

LEGALINSIGHTS

FOR FIRE PROTECTION DISTRICTS

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Revisiting the Public Duty Rule

by Donald L. Potts

In order for a civil defendant to be found negligent for an injury to another, the plaintiff must first prove three things: (1) that the defendant owed a duty to the plaintiff to act in a safe manner; (2) that the defendant breached that duty; and (3) that the defendant's breach of duty caused an injury to the plaintiff. If the defendant is a local government or an employee of a local government, the Tort Immunity Act or another statutory immunity may be applied to defeat the claim even if the plaintiff can prove all elements of negligence.

Immunities are statutorily driven protections provided to governmental entities against certain causes of action. If a provision of the Tort Immunity Act is applicable, a prudent local government defendant will use the provision of the Act as a defense even before the elements of negligence are required to be proven. This is often a sensible strategy and can dispose of the case quickly, especially if a statutory immunity applies directly to the facts of the case. However, most tort immunity provisions do not apply to acts of willful and wanton misconduct; therefore, in cases of alleged willful and wanton misconduct, a different strategy is necessary.

One such strategy is to attack the first element of negligence: the existence of a duty owed to the plaintiff. Recently, the Illinois Appellate Court applied a doctrine known as the "public duty rule" and held that a Village and

an Emergency Telephone System Board (ETSB) did not owe a duty to the widow of a man who died in a fire when a radio repeater malfunctioned, preventing a fire department from receiving the 911 call about the fire. *Donovan v. Village of Ohio*, 2010 WL 152660.

In *Donovan*, a fire began in the kitchen of a local restaurant. A witness called 911, and the ETSB dispatched the fire department via a pager signal. Because of the distance between the dispatch center and the fire department, a radio repeater had been installed at the top of a water tower owned by the Village. Unfortunately, the circuit that the repeater was on tripped, and the repeater's battery backup failed before anyone noticed the problem. Because the repeater failed, the fire department never received the page. The fire claimed the life of Mr. Donovan, and his widow sued the Village of Ohio and the Bureau County ETSB, alleging that their failure to properly design, install, and maintain the 911 system with respect to the repeater constituted willful and wanton misconduct and resulted in the death of her husband.

The Emergency Telephone System Act provides for immunity against charges of negligence, but not against charges of willful and wanton misconduct as alleged in the complaint. Because this immunity was not available,

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Clear as mud: May firefighters obtain PSEBA benefits for training injuries?

by Brian J. O'Connor

In two very recent decisions involving the same fire protection district, two different appellate court panels issued contrary opinions as to whether a firefighter suffering a catastrophic injury during training was entitled to continuation of health insurance benefits under the Public Safety Employee Benefits Act ("PSEBA"), 820 ILCS 320/1 *et seq.*

In *Gaffney v. Board of Trustees of the Orland Fire Protection District*, __ N.E.2d __, 2009 WL 5125793 (1st Dist., Dec. 24, 2009) ("*Gaffney*"), the court held that a firefighter catastrophically injured during a live fire training event was not entitled to continuation of health insurance benefits under PSEBA, even though the firefighter was granted a line-of-duty disability pension. Shortly thereafter, in *Lemmenes v. Orland Fire Protection District*, __ N.E.2d __, 2010 WL 184375 (1st Dist., Jan. 19, 2010) ("*Lemmenes*"), a different court held that a firefighter catastrophically injured during a simulated fire training event was entitled to continuation of health insurance benefits under PSEBA after being granted a line-of-duty disability pension. The seemingly contrary conclusions are somewhat difficult to explain, but insights and guidance nonetheless can be gleaned from a comparison of the very different court rulings.

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Revisiting the Public Duty Rule

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the ETSB argued that, under the “public duty rule”, it did not owe a duty to the plaintiff and could not be held liable for any injuries suffered as a result of the repeater’s failure.

“The public duty rule is a long-standing precept which establishes that a governmental entity and its employees owe no duty of care to individual members of the general public to provide governmental services...” *Zimmerman v. Village of Skokie*, 183 Ill.2d 30, 32 (1998). The rule is grounded in the principle that a governmental entity’s duty to “preserve the well-being of the community is owed to the public at large rather than to specific members of the community.” *Zimmerman*, 183 Ill.2d at 32. In applying the public duty rule to this case, the court stated: “Once a 911 system was provided, the ETS Act did establish duties applicable to the admin-

istration of the system (as [Plaintiff] argues). However, those duties ran to the public at large, not to each citizen individually. The duty element of [Plaintiff’s] cause of action is thus missing.” In other words, the court believed the defendants did owe a duty to maintain the repeater, but they owed that duty to everyone served by the ETSB as a group, not to the plaintiff individually. Because the ETSB did not owe a duty to the plaintiff, the ETSB could not be held liable for Donovan’s death.

The Public Duty Rule does not apply in all situations.

The public duty rule had never been applied to a case involving an ETSB, and

plaintiff argued that doing so would be an improper expansion of the rule. The court rejected this argument stating that the rule applies regardless of the type of governmental entity.

We must note that the public duty rule does not apply in all situations. There is an exception to the public duty rule known as the special duty exception, which applies “in certain limited instances where a governmental entity has assumed a special relationship to an individual so as to elevate that person’s status to something more than just being a member of the public.” *Zimmerman*, 183 Ill.2d at 32-33

OBKC&G, Ltd. attorneys represented the Bureau County Emergency Telephone System Board in *Donovan v. Village of Ohio*. We are pleased to have been able to obtain a favorable result for our client. ■

Court confirms termination for unexcused absences

by David Zafiratos

In *Marzano v. Cook County Sheriff’s Merit Board*, 2009 WL 4893297, ___ N.E. 2d ___ (December 17, 2009), the Illinois Appellate Court ruled that Cook County rightfully discharged a correctional officer for unauthorized absences, despite the officer’s argument that her absences were due to a medical condition. The officer, Michelle Marzano, served the Cook County Department of Corrections since 1978. After several instances of unexcused absences in 2005 and 2006, the Cook County Sheriff sought Marzano’s termination before the Cook County Sheriff’s Merit Board. The Merit Board terminated Marzano, and she filed for administrative review in the circuit court. The circuit court upheld the Merit Board’s termination, and Marzano appealed to the Illinois appellate court.

In seeking Marzano’s termination,

the Sheriff alleged she was absent from work in April of 2005 despite having no remaining sick or vacation days. She received a written reprimand for this unexcused absence. The Sheriff further alleged Marzano received suspensions of 13 days and 15 days in October and November of 2005 for unexcused absences. The Sheriff suspended Marzano an additional 29 days for unexcused absences in December of 2005. After another 21 days of unauthorized absences in January and February of 2006, the Sheriff brought charges seeking Marzano’s termination.

At the time of Marzano’s absences, the Sheriff had in place an “unauthorized no-pay status policy.” Under this policy, all officers who are off work without authorization, regardless of the reason for their absence, are subject to discipline. Importantly, at the

time of Marzano’s first unexcused absence, the Sheriff’s office counseled her on available options under family medical leave or disability leave. Marzano never requested either type of leave. Instead, she took unauthorized leave in violation of the no-pay status policy.

Before the appellate court, Marzano argued the Merit Board’s decision to terminate her was improper because her absences were due to her medical condition. She also argued that an arbitrator had found the no-pay status policy to be unreasonable, and the Merit Board had violated her due process rights when it terminated her. The court held in favor of the Merit Board on each issue.

Regarding the arbitration decision finding the no-pay status policy unreasonable, the court concluded the Merit Board

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PSEBA benefits for training injuries

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Case Similarities

- In both training events, all firefighters were instructed to treat the exercise as an actual emergency and respond to the training site with lights and sirens activated.
- Both Gaffney and Lemmenes suffered a catastrophic injury during training events and subsequently were awarded line-of-duty pensions.
- The district denied both firefighters' requests for PSEBA benefits.
- Both courts' decisions hinged on applying the second of PSEBA's two eligibility criteria that "the injury must have occurred as a result of the firefighter's response to what is reasonably believed to be an emergency."
- Both appellate courts accepted the following definition of emergency: "a situation which is urgent and calls for immediate action" as held in *DeRose v. City of Highland Park*, 386 Ill. App. 3d 658 (2d Dist. 2008).

Case Differences

- The circuit court in *Gaffney* affirmed the district's denial of PSEBA benefits, whereas the circuit court in *Lemmenes* held that he was entitled to PSEBA benefits.
- The appellate court in *Gaffney* upheld the district's denial of PSEBA benefits, while the appellate court in *Lemmenes* ruled that he was entitled to PSEBA benefits. Both courts based their determinations on the reasonableness of responding to an emergency.
- Both the *Gaffney* and *Lemmenes* courts applied the *DeRose* definition of an emergency, but drew very different conclusions when deciding if the training event qualified as an emergency under PSEBA requirements.

- Gaffney was injured participating in a live fire-training event. Lemmenes was injured participating in a simulated fire-training event. Neither court opinion addressed this distinction.
- The court opinions stated that Gaffney was injured during the training, whereas Lemmenes was re-injured during the training. Neither court opinion addressed this distinction.
- The *Lemmenes* opinion was unanimous while the *Gaffney* opinion was a majority opinion (two justices concurred, one dissented).

Analysis

The majority opinion in *Gaffney* determined he was not eligible for PSEBA benefits, noting that an instruction to treat an exercise as an emergency does not necessarily convert it to an emergency that meets PSEBA's Section 10(b) requirements. The majority also referred to the record to support the conclusion that Gaffney was involved in a live fire training exercise, and not responding to an emergency.

The dissenting justice in the *Gaffney* opinion agreed with the majority opinion that a training exercise is not inherently an emergency for PSEBA eligibility purposes, but noted that a training exercise might escalate to an emergency sufficient to satisfy PSEBA's Section 10(b) requirements. He believed the non-emergency training event became a PSEBA qualifying emergency when Gaffney was required to untangle the fire hose being used to suppress the live fire.

The *Lemmenes* court determined that the totality of circumstances (required participation, direction to respond as if a real emergency to rescue a trapped firefighter, respond with lights and sirens activated, dress in full turnout gear, black-out of the SCBA mask to simulate a live fire situation) combined

with the lack of distinction between an actual or simulated emergency as defined in Section 10(b), was sufficient to qualify Lemmenes for PSEBA benefits.

Points to Ponder

As of the date of this writing, we are unsure whether the decisions will be appealed to the Illinois Supreme Court or if the Court will grant certiorari to hear the cases. The issue is not well defined and has not yet been resolved with finality. A ruling by the Illinois Supreme Court would be of great assistance in clarifying this muddled outcome.

The specific facts and circumstances of each case will be paramount in determining future interpretations of whether a firefighter who suffered a catastrophic injury in a training event might be eligible for PSEBA benefits. As the dissenting justice in *Gaffney* noted, a training exercise is not inherently an emergency for PSEBA eligibility purposes; however, the training exercise may escalate to an emergency as defined under PSEBA. Fire protection districts and municipal fire departments alike should be aware of the *Lemmenes* court's more liberal interpretation of eligibility for PSEBA benefits. Fire departments would be well advised to consider having employee-training participants sign written documentation expressly recognizing the non-emergent nature of a training evolution.

Lastly, the *Gaffney* court upheld a fire protection district's authority to enact an ordinance prescribing application procedures for PSEBA benefits. In the unfortunate event a firefighter must apply for benefits, uniform PSEBA application procedures will facilitate the approval process for both the firefighter and the fire protection district. ■

Court confirms termination for unexcused absences

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was correct in not considering the arbitration decision, which dealt with the Sheriff's unilateral implementation of the policy without notice to the officers' union. The arbitrator determined the Sheriff rightfully implemented the policy, but also commented that it was unreasonable. The court held the arbitrator exceeded his authority when opining on the reasonableness of the policy, because the issue of officer discipline was not a subject of the arbitration.

The court likewise ruled in favor of the Merit Board on Marzano's argument that her due process rights were violated. Marzano argued that her termination could cause her to receive reduced pension benefits, and the termination hearing was improper because the Merit Board failed to consider the arbitration award finding that policy unreasonable. On the pension issue, the court held Marzano failed to justify how her pension rights were violated. On the improper hearing argument, the court stated the Merit Board correctly ignored the arbitrator's opinion.

The main issue in *Marzano* was whether the Merit Board improperly terminated Marzano for her unexcused absences, after she argued the absences were caused by a medical condition. In arguing against her termination, Marzano relied on an Illinois Supreme Court decision, *Walsh v. Board of Fire & Po-*

lice Commissioners 96 Ill. 2d 101 (1983). In *Walsh*, the Supreme Court held that a police officer could not be terminated for misconduct related to his psychological problems. Marzano argued that under *Walsh*, she could not be terminated because her absences were caused by a medical condition. The court disagreed and further opined that *Walsh* did not involve an employee's unexcused absences. Marzano had misinterpreted *Walsh* "as standing for the general proposition that she cannot be discharged because her absences were caused by her medical condition." Instead, as the court explained, "an employer may fire an employee for unexcused absences when they become excessive."

Finally, the *Marzano* court discussed a recent, similar case involving a correctional officer discharged under the exact same policy as Marzano. As in *Marzano*, the court in *Cruz v. Cook County Sheriff's Merit Board*, 394 Ill. App. 3d 337 (1st Dist. 2009), upheld an employee's termination for unexcused absences caused by a medical condition. The court in *Cruz* explained that even though the employee was able to prove her medical condition existed, her proof was "irrelevant under the Policy, since establishing that she was actually sick did not negate the fact that she had no more sick days." Further, the court stated, "if an employee has used all his sick days, it

is irrelevant that he has a legitimate medical excuse for not attending work, because he is informed at the first (counseling) stage that he may apply for family medical leave or disability leave."

Although the *Marzano* and *Cruz* cases involved termination of employees under the Cook County Sheriff's unauthorized no-pay status policy, the principles relied upon by the appellate court could apply equally to firefighter discipline cases. Full-time firefighters, like Cook County Sheriff's officers, may only be discharged for cause. Cause for termination certainly exists when employees are absent without permission. As the court in this case explained, "management's right to discipline and ultimately to discharge an employee for absenteeism and tardiness is based on its right to operate efficiently."

However, it is advisable to investigate fully any absenteeism issues prior to instituting discipline. If the investigation will include an interrogation, a full-time firefighter is entitled to notice and other protections as set forth in the Firemen's Disciplinary Act (50 ILCS 745/1 *et seq.*). Management should also review their policies and any collective bargaining agreement provisions concerning discipline of employees prior to initiation of any disciplinary process. ■

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