code and the Tort Immunity Act were not in conflict because each addressed different actors under different circumstances. As a result, the ambulance driver was immune from liability under Section 5-106 of the Tort Immunity Act, which provides immunity for negligence responding to an emergency call - despite the requirement of the Vehicle Code which imposes a duty to refrain from negligence.

**Section 1983: GPS Tracking Devices**

*United States v. Jones*, (United States Supreme Court, 2012)

Attaching a GPS tracking device to a vehicle is a search. Law enforcement agents placed a GPS tracking on a car registered to the defendant's wife pursuant to a warrant. The warrant allowed for the installation of the device within 10 days. The GPS was not installed until the 11th day, and the vehicle's movements were tracked for 28 days. The defendant was later indicted on drug trafficking conspiracy charges. The United States Supreme Court held that attaching a GPS device to a vehicle to monitor the vehicle's movements was a search under the Fourth Amendment. The Supreme Court explained that by attaching the GPS to the vehicle, the officers encroached on a protected area.

**Employment Discrimination: Retaliation**

*Smith v. Bray*, (7th Circuit Court of Appeals, 2012)

Employees alleging retaliation must establish a causal connection between an adverse employment action and a retaliatory motive on the part of a supervisor or decision maker.
Plaintiff Darrell Smith claimed that he was subjected to racial harassment by his immediate supervisor at Equistar Chemicals and was fired for complaining about the harassment. Equistar and its parent company both became bankrupt and were discharged from any liability to Smith. Smith settled his claims against his immediate supervisor, and sued Equistar's human resources manager Denise Bray. Smith claimed that Bray conspired to retaliate against him and that she ignored his complaints and persuaded his bosses to fire him for filing them. The trial court granted Defendant Bray's motion for summary judgment.

The 7th Circuit reviewed two issues: whether Bray caused him to be fired; and, if so, whether she acted with the motive to retaliate against him. In 2004, Smith and his supervisor argued frequently. During one argument, the supervisor raised his voice, slammed a door, and told Smith he was going to tell Bray that Smith had been insubordinate. At that point, Smith retained a lawyer. His supervisor became upset and told Smith he would let Bray know he had hired a lawyer and told Smith "You're going to be sorry." Bray later, when told by the supervisor that he was not going to speak to Smith further in regard to his claims, told Smith "well if Jim is not going to talk to you, I'm not going to talk to you." Smith also claimed Bray refused to return his telephone calls. Smith was later terminated.

Smith attempted to connect the comments made by Bray and the supervisor and argue that the supervisor and Bray had conspired to discriminate against him. The Court found that those comments did not, even if connected, establish a conspiracy against Smith. Further the Court found that Bray's refusal to speak to Smith may have been petty or unwise, but did not indicate that Bray shared the supervisor's retaliatory motive.

**Employment Discrimination: Retaliation**

*Hunt v. DaVita, Inc.*, (7th Circuit Court of Appeals, 2012)

Employers may terminate at-will employees who do not return after they have exhausted available leave time, provided the employer applies such a policy uniformly. Plaintiff Virginia Hunt had worked for DaVita for 19 years when she suffered a heart attack followed by bypass surgery and went on medical leave. While on leave, she was also treated for carpal tunnel syndrome. After Hunt was on leave for six months, she was terminated in accordance with DaVita's leave policy and was told she was eligible for re-hire once she was medically cleared to work again. Hunt filed suit, claiming she was fired in retaliation for her intention to file a workers' compensation claim related to her carpal tunnel syndrome.

Hunt filed a workers' compensation claim several weeks after she was terminated. The only evidence she presented related to carpal tunnel syndrome is that she was treated for that condition while on leave and that she had previously told her supervisor that the numbness in her hands was work related. She had never told anyone at the company that she planned to file a workers' compensation claim. Company representatives testified that Hunt was terminated based entirely on the fact that she had exhausted all leave under the company's policies. The company also terminated more than three hundred other employees in the same year that had run out of leave time.

The 7th Circuit held that employers are entitled to terminate at-will employees who do not return to work after they have exhausted their leave, and retaliation cannot be shown when a company uniformly terminates employees because they did not return to work after exhausting their leave time.

**Negligence: Rescue Doctrine**

*Reed v. Ault*, (Appellate Court of Illinois, 2d District, 2012)

An individual who asserts a negligence claim based on the rescue doctrine must show that the Defendant was negligent, that she knowingly placed herself at risk to save the Defendant's life or secure Defendant's safety, and that the Defendant's negligence was the proximate cause of her injuries. Susan Ault lost control of her vehicle on an icy road. Brenda Reed stopped her vehicle, and as she approached Ault's vehicle, was struck and killed by a third vehicle. Reed's estate sued Ault for negligence, alleging liability under the "rescue doctrine". A jury found in favor of Defendant Ault. Reed filed an appeal

The rescue doctrine allows Plaintiffs who are injured rescuing while rescuing another person to bring a negligence action if that person's negligence placed herself or the rescuer in a position of peril. Reed argued that he proved that the defendant acted negligently where she was traveling too fast for conditions, did not keep her vehicle under control, stepped on the brake instead of accelerating or steering out of a skid, and landed in a ditch. Reed also argued that Ault was smoking and talking on a cell phone at the time of the accident. The Court found that the evidence showed that, on the day of the accident, the roads were clear, except for occasional patches of slush; Ault was driving under the speed limit and slowed down when she saw patches of snow or ice; and her vehicle did not slip or slide until the accident occurred. The Court also found that it was up to the jury to weight the evidence as to whether it believed Ault when she said she was not talking on a cell phone or smoking.

The Court affirmed the jury decision, finding that the decision was reasonable because the jury could have found Ault not negligent even if it believed that Reed was a rescuer who knowingly placed herself at risk in an effort to save Ault's life.

**Negligence: Waiver and Release**

*McKinney v. Castleman*, (Appellate Court of Illinois, 4th District, 2012)

An individual voluntarily entering into a work therapy program may release the entity operating the program for its negligence. Plaintiff Daniel McKinney was injured while performing work therapy tasks related to his drug and alcohol rehabilitation in a Salvation Army program. McKinney alleged that the Defendants' negligence had caused his injuries. Prior to entering the program, McKinney had been informed that he would be required to perform assigned work tasks under the supervision of Salvation Army employees. McKinney signed an agreement that included the statement "I agree for myself, my heirs or assigns, that should any accident occur involving personal injury to myself or loss or damage to my property during my residence in this Center, to hold the Salvation Army free and harmless from any and all liability therewith." The trial court entered summary judgment for the Defendants.

On review, the Court stated that an exculpatory waiver cannot be enforceable if it is 1) between employer and employee, 2) between the public and those charged with a duty of public service, such as a common carrier or public utility, or 3) between persons with a disparity of bargaining power so that the agreement does not represent a free choice on the part of the plaintiff. Additionally, a waiver must provide notice of the danger and possibility of injury. That notice must contain clear language referencing the type of activity, circumstance, or situation for which the individual agrees to relieve a defendant from the duty of care.

McKinney argued that the release should be held invalid because 1) he was an employee of the Salvation Army, 2) he lacked bargaining power that prevented him negotiating the release, and 3) the release was impermissibly ambiguous. The Court found that McKinney was not an employee of the Salvation Army, that the Salvation Army was free to impose conditions on admissions to its programs, and that McKinney's participation in the program was not mandatory. Further, the Court found that McKinney's reading and signing of the work therapy statement at the same time as he signed the release put him on notice that there was a risk he could be injured while participating in work therapy. The Court affirmed the trial court's ruling.

**Negligence: Failure to Warn**

*Bezanis v. Fox Waterway Agency*, (Appellate Court of Illinois, 2d District, 2012)

No duty to warn of shallow water far from shore in a lake. Nicholas Bezanis was a 16 year old boy who dived headfirst from a boar into shallow water 400 feet from shore. He was severely injured when his head struck the lake bottom. Bezanis sued the Fox Waterway Agency and the Lake County Sheriff, alleging that they breached their duty to warn boaters and swimmers of the risk of diving into shallow water far from shore. The trial court dismissed the claim.

On appeal, the Court affirmed the dismissal, finding that a body of water presents an open and obvious danger that is considered to be apparent even to very young children. However, that does not totally rule out a finding that a landowner owes a duty of care. For example, an Illinois court found liability when a 19 year-old dived into the deep end of a man-made swimming area and hit his head on a submerged pipe that had not been anchored. The Court distinguished the natural condition of Petite Lake from a submerged pipe in a man-made swimming hole and found that the Defendants had no duty to warn of shallow water to prevent diving 400 feet from shore.

Further, the Court held that, in order to prevent diving into shallow waters far from shore, Defendants would have to measure the water level and determine the topography of the lakes bottom, post floating warnings and cordon off areas of the lake to show where it is unsafe to dive, and reassess the water level and lake bottom to assess fluctuations. This, the court stated, would create a practical and financial burden that might curtail the public's access to the lake.

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

*Stehlik v. Village of Orland Park*, (Appellate Court of Illinois, 1st District, 2012)

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

**Workers' Compensation: Retaliation**

*Gordon v. FedEx Freight, Inc.* (7th Circuit Court of Appeals, 2012)

Employers may eliminate the position of an employee who has been injured on the job, but only if the decision to eliminate the position is made based on legitimate, non-discriminatory reasons. Marion Gordon was employed as a clerk at FedEx's Moline service center. Gordon tripped and fell while on duty, injuring her wrist. The next day, she informed her supervisor that her wrist was not improving and she would be seeking additional treatment. That afternoon, her supervisor met with a FedEx managing director who informed him that FedEx was implementing a nationwide reduction in force and the Moline facility would need to eliminate one of the three full-time employees at the Moline facility. Those positions included two operations supervisors and one clerk, Gordon. The management team decided it needed to have two supervisors, and decided to eliminate the full-time clerk position.

Gordon's doctor determined that her wrist was broken and required surgery. When Gordon returned to work, approximately one month after her injury, she was informed that her position was being eliminated and she was terminated, effective that day. Gordon filed a workers' compensation claim approximately one month later. Six months after that, she filed a wrongful termination suit, alleging that FedEx retaliated against her because she exercised her rights under the Workers' Compensation Act. The trial court granted summary judgment in favor of FedEx.

The 7th Circuit stated that Illinois Law recognizes three ways in which an employee exercises his/her rights under the Workers' Compensation Act. First, by filing a claim; second, when the employee is preemptively fired to prevent a Workers' Compensation claim; and third, by requesting and seeking medical attention. The Court found that FedEx was aware that Gordon was seeking medical attention and, as a result, she had demonstrated she was exercising a right under the Act.

The Court then moved to an analysis of whether FedEx terminated her because she exercised that right. Gordon argued that the plan prior to her injury was to eliminate a supervisor position, that the plan was changed the day after her injury, and that her duties were passed on to a supervisor and later to a part-time employee who took over her position. She also argued that the timing of these decisions was suspect.

The Court found that FedEx's decision to eliminate her position was based on legitimate, nondiscriminatory reasons. The company was implementing a nationwide reduction in force, determined that it did not want to reduce the number of supervisors at the Moline facility, and eliminated the only full-time non-supervisory position.

**Intentional Torts: Immunity under Citizen Participation Act**

*Hammons v. Society of Permanent Cosmetic Professionals*, (Appellate Court of Illinois , 1st District, 2012)

Statements posted on a blog or message board, which do not support or oppose governmental action, are not immune from a suit for defamation or other intentional torts. Plaintiffs operated a business which applied permanent makeup, such as permanent tattoo pigments, to customers. Defendants operated a blog on their website. Defendants were accused of posting defamatory comments about Plaintiffs on an ongoing basis. Statements included accusations that Plaintiffs used unsanitary training methods, that they defaced and "butchered" customers, and that they were a "joke" in the industry. Plaintiffs sued for defamation, tortuous interference with business relationships, consumer fraud, and deceptive trade practices. At trial, the court found that the Illinois Citizen Participation Act immunized Defendants from such claims. That Act is intended to prevent Strategic Lawsuits Against Public Participation (SLAPP suits), which are suits involving citizens who support or oppose government action, petition government regarding that action, and are sued in an effort to cause them to defend the lawsuit rather than further their efforts to support or oppose the government action.

On appeal, the Court held that the Act only applies to meritless, retaliatory SLAPP suits. In this case, the Defendants were not trying to influence government action or gain governmental support. Rather, the comments were simply aimed at informing anyone who read the blog that Plaintiff's products were lousy. The Court ruled that the Defendants were not entitled to immunity under the Act, and remanded the case for further proceedings.

**Nuisance: Farm Animals**

*Toftoy v. Rosenwinkel*, (Appellate Court of Illinois, 2d District, 2011)

Park and recreation agencies which operate farms may have a duty to develop a plan to prevent the proliferation of stable flies and other such pests. Defendant operates a cattle farm across the road from Plaintiff's residence. The cattle farm was in operation when Plaintiff purchased the home on the adjacent property. After several years, Plaintiff's property was infested with swarms of flies. Plaintiff sued Defendant, arguing that excessive flies emanating from the cattle farm constituted a nuisance. The trial court held that the flies were a nuisance, entered a declaratory judgment that the fly invasion was substantial and unreasonable, and entered an injunction requiring Defendants to conduct weekly inspections of their cattle-confinement and hay storage areas and remove all potential fly breeding sites. Additionally, the court ordered that the Defendants hire a professional inspector to develop a written plan to eliminate active fly breeding sites, and ordered that, after that year, defendants had a continuing obligation to maintain their operation free from active and potential breeding sites.

On review, the Court upheld the declaratory judgment, but overturned the injunction. The Court found that the injunction was too broad, was likely impossible to achieve, and there was no evidence that the injunction order would actually abate the fly nuisance.

**Title IX Educational Discrimination**

*Parker v. Franklin County Community School Corp.*, (7th Circuit Court of Appeals, 2012)

School districts that schedule boys' athletic competitions at prime time on weekends, while relegating girls' games primarily to weeknights, may violate Title IX. Franklin School District, for a period of several years, scheduled 95 percent of its boy's basketball home games on Friday or Saturday nights, while scheduling only 53 percent of girls' basketball games on those nights. A parent of a girl on the basketball team brought suit for disparate treatment under Title IX and for violation of the Equal Protection Clause. The trial court granted summary judgment in favor of the school district on both claims.

On review, the 7th Circuit held that the disparate schedules created a negative impact on the girls' team, including disproportionate academic burdens caused by a larger number of weeknight games, reduced school and community support for the team, and a feeling of inferiority. The Court reversed the order of summary judgment on the Title IX, holding that there was sufficient evidence for a trial to determine whether the disparity and resulting harm are a denial of equal athletic opportunity under Title IX. Further, the Court found that the school district was not entitled to immunity from the Equal Protection claim. The case was remanded for further proceedings.

**Employment: Racial Discrimination**

*Hanners v. Trent*, (7th Circuit Court of Appeals, 2012)

Claim for racial discrimination related to employee discipline and performance ratings will fail when not supported by specific evidence. Plaintiff Flynn Hanners, a Caucasian, was an Illinois State Police Master Sergeant. Hanners distributed an email to other members of the department which contained derogatory references to women, African Americans, and other categories of people and presented negative and demeaning stereotype of those groups. The email was also forwarded by three other employees of the department. After an investigation, a disciplinary board recommended a thirty day suspension, but offered to reduce the suspension to fifteen days if the officers would accept full responsibility for their actions. Hanners refused that offer, while the other three employees accepted it. After a hearing before the board, the board unanimously agreed that the thirty day suspension should be invoked. Following that suspension, Hanners was evaluated by his supervisor for potential promotions and was downgraded based on his dissemination of the email message and subsequent punishment. Hanners sued, alleging racial discrimination. The trial court granted summary judgment for Defendants.

Hanners submitted evidence that eighteen other employees received less severe punishment than him for comparable offenses. However, Hanners failed to provide any evidence that any of those individuals were not Caucasian, or that they were similarly situated to him. He did not provide evidence regarding the three other employees who were disciplined for disseminating the email. The Court held that there was no evidence to support a claim of racial animus, and that Hanners' general claims that the investigation of his actions was performed differently than others was not enough to sustain a claim for racial discrimination.

**Americans with Disabilities Act: Definition of "Regarded As" Disabled**

*Steffen v. Donahue*, (7th Circuit Court of Appeals, 2012)

Plaintiff's may have a claim under the ADA if they are regarded as disabled under the ADA. Plaintiff Craig Steffen was a part-time employee for the U.S. Postal Service for nine years. He injured his back and worked only one week in the final three years. During that time, Steffen failed to properly apply for leave or submit paperwork confirming that he was injured. When Steffen requested the opportunity to return to work, the USPS agreed to allow him to return to his job, provided he had no restrictions on his ability to work. Steffen entered into an agreement with the USPS, under which the parties agreed that he could file for disability retirement if he was limited in his duty. An examining physician placed restrictions on the work Steffen could perform. Steffen did not file for disability retirement. As a result, he was terminated. Steffen sued, claiming that his termination was discriminatory under the ADA. The trial court dismissed Steffen's claim.

On appeal, Steffen argued that, while he was not legally disabled, he was discriminated against because he was "regarded as" disabled by the USPS. At the time, the ADA definition of "regarded as" disabled if the employer believed he satisfied the definition of disabled under the ADA. That definition was amended in 2009 to include individuals who had been subjected to an action "because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." The Court held that, based on the timing in this case, Steffen was not covered by the amended language. Steffen attempted to show that a single comment by a USPS represented showed that the USPS regarded him as disabled. The Court disagreed, and found that Steffen was unable to establish that the USPS believed he was substantially limited in a major life activity accepted under the ADA. Steffen's claim may have been able to survive under the more liberal definition of the ADA amendment, but that amendment was not applicable to his case.

**Employment: Racial Discrimination**

*Good v. University of Chicago Medical Center*, (7th Circuit Court of Appeals, 2012)

To prove racial discrimination, evidence must show that a negative employment action was racially motivated. Barbara Good, a Caucasian woman, was employed as a lead technologist in the UCMS's Radiology Department. Good received a below average performance appraisal from her supervisor, who was also white. She was placed on a 90 day performance improvement planned, but failed to successfully complete the plan. Good offered to take a demotion, but was instead terminated. Good filed suit, alleging reverse discrimination. The trial court granted summary judgment to the Defendant.

On review, the 7th Circuit found that Good failed to show racial discrimination under either the direct or indirect methods of proof. Under the direct method, a plaintiff must provide direct evidence that creates a convincing mosaic of discrimination on the basis of race. Good pointed to three other similarly situated employees with different race than hers that were demoted rather than terminated. The Court agreed that the employees in question were similarly situated, but found that Good was unable to show that the decision to demote those employees rather than terminate them led directly to a conclusion that race was involved in the decision.

Under the indirect method, the employee is required to show background circumstances that the employer has a reason or inclination to discriminate invidiously. Good offered no facts that could suggest to a reasonable jury that UCMC had any reason or inclination to discriminate against white persons. The mere fact that she was treated differently than three employees who were offered a demotion rather than termination was not enough to demonstrate racial discrimination. The Court also suggested that it may be time to abandon the use of the direct and indirect methods of proof and, instead, focus on the evidence as a whole.

**Employment: Discrimination Based on National Origin**

*Dass v. Chicago Board of Education*, (7th Circuit Court of Appeals, 2012)

Employees who claim discrimination based on national origin must establish a causal connection between an adverse employment action and evidence that the action was taken based on their natural origin. Plaintiff Veronica Dass was born in India. She worked as a non-tenured teacher for the Chicago Public Schools. She was teaching fifth grade students and her evaluation was sub-par, in part because she had difficulty maintaining order in the classroom. She was reassigned to a seventh grade class the following year. Her performance did not improve and her contract was not renewed. Dass sued, alleging the reassignment and non-renewal were discriminatory, and were based on her national origin. The trial court granted summary judgment to the Defendants.

The 7th Circuit held that the reassignment to teach a different grade level was not an adverse employment action. Dass offered four pieces of evidence in support of her claim. The strongest was that the person who recommended her termination had once made a comment that Dass should "look for another job on the North Side where most of the Indian kids go." The Court found that this comment was made more than ten months prior to the recommendation to non-renew was not causally related to the discharge. The Court found that the decision to non-renew was based on Dass' inability to control her classroom, and was not based on national origin.

**Board Action: Interest in Contracts and Abstention from Voting**

*People v. Bertrand*, (Appellate Court of Illinois, 1st District, 2012)

An abstention by a board member who has an interest in a public contract cannot be counted as an affirmative vote on that contract. Joseph Bertrand was elected to a seat on the three-member Board of the Bremen Community High School District Board of Education. The other members of the Board refused to seat him because he resided in the same elementary school district as one of the other elected Trustees on that Board. Bertrand sued, prevailed, and was seated on the Board, but his claims for damages and fees were dismissed without prejudice.

At a subsequent Board meeting, only Bertrand and one other Board member were present. They held an executive session to discuss a possible settlement of the lawsuit. In open session following the executive session, the other Board member moved to award Bertrand $220,000 in return for his full release of the lawsuit. Bertrand seconded the motion. The other Board member voted in favor of the motion and Bertrand abstained. Based on this action, the Board president directed the Board's attorney to prepare a settlement agreement.

The agreement was presented at the next meeting of the Board. One Board member voted in favor of the agreement, one voted against it, and Bertrand again abstained. The Board president declared that the motion passed. A group of residents sued, and the Illinois Attorney General intervened on their behalf. The trial court held that the agreement was void because it was not properly approved by the Board and because it was procured in violation of the Public Officials Prohibited Activities Act.

The 7th Circuit affirmed, finding that Bertrand's attendance at the executive session to discuss the agreement and his action to second the motion to enter into a settlement agreement constituted active participation in the settlement agreement and was an impermissible conflict of interest. Further, the Court held that the agreement had never been approved by the Board. The Board president erred in counting Bertrand's abstention as an affirmative vote. The Court stated that when the affirmative vote of a majority is required, only an actual "yea" or "aye" vote will be counted toward passage.

Bertrand also attempted to argue that the Citizen Participation Act granted him immunity and precluded the court from invalidating the agreement. The Court disagreed, and held that Act does not support a claim of a public official to be paid public funds in violation of a statute and without the proper authorization of the public body.

**Employment: Racial Discrimination: Retaliation**

*Hicks v. Forest Preserve District of Cook County*, (7th Circuit Court of Appeals, 2012)

Retaliation by a supervisor may be imputed to an employer's decision makers when they base their decision on information provided by that supervisor. Dwaine Hicks, an African American, was employed as a mechanic at the Cook County Forest Preserve District's central garage. During his two years on the job, he received 28 disciplinary action forms from his supervisor, participated in an investigation of a discrimination complaint against his supervisor, and later filed his own complaint for discrimination against that supervisor. Hicks was eventually offered a choice to either accept a demotion to a non-mechanic position and have his pay cut, or face further disciplinary action up to and including termination. Hicks accepted the demotion, but filed suit, alleging retaliation. A jury found in favor of Hicks and awarded him $30,000 and reinstatement to his position as mechanic.

The evidence showed that Hicks' supervisor had told the decision makers at the Forest Preserve that Hicks needed to be "gotten rid of" because he had participated in an investigation of the supervisor. While this happened twenty-two months prior to the time when Hicks was demoted, the Court found that there was evidence that comment and the 28 disciplinary action forms filed against Hicks by that same supervisor were the reasons for the demotion. This supported the finding that the supervisor had a retaliatory animus against Hicks, and since the other employees making the decision to demote Hicks relied on the supervisor for information on which to base their decision, the retaliation could be imputed to them.

**Americans with Disabilities Act: Employer Obligation to Employee with Disabled Relative**

*Magnus v. St. Mark United Methodist Church*, (7th Circuit Court of Appeals, 2012)

Employers are not obligated to accommodate the schedule of an employee with a disabled relative. Eunice Magnus was employed as a secretary at St. Mark Church, and was required to work weekends. Magnus has a child with a disability. For a time, Magnus' work schedule did not include weekends. There was one other secretary, who worked every weekend. The church administration determined that it would change the schedule so that the secretaries would alternate weekend shifts. Magnus refused. Magnus's supervisor determined there were deficiencies in Magnus' work performance and counseled her on those deficiencies. Magnus was later terminated for poor performance and for refusing to work weekends. She sued, alleging that her termination was based on associational discrimination under the ADA. Under that provision, an employer is prohibited from discriminating against an employee because of the known disability of an individual with whom the employee is know to have a relationship or association.

The Court held that St. Mark had legitimate non-discriminatory reasons for terminating Magnus, including her performance and her refusal to work weekends when the church was asking her to rotate her schedule with the only other full-time secretary who worked there. The Court found that despite the fact that the church ma have placed her in a difficult situation, she was not entitled to have her schedule accommodated by the church.

**Animal Control Act: Definition of Owner**

*Cieslewicz v. Forest Preserve District of Cook County*, (Appellate Court of Illinois, 1st District, 2012)

Public bodies are not "owners" of stray dogs on their property and, consequently, are not liable for injuries caused by those dogs. Anna Cieslewicz was killed when she was attacked by two pit bulls while on Forest Preserve District property. Her estate brought an action against the Forest Preserve District, alleging that the District was the statutory owner of the dogs under the definition in the Animal Control Act, which, at the time of the incident, included "any person … who knowingly permits a dog or other domestic animal to remain on any premises occupied by him." The statute has since been amended to remove that provision from the definition of an owner.

The Court found that the Forest Preserve District did not knowingly permit the dogs to remain on its property and that it was merely a passive owner of property that was temporarily inhabited by dogs. As a result, the Forest Preserve District is not an "owner" of a stray animal and was not liable for the injuries to the Plaintiff.

**Employment: Termination for Association**

*Benedix v. Village of Hanover Park*

An executive assistant to the Village Manager is a confidential employee who may be terminated for political reasons. The Village of Hanover Park fired its Village Manager, then restructured its work force and eliminated three positions. Kimberly Benedix, who had served as Executive Coordinator to the Village Manager, was one of the employees whose position was eliminated. Benedix sued, claiming that she was fired because of her association with a friend of the former Village Manager.

The Court held that, because the Village implemented its plan to reorganize through an ordinance, the individual Board members were protected by legislative immunity. Further, the Court ruled that an executive coordinator who works closely with the Village Manager is a confidential employee who may be hired and fired based on politics or friendship. The Court quoted an earlier Court statement that "you cannot run a government with officials who are forced to keep political enemies as their confidential secretaries."

**Employment: Racial Discrimination**

*Harris v. Warrick County Sheriff's Department*

Plaintiff Kevin Harris was terminated from his probationary employment as a deputy sheriff based on violations of standard operating procedures, failure to follow orders, and insufficient commitment to the job. Harris sued, claiming he was fired because he is black. The trial court granted summary judgment to the Defendants.

The evidence Harris presented in support of his claim of discrimination included the fact that several detectives once watched excerpts of the movie *Blazing Saddles* in his presence and other deputies occasionally gave him nicknames from African-American characters in television shows and commercials. He also argued that other probationary officers who were white and had performance problems were not terminated. Warrick County presented evidence that Harris had, in fact, violated operating procedures and failed to follow orders.

The Court found that the other deputies Harris pointed to were not similarly situated and ruled that there was no evidence that the decision makers had anything to do with the viewing of the film clips or the use of racially tinged nicknames. The Court affirmed the trial court's grant of summary judgment.

Ancel Glink | Diamond Bush DiCianni & Krafthefer

# ROBERT K. BUSH

**ROBERT K. BUSH** received his J.D. Degree in 1977 from the Boston University School of Law. He received his Bachelor's Degree from the College of William & Mary in 1974 and also attended Wesleyan University in Middletown, Connecticut. Since May, 2005, Mr. Bush has been named by Chicago Magazine as one of the top attorneys in the State of Illinois representing cities, municipalities and other local governments. He is a member of the Bar of both the State of Illinois and the State of Indiana. Mr. Bush has significant experience representing numerous Illinois public entities, both in a corporate and litigation setting. He presently serves as Village Attorney for the Village of Harwood Heights and the Village of Lisle and he serves as Park District Counsel to the Cary Park District, the Hoffman Estates Park District, the Downers Grove Park District and the Salt Creek Park District, among others. Mr. Bush works closely with the many self-insured pools represented by Ancel Glink and is the corporate counsel for the School Employees Loss Fund, the Municipal Self-Insurance Cooperative Agency, the Northern Illinois Health Insurance Program, the McHenry County School Insurance Pool and the North Suburban Benefit Cooperative.

Mr. Bush has lectured before the Self-Insurers Institute of America, the American Bar Association, the Chicago Bar Association, the Illinois Association of Park Districts, the Illinois Park District Association, the International Association of School Business Officials, the Public Risk Management Association, the National Business Institute, as well as having participated in seminars before a number of municipal organizations. Mr. Bush is co-author of the *Illinois Park District Law Manual* and has published articles on diverse public law topics in several state and national publications. Mr. Bush has authored the chapter on "Workers' Compensation Practice" in the Chicago Bar Association - Young Lawyer's Section Handbook from 1983 to the present and has written several articles in the area of worker's compensation practice including "Mystery of Worker's Compensation" published in the Illinois Municipal Review and "Compensation Rates for Volunteer Municipal Employees" - the Illinois Bar Journal. Mr. Bush has also penned an article entitled "Civility In Municipal Government: Keeping Order When Factions Fracture Your Meetings" - Illinois Municipal Review. In addition to handling cases at the trial level and State and Federal Courts, he has appeared before the Illinois Appellate Court and the Illinois Supreme Court, as well as other administrative agencies. Mr. Bush is a member of the American Bar Association, the Chicago Bar Association, the International Municipality Lawyers Association and in 1984 was awarded the "Lawyer in the Classroom" Award by the Constitutional Rights Foundation. In 2008, Mr. Bush accepted on behalf of himself and the firm a "Lifetime Appreciation" award given by the Illinois Association of Park Districts in recognition of their steadfast counsel, commitment and generosity in helping make Illinois a better place through parks, recreation and conservation.