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**Legal Insights**

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**Illinois federal court addresses sexual harassment of female firefighter**

by Thomas J. Gilbert

In *Januszewski v. The Village of Oak Lawn*, \_\_\_ F.Supp.2d \_\_\_, 2007 WL 704454 (N.D. Ill. 2007), the Federal District Court for the Northern District of Illinois, Eastern Division, addressed allegations by Januszewski, a female firefighter for the Village of Oak Lawn, that she had been subjected to various incidents of sexual harassment. Specifically, she alleged to her superiors that semen had been prominently placed on her stored bed linens; however, this incident was not investigated. Additionally, she alleged pornographic material was placed in areas readily accessible to women. Further, she alleged a superior office propositioned her and after rejecting his advances, she was falsely accused of misconduct, threatened, and subjected to disciplinary action. Finally, she claimed that she was shunned by her co-workers and purposely excluded from social functions at the fire house.

The Village moved to dismiss counts III, IV, and V of her complaint. Count III alleged an equal protection violation under Section 1983, Count IV alleged retaliation in violation of the First Amendment and equal protection rights under Section 1983, and Count V alleged intentional infliction of emotional distress. The court granted the Village's motion to dismiss Counts IV and V and ordered the Village to answer Counts I, II, and III.

The court first addressed the issue of whether the Village violated Title VII by retaliating against Januszewski for complaining to her supervisors about the sexual harassment in the workplace. In denying the motion to dismiss Count III, the court noted that a municipality can only be liable under Section 1983 (Title VII) for the acts of its employees performed according to established municipal practice or custom, which Count III sufficiently alleged. Citing *Cornfield ex rel. Lewis v. Conso-*

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**Recent court rulings support immunity for EMTs**

by Brian O'Connor

Two recent court rulings addressed immunity for paramedics and EMTs when providing emergency medical services. On June 22, 2007, the Illinois Appellate Court's First District issued its opinion in *Abruzzo v. City of Park Ridge*, 374 Ill.App.3d 743, (1<sup>st</sup> Dist. 2007), addressing which immunity applies for failing to provide medical services. In addition, the Seventh Circuit Court of Appeals issued its opinion on July 13, 2007, in *Fagocki v. Algonquin/Lake-in-the-Hills Fire Protection District*, 496 F.3d 623 (7<sup>th</sup> Cir. 2007), addressing application of the EMS Act immunity once medical services are provided.

***Abruzzo v. City of Park Ridge***

After weighing the application of the Tort Immunity Act versus the EMS Act, the court in *Abruzzo* applied the absolute immunity granted to municipal EMS providers under Sections 6-105 and 6-106 of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/1-101 *et seq.*) over the limited immunity provided to EMS providers under Section 3.150(a) of the Emergency Medical Services Systems Act (210 ILCS 50/1 *et seq.*). In *Abruzzo*, City of Park Ridge paramedics were dispatched to a call for a "nonresponsive" patient. On arrival, the complaint alleges the paramedics did nothing to assist the patient resulting in the patient's death the next day. The circuit court found as part of its ruling that the paramedics failed to evaluate, assess, examine, diagnose, treat or document the patient's condition. The patient's estate sued, and the circuit court granted the City's motion to dismiss on grounds of immunity.

On appeal, the City argued that the absolute immunity provided under Sections 6-105 and 6-106 of the Tort Immunity Act precluded liability. As noted by the court, both sections provide that a public entity and public employees acting within the scope of their employment will not be held liable for injuries resulting from (1) failing to examine; (2) failing to adequately examine; (3) diagnosing; (4) failing to diagnose; and (5) failing to prescribe.

The patient's estate offered two counter arguments. First, the estate argued that the limited immunity provided to EMS providers under Section 3.150(a) of the Emergency Medical Services Systems Act was the applicable immunity provision in this case, since it specifically applied to the EMS providers. Section 3.150(a) provides that any person licensed under the EMS Act who provides emergency or non-emergency medical services will not be held liable for providing those services unless they act willfully and wantonly. Secondly, the estate argued that their failure to evaluate or assess

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## Sexual harassment

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lided *High School Dist. No. 230*, 991 F.2d 1316 (7th Cir. 1993), the court indicated that a municipal policy could be established in one of the four following manners:

1. An official pronouncement of the legislative body of the municipal entity;
2. An action of an agency of the municipal agency which was delegated the authority to establish a policy;
3. Actions by individuals with final decision-making authority; or
4. The establishment of a custom or inaction on the part of the municipal agency contrary to the policy.

The court noted, while denying the motion to dismiss Count III, that Januszewski would still be required at trial to show that the action of the municipality through its agents was deliberate and to demonstrate a direct causal link between the action of the municipality and the actual deprivation of her rights.

In a separate and additional action, she alleged that the acts of retaliation in response to her complaints violated her First Amendment and Equal Protection Rights. The court granted the Village's motion to dismiss this part of the complaint stating that in order for the complaint to be sustained, the plaintiff had to demonstrate that:

1. Her speech was based on a matter of public concern;
2. Her speech was a motivating factor in the retaliatory action by the Village against her; and
3. That the interest of the Village and the other defendants did not outweigh her rights.

The court found that the plaintiff's complaints to her supervisors concerning her alleged sexual harassment were a personal concern rather than a matter of public concern. Accordingly, these complaints were insufficient to state a claim under Title VII (Section 1983).

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## Immunity for EMTs

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the patient and to follow applicable Standard Medical Orders (SMOs) constituted willful and wanton conduct by the paramedics. The estate introduced evidence that for the symptom of an unresponsive patient, the SMOs provide that the paramedics should have initiated advanced life support treatment, assessed the patient's breathing and circulation, and transported the patient to the appropriate medical center.

In finding absolute immunity applicable to the Park Ridge paramedics, the court noted that they had failed to examine, adequately examine, diagnose or adequately diagnose the patient, and as a result the Tort Immunity Act applied. The court noted that categorization as "unresponsive" in the 911 call did not rise to the level of a diagnosis, but rather a symptom. Although not expressly addressed by the court, the opinion infers that had the Park Ridge paramedics provided medical services by examining or diagnosing the patient, then the limited immunity provision of the EMS Act would apply.

In a broader context, the court noted that immunity provided under the Tort Immunity Act applied only to local public entities and public employees, distinguishing tort immunity from immunity granted under the EMS Act which applied to both public and private entities. In so ruling, the court likened the immunity provided by the EMS Act to public and private entities to the immunity granted under the School Code (*Heinrich v. Libertyville High School*, 186 Ill.2d 381 (1999)), as opposed to immunity granted to public entities and public employees in the Domestic Violence Act (*Moore v. Green*, 219 Ill.2d 470 (2006)).

### ***Fagocki v. Algonquin/Lake-in-the-Hills Fire Protection District***

In *Fagocki*, a patient suffered a severe allergic reaction to peanuts while eating at a Chinese restaurant. Her husband drove her to the nearby immediate care center, but she was comatose upon arrival. The paramedics responded to a 911 call to transport the patient from the care center to a hospital for proper treatment. Based upon the patient's condition, attempts to intubate the patient were undertaken. Because the patient's jaw was clenched shut, the first two attempts were unsuccessful. Intubation was successful on the third attempt after three rounds of medication to relax the patient's clenched jaw. Upon arrival the emergency room staff discovered the intubation tube was inserted in the patient's esophagus rather than trachea. The patient suffered severe, irreversible brain damage and died two and a half years after the incident.

The estate filed suit against the District with the jury finding for the patient and against the District. The District filed an appeal with the federal appellate court which reversed the judgment as a matter of law, and remanded the case with directions to enter judgment in favor of the defendant District. The court looked to the immunity provided by Section 3.150(a) of the EMS Act (210 ILCS 50/3.150(a)) which provides that licensed emergency medical service providers "who in good faith provide[ ] emergency ... medical services ... in the normal course of conducting their activities, or in an emergency, shall not be civilly liable as a result of their acts or omissions in providing such services unless such acts or omissions ... constitute willful and wanton misconduct."

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## Recent legislation affecting fire protection districts

by Donald L. Potts

### PA 95-245 – Open Meetings Act

This amendment to the Open Meetings Act applies only to five-member boards. The Open Meetings Act defines a “meeting” as a majority of a quorum meeting to discuss public business. In the case of a five-member board, a majority of a quorum is two members, which makes it very difficult for board members to speak with each other between meetings. The new amendment provides that, for five-member boards, a quorum (three members) constitutes a meeting. Therefore, two members of a five-member board can discuss public business outside of a meeting without violating the Act.

The amendment also provides that for any five-member board, “the affirmative vote of 3 members is necessary to adopt any motion, resolution, or ordinance, unless a greater number is otherwise required.” Normally, if a quorum of the board is present at a meeting, the vote of a majority (two) of those present was sufficient to pass most motions, resolutions or ordinances. Now, because two board members can discuss public business without creating a meeting under the Act, there was a concern that if only three members attend a meeting, two of them could have discussed items on the agenda outside of the meeting, and then voted without public discussion of the issues. (*Effective August 17, 2007*)

### PA 95-0316 – Workers’ Compensation

This amendment to the Workers’ Compensation Act creates a rebuttable presumption that certain medical conditions are related to employment as a firefighter, EMT or paramedic. Generally, an employee must show that his or her injury or illness is related to employment. The rebuttable presumption shifts that burden to the employer to show that it is not related to employment. The following conditions are subject to this rebuttable presumption:

- blood borne pathogen-related diseases or illnesses;
- lung or respiratory diseases or conditions;
- hypertension;
- tuberculosis;
- cancer that results in any disability to the employee;
- hernia; and
- hearing loss.

To take advantage of the rebuttable presumption, the firefighter, EMT or paramedic must have been employed in that capacity for at least five years. The amendment applies only to workers’ compensation claims, and not pension claims. If a firefighter, EMT or paramedic is found to be disabled for workers’ compensation purposes, that determination will not be binding on the pension board. (*Effective January 1, 2008*)

### PA 95-0681 – Pension Code

This law makes several changes to the disability provisions of Article 4 of the Pension Code. First, the new law makes clear that, although three physicians are required to examine the firefighter, they

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### Sexual harassment

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The court also dismissed Januszewski’s additional count that claimed the defendant’s conduct was the intentional infliction of emotional distress. The court routinely dismissed this count for the reason that any claims based solely on sexual harassment are covered by the Illinois Human Rights Act (IHRA) and that a common law action for the intentional infliction of emotional distress will not stand.

The court’s decision merely reaffirms certain sexual harassment principles that apply to all Illinois fire departments. Complaints of sexual harassment must be taken seriously, and reported complaints investigated promptly with due diligence. Additionally, the employer should have a sexual harassment policy in place to govern all employees’ conduct, and sexual harassment training should be provided for employees. ■

### Attorney Notes

• **OBKC&G, Ltd.** is pleased to announce that **Joseph Miller III** has become a partner with the firm. Joe joined the firm in November 2000 and has focused his practice in municipal and education law. He graduated from the University of Illinois in 1991 with a bachelor’s degree in Speech Communication and English. He attended Washington University School of Law and received his J.D. in 1994. Joe practices in our Naperville office.

• The firm is also pleased to announce that **William R. Thomas** has joined the firm as an associate in December 2007. Bill focuses his practice in a variety of areas including municipal law, real estate, eminent domain, family law, as well as wills and estate planning. He attended Valparaiso University School of Law and received his J.D. in 1991. Bill practices in our Elburn office.

• Effective December 2007, the firm welcomes **David T. Zafiratos** as an associate. David graduated from Northern Illinois University in 2004 with a bachelor’s degree in Political Science and received his J.D. in 2007 from Chicago-Kent College of Law. His practice will focus on municipal law, with an emphasis on fire protection districts and school districts. David will practice in the firm’s Naperville and Joliet offices. ■

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The court considered the meaning of "willful and wanton" in various Illinois court rulings, noting the challenge posed by the lack of a uniform definition and the difficulty in applying a general statement to fact-specific circumstances. The court found that various acts or omissions by the paramedics did not rise to the level of being willful and wanton misconduct, including their failure to detect the improper intubation of the patient, the timing of the re-intubation efforts, and the sequence of medication administered to the patient. The court dismissed their failure to follow the applicable Standing Medical Orders (SMOs), noting that SMOs were "to be followed only 'as circumstances allow'" and that strict adherence to SMOs would create "the perverse incentive" preserving the statutory immunity at the cost of needlessly endangering persons needing emergency care.

### Lessons of *Abruzzo* and *Fagocki*

Under the Tort Immunity Act, EMTs employed by public entities are provided absolute immunity for failing to examine or adequately examine, to diagnose or adequately diagnose, or to prescribe for a patient. Once emergency or non-emergency medical services are provided by properly licensed EMTs -- of both public and private entities in the course of their duties -- the immunity of the EMS Act becomes applicable. ■

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has moved to

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## Recent legislation

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are not all required to agree that the firefighter is disabled before the board can grant a disability pension. Next, the law states that if a firefighter applies for a disability pension, the fire department cannot use that disability as a cause for discharge of the firefighter. Finally, the law clarifies the procedure for returning a disabled firefighter to duty if he or she recovers from the disability. The law states that the department must immediately reinstate the firefighter and that he or she shall immediately be placed on the department payroll at the same rank or grade held when the disability began. If a firefighter must file a lawsuit to be reinstated, he or she can recover costs and attorney's fees. (*Effective October 11, 2007*)

### PA 95-0497 – Reimbursement for Specialized Rescue Services

This law adds Section 25 to the Fire Protection District Act and allows districts to "fix, charge, and collect reasonable fees for specialized rescue services." The fee must not exceed the reasonable cost of providing the services and cannot exceed \$125 per hour per vehicle and \$35 per hour per firefighter. The fee can only be charged to persons who have been found to be at fault by the Occupational Safety and Health Administration or the Illinois Department of Labor. (*Effective January 1, 2008*)

### PA 95-0025 – Pregnant Firefighters

This law requires fire departments to transfer a pregnant firefighter to a "less strenuous or hazardous position for the duration of her pregnancy," if she requests with the advice of her physician, and if the transfer can be reasonably accommodated. Failure to transfer a pregnant firefighter as required is a violation of the Illinois Human Rights Act. (*Effective January 1, 2008*) ■

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

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