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City trips over immunity defense in sidewalk repair case

by Maureen Anichini Lemon

The City of Danville's effort to avoid a trial over the failure to repair a sidewalk defect fell flat in a recent decision by the Illinois Supreme Court in *Monson v. City of Danville*, 2018 IL 122486 (2018). The plaintiff, Barbara Monson, tripped and fell forward onto a sidewalk while walking from a shop to her car in the downtown business district of Danville, Illinois, in December 2012. Monson sustained multiple injuries to her face, mouth, foot, shoulder, and arm.

According to Monson, the sidewalk was broken, sunken and uneven; the City failed to repair the sidewalk; and the City failed to warn pedestrians of the dangerous conditions on the sidewalk. Monson sued the City, alleging negligence, and willful and wanton conduct. She relied on Section 3-102(a) of the Local Governmental and Governmental Employees Tort Immunity Act ("Act"), which requires a local public entity to maintain its property in a reasonably safe condition so that peoples using ordinary care are not harmed while using the property (745 ILCS 10/3-102 (a)).

The City filed a motion for summary judgment on the grounds that the City was immune from liability under Sections 2-109 and 2-201 of the Act. Section 2-109 of the Act immunizes a local public entity from liability for an injury resulting from an act or omission of an employee when the employee is not liable (745 ILCS 10/2-109). Section 2-201 immunizes a public employee serving in a position involving the determination of policy or the exercise of discretion from liability for an injury resulting from the employee's act or omission in determining policy when the employee is acting in the exercise of such discretion (745 ILCS 10/2-201).

The trial court granted the City's motion, and the appellate court affirmed that ruling. Monson appealed the case to the Illinois Supreme Court. The court reversed the lower court's ruling and remanded the case back to the trial court for further proceedings. The court acknowledged that a negligence claim based on a municipality's violation of the duty to maintain its property *may* be subject to discretionary immunity under Section 2-201 of the Act; however, whether the claim is subject to Section 2-201's immunity protection depends on the facts of the case. The court did not believe that it had enough facts before it to rule in the City's favor.

A municipal entity claiming immunity must prove its employee held a position involving the determination of policy or a position involving the exercise of discretion. The act or omission giving rise to the injuries must be both a determination of policy and an exercise of discretion. Discretionary decisions involve personal deliberation and judgment in deciding whether to perform a particular act, or how and in what manner that act should be performed.

According to the court, the burden to present sufficient evidence that the alleged acts or omissions were a conscious decision not to perform the repair and a determination of policy rested with the public entity claiming immunity. Here, the City of Danville failed to meet that burden.

The depositions of two City officials show that the City completed a project to repair downtown-area sidewalks between the fall of 2011 and the spring of 2012. One

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Meeting recordings cannot be deleted with a simple push of a button

by Ryan R. Morton

Government officials and employees should already be trained on the requirements of the Open Meetings Act and the Freedom of Information Act ("FOIA"). Most officials and employees will also be aware, then, that public records must be preserved for a certain length of time before they can be destroyed and the destruction of public records must first be approved by the State Archivist according to the Illinois Local Records Act ("LRA"). (50 ILCS 205/7) However, many do not realize that those rules also apply to any *recordings made of open meetings*, even if the recording is just to help the person writing the minutes.

Open public meetings do not have to be recorded; only closed session meetings must be recorded under the Open Meetings Act. However, it is common for a board secretary, clerk, or other employee to record an open public meeting to help them revisit discussions and double-check votes, just in case they missed jotting something down during the meeting.

As soon as an official or employee presses the red circle on a recording device during an open meeting, the resulting recording becomes a public record pursuant to the LRA. (50 ILCS 205/3) Additionally, the LRA provides that public records shall not be destroyed.

The FOIA presumes that "all records in the custody or possession of a public body" can be inspected or copied. (5 ILCS 140/1.2) That means the public has a right to request and receive a copy of the recording of an

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Sidewalk repair case

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of the city officials walked through the identified areas of concern and marked certain sidewalks with highlighter paint. The second city official, Ahrens, conducted a separate walk-through and, after conferring with other City officials, made the final decision about which sections of sidewalk would be repaired or replaced. Ahrens testified that his decisions were made on a case-by-case basis, considering the condition of the concrete; the height between slabs of sidewalk; the normal path of pedestrian travel; the area's intended use; proximity to buildings, light poles, and trees; and the available time and cost. No policy addressed these factors or dictated the decision regarding sidewalk repairs.

Ahrens signed an affidavit averring that, to the best of his knowledge and memory, the portions of sidewalk where Monson fell were either not prioritized to be replaced or such replacement could not fit within the allowable time and budget for the project. He used his discretion not to replace the portion of sidewalk in question. Aherns had no emails or documents relating to those sidewalk slabs.

The court refused to apply discretionary immunity to this case without actual evidence that the site was included in the overall evaluation of city sidewalks, that an assessment of the actual site was made, and that the City took specific factors into account in deciding not to repair that sidewalk. Otherwise, nearly every failure to maintain public property could be described as an exercise of discretion. The court remanded the case back to the trial court to determine if the City was aware of the sidewalk defect or whether it was simply overlooked. If the City assessed the actual site, the court would want to consider which factors were considered by the City in deciding not to repair the sidewalk.

The court distinguished the *Monson* case from the facts in another case involving a sidewalk defect, *Richter v. College of DuPage*, 2013 IL App (2d) 130095. In *Richter*, a student filed a lawsuit after being injured on an uneven sidewalk. The record showed that the College of DuPage buildings and grounds department manager had unfettered discretion over sidewalk deviations. The College policy included a three level response to sidewalk deviations: (1) place orange cones to alert people to the deviation, (2) apply yellow paint, and (3) physically altering the sidewalk. The manager's own policy was to 'wait and see' and make a per-case judgment call depending on the height, timing, and location of the defect. Prior to the plaintiff's accident, the manager became aware of the uneven sidewalk. He placed orange cones and applied yellow paint to the site. The cones and paint were present when the plaintiff tripped and fell. The manager waited until after the final thaw of the year to physically repair the sidewalk.

The court concluded that the manager's handling of the sidewalk deviation constituted a proper exercise of discretion and a determination of policy within the meaning of Section 2-201 of the Act. For these reasons, the College was absolutely immune from liability pursuant to Sections 2-109 and 2-201 of the Act.

The City of Danville still has an opportunity to prevail in this matter on remand. In addition to considering the discretionary immunity defense, the court directed the trial court to consider whether (1) the sidewalk defect was *de minimis*, whereby a reasonably prudent person would not foresee some danger to persons walking on it; and (2) the sidewalk defect was open and obvious.

In a lengthy concurrence opinion, Justice Thomas did not believe that Section 2-201's general discretionary immunity should apply to a violation of Section 3-102 of the Act. He was concerned that Section 3-102's duty to exercise ordinary care to maintain public property in a reasonably safe condition could be obliterated as follows: a municipal official could simply inspect and list everything that is defective and dangerous about the public property, and implement a "policy decision" not to repair the defect or danger.

Justice Thomas found the *Richter* decision distinguishable because the College manager affirmatively took measures to protect against the sidewalk defect with orange cones and yellow paint. Justice Thomas questioned the validity of the *Richter* decision if it was construed as holding that a public entity may have discretionary immunity where the public entity takes no reasonable action to repair or otherwise remedy an unsafe condition in a reasonable period of time. To the extent that this was the majority's interpretation of *Richter*, Justice Thomas asserted that it was wrongly decided and should be overturned.

It is always best practice for a public entity to take reasonable action to repair a defect or danger on public property. While cost, time, or other constraints may make such action impractical; municipal decision-makers should document their evaluation of a defect, including the factors considered in deciding whether to repair a known defect. Under the *Monson* ruling, Sections 2-201 and 2-109 could protect the municipal decision-maker and, by extension, the municipality, from liability for what amounts to a policy decision based on such a discretionary analysis. If you have questions regarding the protections of the Act, please contact one of the Ottosen Britz attorneys. ■

Attorney Note

Michael Weinstein has joined the Appellate Law and Practice Committee for the DuPage County Bar Association as Vice Chair. This committee keeps the association fully informed of all case law, statutory and regulatory changes in local government law. The committee sponsors noon hour CLE presentations on appellate law and practice at the DuPage County Courthouse.

Retaliation claims and fitness for duty exams addressed by Seventh Circuit

by Joseph Miller III and Chloe Cummings

It is common for local government entities to encounter struggles in terminating employees who are unfit for duty. A recent case from the Seventh Circuit, *Milliman v. County of McHenry*, 893 F.3d 422 (7th Cir. 2018), reviewed a Sheriff's Deputy's claim that he was terminated in retaliation for his protected speech rather than his fitness for duty issues. The case provides a reminder of the proper steps for addressing retaliation claims and fitness for duty evaluations.

Milliman was hired as a McHenry County Sheriff's Deputy in March of 1998. In late 2001, Milliman was diagnosed with brain cancer and underwent extensive treatment for his illness including brain surgery, radiation, and chemotherapy. Milliman ultimately recovered after extended medical leave and returned to work after a fitness-for-duty examination in 2003.

In November of 2010, another deputy brought suit against the McHenry County Sheriff's Department, and Milliman served as a witness. During his testimony, Milliman accused the Sheriff of "corruption, bribery, securing fraudulent loans, trafficking illegal aliens, and soliciting the murder of two individuals." Based on the allegations, the Sheriff referred Milliman to a psychologist. After Milliman objected to the first psychologist selected to perform the examination, the Sheriff sent Milliman to Dr. Grote to determine his fitness for duty.

In February of 2011, Dr. Grote found Milliman was unfit for duty. In his findings, Dr. Grote concluded that Milliman suffered from cognitive and psychological impairments resulting from his previous brain surgery, chemotherapy, and radiation, thereby rendering Milliman unfit for duty. After receiving this report, the Sheriff encouraged Milliman to retire with disability benefits. Milliman did not submit the required paperwork and was subsequently terminated for making false allegations against the Sheriff in his prior deposition, violating multiple Department General Orders, and being unfit to perform his duties as a deputy.

On December 9, 2011, Milliman filed suit against the Sheriff and the County claiming they violated his First Amendment rights by retaliating against him for engaging in constitutionally protected speech. In 2017, the district court granted summary judgment in favor of Defendants because the fitness-for-duty examination was independent, non-retaliatory, and non-pretextual.

However, in retaliation cases, after the plaintiff meets the first three elements, the burden of proof shifts to the defendant to show that the harm would have occurred regardless of the presence of protected speech.

Milliman appealed to the Seventh Circuit. In deciding in favor of the Sheriff and County, the Seventh Circuit outlined both the factors and various burdens needed to prove a retaliation claim.

First, to prevail on a retaliation claim, a public employee must show that (1) he engaged in constitutionally protected speech; (2) he suffered a deprivation because of his employer's action; and (3) his speech was a but -for cause of the employer's action. Specifically, a plaintiff must show that the violation of First Amendment rights was a motivating factor of the alleged harm.

However, in retaliation cases, after the plaintiff meets the first three elements, the burden of proof shifts to the defendant to show that the harm would have occurred regardless of the presence of protected speech. If such a showing can be made by the employer, the burden shifts back to the plaintiff to prove that the employer's reason for terminating the employee is "pretextual and the real reason was retaliatory animus."

In applying this burden-shifting analysis to *Milliman*, the question became whether Milliman produced sufficient evidence to show that his employer's reason for termination was pretextual. To meet this burden, Milliman argued that the Sheriff and his subordinates intentionally misled Dr. Grote in an attempt to influence Dr. Grote's evaluation in favor of termination. However, the court found that the statements to Dr. Grote did not undermine the finding that Milliman was unfit for duty. In fact, Dr. Grote cited additional reasons to prove Milliman was not fit for work including disorganized and derailed conversation, impairment on cognitive tests, conflicting self-reports of memory loss, and abnormal testing. According to Dr. Grote, these impairments were consistent with frontal lobe dysfunction relating to Milliman's previous brain tumor, chemotherapy, and radiation.

Milliman presented an expert witness, Dr. Dawkins, to argue that the conclusions were pretextual based on a criticism of Dr. Grote's psychiatric evaluation. However, the court held that although Dr. Dawkins's criticisms may have shown a different opinion than that of Dr. Grote's, the criticisms did not change the fact that the Sheriff's Department *honestly believed* Dr. Grote's report and relied on that when making the termination decision.

Pretext requires more than foolish reasoning; pretext requires some level of intention on the part of the employer to further a desired unlawful action. What began as a seemingly routine fitness-for-duty examination evolved into an almost decade-long dispute over First Amendment rights. Many public entities require periodic employee psychological evaluations in order to assess the mental health risks associated with working in public service fields; thus, public entities may encounter similar issues when fitness for duty issues arise. When questions about employee fitness occur, ensure that the evaluation and termination processes are conducted in the proper manner. ■

Meeting records cannot be deleted

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open meeting. If the recording cannot be disclosed because it was improperly deleted, the public body and the person who deleted the recording have violated the LRA. A person who violates the LRA may be committing a Class 4 felony. (50 ILCS 205/4)

The Illinois Attorney General recently considered this issue. A reporter submitted a FOIA request for all audio recordings made that year during the Lake County Housing Authority's Board of Commissioners meetings. The Housing Authority denied the request, arguing that the recordings were preliminary materials exempt from FOIA under 5 ILCS 140/7(1)(f) because the recordings were only made to help someone compose the meeting minutes. The Housing Authority contended that the recordings would reveal the deliberations of the Board before the decisions were made public through the approved minutes.

The Attorney General's Public Access Bureau issued a binding opinion in favor of the reporter (Public Access Opinion 17-012). The opinion explained that there is no danger of preliminary deliberations being revealed in the recording, because the meeting was open to the public. Someone could have attended the meeting and heard the discussion live. The opinion also explicitly stated that because the recording "is a record in the custody or possession of a public body" it must be made available for public inspection, if requested.

Although a recording of an open meeting is a public record, it does not need to be kept forever, unlike the minutes themselves. If a public body wants to delete these recordings on a regular basis, it should follow these four steps:

Add to Records Retention Schedule

Include any records the public body seeks to dispose on the "Records Retention Schedule." To create a schedule, contact the State Archives at (217) 782-1080. However, if the public body has a Schedule on file, apply for *an add-on to the Schedule.*

Obtain the Local Records Commission's Approval

The Local Records Commission ("LRC") will review any proposed Schedule add-ons and determine whether the additional entries should be allowed.

Annually Submit Certificate for Disposal

An entry on a Records Retention Schedule merely clears the way for records destruction. A public body still must receive permission from the Commission before destroying anything, but that permission will be granted only if the record is listed on the Schedule. For recordings, though, a public body can submit a "Multi-Event Single Disposal Certificate" at the beginning of each year. This saves the public body the hassle of submitting a separate Certificate for every recording.

This Certificate should set the dates when each open meeting recording will be deleted during that year. The State Archivist recommends waiting at least 60 days after the minutes of that meeting are approved before deleting the recording. Therefore, a public body that meets monthly could approve its January minutes in February and then delete the January recording in April. The Certificate would explain what recording will be deleted every month.

Delete A Recording Each Month

After receiving the Commission's approval of the annual Certificate, the public body is free to delete each recording according to that schedule.

* * *

Keep in mind that the rules are different for closed session recordings. As mentioned above, verbatim audio recordings are required by the Open Meetings Act. (5 ILCS 120/2.06(a)) Unlike other "public records," the Open Meetings Act provides a minimum length of time those recordings must be kept. After eighteen months, closed session recordings can be deleted, as long as the minutes for that closed session have been approved and still exist. While no permission is needed from the Commission to destroy these closed session recordings, the local governmental body should approve the destruction.

If a recording device is currently being used at open meetings, make sure the resultant recordings are being kept securely. Also, remind the person making those recordings that they cannot be deleted, unless the requirements of the LRA are met. If you need help updating your Schedule or working with the Commission, please contact your attorney with any questions. ■

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