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**Legal Insights**

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**Police officer's comments not protected by the First Amendment**

by David Zafiratos

In *Sigsworth v. City of Aurora*, 487 F.3d 506 (7th Cir. 2007), the Seventh Circuit Court of Appeals decided the First Amendment did not protect a police officer's complaints about suspected misconduct within his department. After a botched attempt to serve several warrants on suspected drug dealers and gang members, Martin Sigsworth, a member of the Aurora Police Department's Investigations Division, believed some of his peers had tipped off several suspects who avoided arrest. Sigsworth reported his suspicion to his superiors, who instructed him to remain silent. He was later removed from the task force that had been assigned to the case. Sigsworth then failed to gain a promotion to sergeant despite ranking atop the list of eligible candidates.

Sigsworth sued the City of Aurora, its mayor, and officials within the Aurora Police Department alleging they had violated the First Amendment by retaliating against him for speaking out. The district court dismissed the suit, ruling that Sigsworth had not spoken as a citizen on a matter of public concern. His speech was therefore not protected by the First Amendment. On appeal, the Seventh Circuit affirmed the district court's decision while offering a review of public employee free speech cases.

The court began its review by explaining that "[t]he First Amendment protects a public employee's right to speak as a citizen about matters of public concern under certain circumstances." In those circumstances where the First Amendment does apply, an employer may not punish or retaliate against an employee because of the employee's speech. The court then outlined the *Connick-Pickering* test for determining when the First Amendment protects a public employee's speech. That test

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**New laws of interest to local governments in Illinois**

by Brian J. O'Connor

As of the end of November, over seven hundred bills have passed through the Illinois General Assembly and have become law for 2007. Below are ten of these new laws that are of interest to local governments.

**95-0006 -- General Primary Election Dates**

This new law made a number of changes to the Election Code. The most significant change impacting units of local government was changing the general primary election date from the third Tuesday in March to the first Tuesday in February in even-numbered years. For the February 2008 General Primary, the Illinois State Board of Elections notes that 12/03/07 is the last day for local governments to adopt a resolution or ordinance for binding a public question to appear on ballot, or for county, municipal, township or park district boards to place advisory referenda on ballot by resolution. (*Effective 6/20/07*)

**95-0245 -- Open Meetings & Municipal Code -- Officers Terms**

This new law amends the Open Meetings Act to define a "meeting" for a five-member public body as a quorum of the members of a public body (three members) held for the purpose of discussing public business. It also changes the terms of offices of municipal officials - taking office at the first regular or special meeting after receipt of election results from the county clerk - to conform to recent changes in the Election Code. (*Effective 8/17/07*)

**95-0341 -- Prevailing Wage**

This new law amends the Prevailing Wage Act to clarify that the Act applies to any maintenance, repair, assembly, or disassembly work performed on equipment whether owned, leased, or rented, in addition to other covered activities. (*Effective 8/21/07*)

**95-0693 -- Municipal Code & Borrowing**

This new law amends the Municipal Code provisions relating to municipal authority to borrow money, permitting borrowing from another corporate fund, or from a bank or financial institution with repayment within 10 years. (*Effective 11/5/07*)

**95-0016 -- Smoke Free Illinois Act**

This new law creates the Smoke Free Illinois Act. The Act includes a number of provisions, some of which are listed here. New prohibitions include: (1) smoking in public places, places of employment, and governmental vehicles; and (2) smoking within a minimum

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derives from the United States Supreme Court cases of *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Meyers*, 461 U.S. 138 (1983).

The *Connick-Pickering* test requires a public employee's speech to survive a two-part analysis before receiving First Amendment protection. As stated in *Sigsworth*, "a public employee can establish that his speech is constitutionally protected if (1) the employee spoke as a citizen on matters of public concern, and (2) the interest of the employee as a citizen in commenting upon matters of public concern outweighs the interest of the State as an employer in promoting the efficiency of the public services it performs through its employees." Recently, in *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006), the Supreme Court decided a deputy district attorney's memorandum to his supervisors did not constitute speech as a citizen. Instead, the Court considered communicating through the memorandum to be part of his official duties. The First Amendment therefore did not protect the speech from discipline by the employer.

The *Sigsworth* court held that -- within the context of *Garcetti* -- a court must first determine whether a public employee spoke as a citizen or as a public employee. The court applied the first half of the *Connick-Pickering* test and determined that *Sigsworth's* complaints to his superiors were not made as a citizen but were "part of the tasks he was employed to perform." As such, the court did not need to balance *Sigsworth's* interest in his speech against the Department's interest in providing efficient public service. Once the court determined the speech occurred as part of *Sigsworth's* official duties, the inquiry ended, and the First Amendment did not protect the speech.

The court noted that not all work-related complaints go unprotected by the First Amendment. Only speech occurring within a public employee's official duties will fail the first half of the *Connick-Pickering* test. Additionally, even absent First Amendment protection, the Illinois Whistleblower Act (740 ILCS 174/1 *et seq.*) provides public employees with the option of seeking damages if employers retaliate against them for disclosing illegal actions.

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## New laws affecting local governments

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distance of 15 feet from entrances, exits, windows that open, and ventilation intakes that serve an enclosed area where smoking is prohibited. New requirements include: (1) "No Smoking" signs to be posted in each public place and place of employment where smoking is prohibited; (2) ashtrays to be removed from any area where smoking is prohibited. The law provides that the Department of Public Health, state-certified local public health departments, and local law enforcement agencies shall enforce the provisions of the Act, and establishes fines and other legal remedies for violations. The law provides that a home rule unit, and non-home rule county and municipality, may regulate smoking in public places, but that regulation must be no less restrictive than the provisions in the Act. (Effective 1/1/08)

### 95-0026 -- Employee Classification Act

This law creates the Employee Classification Act. The law was passed to address the practice of misclassifying employees as independent contractors. The law defines requirements for a person to be deemed to be an independent contractor, and provides that an individual performing services for a contractor is deemed to be an employee of the employer. It provides that it is a violation of the Act for an employer or entity not to designate an individual as an employee under the Act unless the employer or entity satisfies the provisions of the Act. The Act provides for civil remedies and civil penalties. (Effective 1/1/08)

### 95-0174 -- Municipal Code -- Annexation

This law amends the Section 7-1-1 of the Illinois Municipal Code (65 ILCS 5/7-1-1), requiring that the Township Supervisor and the Township Clerk shall be notified when a municipality annexes territory that includes a township highway or other area within the township. (Effective 1/1/08)

### 95-0497 -- Fire Protection Districts & Reimbursements

The law makes two changes. It amends Section 22 of the Fire Protection District Act, providing that for purposes of a tax levied by a fire protection district to provide an ambulance service, the term "ambulance service" includes pre-hospital medical services. The law also amends the Township Code (adding a new Section 14a), the Municipal Code (adding a new Section 11-6-5), and the Fire Protection District Act (adding a new Section 25), which provide that townships, municipalities, and fire protection districts may fix, charge, and collect reasonable fees from certain parties for providing specialized rescue services, and defines "specialized rescue services." (Effective 1/1/08)

### 95-0541 -- Civil Rights Act -- Gender Discrimination

This law amends the Illinois Civil Rights Act of 2003, which prohibits units of government from discriminating on the basis of race, color, or national origin, adding "gender" to this Act as a prohibited basis for discrimination. (Effective 1/1/08)

### 95-0635 -- Prevailing Wage -- Substance Abuse Prevention

This creates the Substance Abuse Prevention on Public Works Projects Act, which prohibits substance abuse on public works projects. The law provides for substance abuse prevention programs, and the requirement to file the program with the public entity before starting work on the public project. (Effective 1/1/08) ■

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## Should a corrections officer be forced to submit to a polygraph examination?

by Victoria Johnson

On April 12, 2007, the Second District Appellate Court handed down an important decision that will most likely affect many administrative agencies. In *Kelley v. Sheriff's Merit Commission of Kane County*, \_\_\_ Ill.App.3d \_\_\_, 866 N.E.2d 702 (2<sup>nd</sup> Dist. 2007), the court held that a corrections officer could not be forced to submit to a polygraph examination or suspended without pay for refusing to do so.

Michelle F. Kelley, a corrections officer employed by the sheriff of Kane County refused to submit to a polygraph test ordered by a superior officer. Therefore, she was suspended by the Kane County Sheriff's Merit Commission without pay for 120 days for insubordination. The trial court agreed with this suspension.

The appellate court found that Kelley's duties as a corrections officer did not accord her the status of a peace officer. Therefore, the Uniform Peace Officer's Disciplinary Act did not apply to her. The Act states, "In the course of any interrogation, no peace officer shall be required to submit to a polygraph test, or any other test questioning by means of any chemical substance, except with the officer's express written consent. Refusal to submit to such tests shall not result in the disciplinary action nor shall such refusal be made part of his or her record." (50 ILCS 725/3.11)

Although Kelley was not protected by the Act, the appellate court found that Kelley's status as a corrections officer fell within the gambit of the Illinois Supreme Court case *Kaske v. City of Rockford*, 96 Ill.2d 298 (1983). In *Kaske*, the Illinois Supreme Court ruled that it was error to use the results of a polygraph examination at an Itasca police officer's disciplinary hearing. The court further ruled that two Rockford police officers could not be disciplined for refusing to submit to polygraph tests."

The *Kaske* court followed the rule articulated in *Sommer v. Goetze*, 102 Ill.App.3d 117 (1981), that polygraph evidence is not reliable enough to be used as substantive evidence in an administrative proceeding before the board. Therefore, "there is a real danger that the board of fire and police commissioners will find the results of the polygraph examination completely determinative of guilt or innocence." The material fact underlying the ruling in *Kaske* was not that the plaintiffs were police officers, but rather that polygraph evidence violates the requirements of a fair hearing because the examinations do not produce results that are more probative than prejudicial.

Therefore, the court in *Kelley* found that it was a not a material fact that the plaintiffs in *Kaske* were police officers. Instead, the material fact was that polygraph evidence was not sufficiently reliable to be admitted to a disciplinary hearing. Thus, the appellate court reversed the trial court's decision and remanded the case for the entry of an order reversing the Commission's decision.

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This case highlights the important perception that public employees who speak within the context of their official duties are not protected by the First Amendment from discipline by their employers. Since Sigsworth's speech was part of his official duties, the level of public concern raised by that speech did not matter. Speaking out under the circumstances of this case would have arguably satisfied the second half of the *Connick-Pickering* test. However, since the speech occurred as part of his official duties, the court did not need to reach part two of the *Connick-Pickering* test, and the First Amendment did not protect Sigsworth from retaliation by his employer. ■

### 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

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### **Polygraph examination**

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It is important to note that the appellate court pointed out that there was no issue raised with respect to the impact of any collective bargaining agreement relating to the plaintiff's employment. This court did not express an opinion as to whether *Kaske* prohibits a public employer from bargaining for the right to administer polygraph examinations as an investigative tool. ■

### **Attorney Notes**

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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.

- **Karl Ottosen** and **Shawn Flaherty** participated as invited guest speakers at the Illinois Government Financial Officers Association's Training Program, *Basic Revenue Seminar*, on August 23, 2007, at Northern Illinois University's Naperville Campus in Naperville, Illinois. Karl spoke on "Property Tax Issues for Municipalities" and Shawn presented "Revenue Issues for Special Districts."
- **Tom Gilbert** and **Shawn Flaherty** addressed the topic of "Districts in Transition" at the IAFPD Fall Workshop held on Saturday, November 3, 2007 at the Bourbonnais Fire Protection District from 9:00 a.m. to 12:00 p.m. Topics covered in the presentation included: Setting up and running a board of fire commissioners, hiring practices compliance, labor relations – collective bargaining in the fire service, wage and hour law compliance for the fire service, and career department discipline.
- In September and October 2007, **John Kelly** presented "Liability Issues in the 9-1-1 Center" at the Tennessee, Alabama, and Florida 9-1-1 state conferences. He also presented "Personnel Issues in the 9-1-1 Center" at the Illinois 9-1-1 Conference in Springfield. ■

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