MUNICIPAL ATTORNEYS NEWSLETTER
Missouri Municipal Attorneys Association
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IMPORTANT INFORMATION

SUMMER SEMINAR. With this issue of the *Newsletter* is a link to **registration material for the City Attorney's Annual Summer Seminar.** This year's Seminar will be held July 17-19, 2009 at Tan-Tar-A Resort. Please return the registration material to the Municipal League headquarters. There is no separate room reservation card for Tan-Tar-A this year. For reservations call 800-Tan-Tar-A or go online at **http://www.tan-tar-a.com.** Room rates are $124. The tentative program listed on the registration materials is just that – tentative. If you have a better idea for topics, please let us know.

DUES. You will receive by mail a dues statement for membership in the Municipal Attorneys Association. Please pay promptly.

If you are not currently a member of the Association and would like to join, simply complete the form and return it along with payment.

LOU CZECH AWARD NOMINATIONS. The committee appointed by the Missouri Municipal Attorneys Association is soliciting nominations for the Lou Czech Award, which will be presented at the Summer Seminar July 17-19, 2009, at Tan-Tar-A.

Nominees are limited to full members of the Missouri Municipal Attorneys Association and former members of the association gone from the state or profession less than three years. The committee will review the applications using the following criteria:

1. The individual's professional accomplishments in serving the public's interests and the various governmental jurisdictions wherein the nominee was employed.

2. The professionalism exhibited by the nominee in his/her relationship with elected officials, the public, and other local government professionals. The committee also will consider the nominee's time and effort spent in training and supporting young professionals just entering the field.

3. The individual's accomplishments in addition to service to the employing jurisdiction; time and effort spent serving the local, state, and international city attorneys associations; serving on Municipal League committees and in other capacities that have proven beneficial to the public welfare or the promotion of the profession of municipal law.

4. The nominee's record of ethical conduct in all private and professional matters that bear on the individual's acceptability of the Lou Czech Award.

If you have a nomination, please submit the name and reasons you think the person should receive the award to Gary Markenson, Missouri Municipal League, 1727 Southridge Drive, Jefferson City, MO 65109.

CASE OUTLINES (MISSOURI)

MISSOURI SUPREME COURT OFFERS GUIDANCE ON DUE PROCESS NOTICE. For several years we have been reporting on the type of notice required to meet the due process clause based on *Jones v. Flowers* decided in 2006 by the United States Supreme Court. The Missouri Supreme Court provides further guidance by considering the following question: "Due process requires notice, but what notice will do?" In *Schlereth v. Hardy and Jefferson County Collector of Revenue* the Missouri Supreme Court revisits this question in the context of two separate redemption notices mailed by certified mail that were returned to the Sender as "unclaimed." In this case, the property was bought at a tax sale by Purchaser for delinquent taxes. The former owner (Sender of Notice) sought to redeem the property and sent notice as required by the statute which required notice by certified mail. The notice was sent two times and was returned as "unclaimed." The Purchaser of the property, at the tax sale, admitted she was aware of the attempts to deliver the certified mail but testified she was not aware of the contents of the notice. The Sender took no further action to provide notice and relied on the notice set forth in the statute for redemption of the property and failed to redeem the property as required by law. The Purchaser proceeded to obtain a deed from the county collector of revenue and brought a quiet title action to which the Sender responded by asking that the tax sale be rescinded and that the property be returned. The trial court entered summary judgment for the Purchaser on the grounds that the notice mailed by Sender was insufficient as a matter of law. Sender appealed to the Missouri Supreme Court which affirmed on the grounds that due process requires notice that is "reasonably calculated" to notify the purchaser of the Sender's redemption rights. Under *Jones v. Flowers,* notice by certified mail that was "unclaimed" was legally insufficient; therefore, the Sender was required to take additional steps "reasonably calculated" to provide notice in order to satisfy the due process clause. The Court goes on to describe some of the additional steps such as service of process (the gold standard), regular mail which if not returned creates a presumption of notice and posting of the property. *Schlereth v. Hardy and Jefferson County Collector of Revenue*, (SC 89402).

Comment Howard. This is a well written opinion that clarifies development of due process notice in Missouri since the 2006 decision in *Jones v. Flowers.* It is a must read opinion although it does not establish any new legal principles.

LEGISLATION THAT IS ECONOMIC CARRIES PRESUMPTION OF VALIDITY THAT CAN ONLY BE OVERCOME BY SHOWING IT IS ARBITRARY OR UNREASONABLE. Juvenile office employees (Employees) are paid by Jefferson County (County) and each Employee is eligible for the retirement program except under the County's Employees' Retirement Fund (CERF). State law prohibits the Employees from belonging to CERF. Employees tried to enroll in CERF but were informed that they were not "county employees" for the purpose of CERF. Employees sued alleging that they were "county employees" under CERF and that the actions denying them the right to enroll denied them equal protection under both the Missouri and the United States Constitutions. Motion for summary judgment was granted and Employees appealed to the Missouri Supreme Court. The Court reviewed the legislation and its history noting that the Employees had another pension option such as LAGERS. In reviewing the legislation, the Court determined that the legislation pertains to economic issues. The test to determine the validity of economic legislation is whether or not the "classification is rationally related to a legitimate state interest." Legislation that touches only upon economic interests carries a presumption of rationality that can only be overcome by a clear showing of arbitrary and irrationality. Under this standard, a classification is constitutional "if

any state of facts can be reasonably conceived that would justify it." In this case, the statute limiting the right to belong to CERF allowed the County to control who was eligible for a retirement fund that has finite resources; therefore, the legislation did not violate the Constitutions. *Alderson, et al., v. State of Missouri,* (SC89370. 1/13/09).

Comment Howard. The standard for challenging economic legislation is very high considering the presumption of validity and a rationale justification for the legislation. While this case involved state legislation, the same standards would apply to local legislation.

THIRD CLASS CITIES DO NOT HAVE POWER TO REQUIRE LICENSE FOR RENTAL OF PROPERTY. Hindman owned rental property in the city of Jennings (City) – a third class city. The City passed an ordinance requiring owners of rental property to obtain a license and to pay a fee for the license. Owners of property are not allowed to rent property unless they have a license and pay a fee for the license. The license application required detailed information from the applicant and a requirement that the owner comply with other city ordinances. Hindman was sent a notice by the City informing him of the requirements of the ordinance and informing him that unless he secured the license he would not be allowed an occupancy permit. Hindman filed the application, paid the license fee under protest and filed a declaratory judgment challenging the validity of the ordinance on the grounds that the City did not have statutory authority to require the license. The trial court found that the claim was not ripe and that if had been ripe the City had authority to require the license. Hindman appealed and the Eastern District reversed holding that the claim was ripe and that third class statutes do not provide for the licensing of rental property. The court determined that the case was ripe because it "is of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Section 71.610 states that a city cannot license a business, trade, or occupation unless it is specifically named in the authorizing statute. Section 94.110 RSMo does not provide for the licensing of rental property. *Hindman Real Estate, Inc., v. City of Jennings,* (ED91472, 03/10/09).

TEST FOR BLIGHT IS THE SAME AS IT WAS PRIOR TO EMINENT DOMAIN LEGISLATIVE REFORM. In 2004, the Land Clearance for Redevelopment Authority (LCRA) of the city of St. Louis prepared its first blighting study for a 24-acre area being described as "in fair to poor condition." "Fair condition" was considered to be inadequately maintained, under-utilized or vacant, and "poor condition" was considered to be property with structurally unsound or substantially deteriorated buildings, or poorly maintained property without buildings used for open storage. The study found the area blighted because the deteriorated conditions posed an economic liability to the City and a hazard to its citizens' health and well-being. Based on this study, the board of aldermen of the city of St. Louis adopted an ordinance finding the area to be blighted pursuant to 99.320 RSMo, and approved a development plan for the area that included authorization of LCRA to acquire any property in the area through the use of eminent domain. In 2006, the General Assembly of Missouri undertook eminent domain reform. After the reform legislation passed, the LCRA passed a resolution affirming its previous finding of blight. It also prepared a second blight study that concluded the property was blighted. LCRA thereafter, started procedures to acquire the property and when negotiations failed, it proceeded to condemn the property. At the hearing for the appointment of Commissioners, LCRA introduced a resolution affirming the blight in the first blight report and introduced its second blight study without objections by the property owner. The court ordered

the property condemned. The property owner appealed to the Eastern District, raising questions concerning whether or not a legislative determination of blight made before eminent domain reform by the General Assembly was valid, whether Missouri's eminent domain reform affects the standard of review, and whether or not the evidence supports the board's determination. The Eastern District concluded that the reform by the General Assembly did not affect the blight determination made prior to reform since the legislation was silent on this question. With respect to the validity of the determination of blight, the court concluded that while the new procedures control the procedural steps, unless an intention in the statute is manifested to the contrary, the standard for review remained the same as it was prior to reform; therefore, the legislative determination stands unless it is shown that it is "arbitrary or capricious or induced by fraud, collusion, or bad faith and not supported by competent evidence." In determining if this standard has been met, the test is whether or not the legislative findings are "fairly debatable." Applying this standard and test, the court concluded that the legislative determination was supported by substantial evidence of economic and social liability. *Land Clearance for Redevelopment Authority of the City of St. Louis v. Inserra*, (ED91760, 03/10/09).

Comment Howard: This case is good news and important because there was lots of debate by the Governor's Eminent Domain Task Force and the General Assembly on the issue of what should be the standard for review of the legislative determination of blight. The holding, that the same standard for review that existed prior to eminent domain reform means that the courts will have very little leeway in reversing the determination of blight.

EMPLOYEE MUST SHOW THAT HER ACTION IN REPORTING A FLSA VIOLATION WAS THE EXCLUSIVE REASON FOR HER DISCHARGE. In March of 2003, the United States Department of Labor (DOL) began an investigation into whether Pepose Vision Institute (Employer) failed to pay its employees overtime as required by the FLSA. In the process of conducting the investigation, the DOL interviewed Michelle Fleshner, (Employee). After being interviewed by the DOL at work, Employee consented to an interview at her home by phone. Employee's direct supervisor asked the Employee to contact him immediately if she was contacted by the DOL at home. The Employee cooperated with the DOL in the interview and read to the DOL specific time studies that the Employee had done for the Employer. After the interview, the Employee contacted her supervisor and informed her supervisor about the details of her interview with the DOL including the time studies. The supervisor appeared to be upset and questioned why she had read the time studies to the DOL. That afternoon, the supervisor contacted Ms. Feigenbaum, wife of the owner, executive secretary to the corporation and consultant to the Employer, about immediately terminating the Employee. She agreed and the following day the Employee was dismissed on the grounds that she was rude to customers and the DOL investigator. Employee was an at-will employee. She filed suit alleging wrongful termination in violation of public policy and that she was terminated because she provided information to the DOL as part of its investigation into FLSA violations. The jury returned a verdict of $30,000 for Employee and awarded her $95,000 in punitive damages. Employer appealed to the Eastern District which reversed on grounds that the instruction to the jury was flawed because it did not require a finding that her engagement in the protected activity (cooperating with the DOL in its investigation) was the exclusive cause of her termination. In addition, punitive damages did not lie since this was not allowed by the FLSA and on this point the FLSA law governs. On other issues Missouri law governs. *Fleshner v. Pepose Vision Institute, P. C.*, (ED90853, 01/20/09).

Comment Howard. This decision is hard to reconcile with more recent decisions and facts that show the Employer took action to fire the Employee immediately after she provided information to the DOL. Sure, the Employer may have had other reasons to fire the employee but apparently the Employer did not think this was necessary until the Employee cooperated with the DOL in its investigation.

EMPLOYER HAS DUTY TO TAKE REASONABLE STEPS TO IMPLEMENT SEXUAL HARASSMENT POLICY. Employee was a police officer (Officer) with the city of Manchester's (City) police department. On several occasions, Officer sexually harassed a fellow employee (Employee) while acting as her relief supervisor. The Employee filed a sexual harassment complaint with the City and within days the City changed the Officer's work schedule so he would no longer have contact with the Employee. The City investigated and after an investigation by the Missouri Highway Patrol and the City's police department, the Officer was eventually terminated due to his behavior. The Employee then filed a sexual harassment lawsuit against the City under the MHRA. The City filed a motion for summary judgment that was sustained by the trial court on the grounds that the City had a valid sexual harassment policy and the Employer complied with this policy. The Employee appealed to the Eastern District which reversed on the grounds that the City failed to demonstrate that it took reasonable steps to prevent sexual harassment. Unbeknownst to the City at the time it hired the Officer, the Officer had a prior record of engaging in sexual harassment of citizens while engaged as a police officer. Prior to hiring the Officer, the City checked with Officer's prior employer and was provided only the dates of employment. The City did not follow up with any other inquiry concerning the Officer's past employment record; although, if the City had followed through by asking the prior employer, it would have provided this information according to its police chief. The police chief of the City stated that had he known the history of the Employee's past sexual misconduct he would have not hired the Employee. In addition, while employed by the City the Officer responded to a nuisance complaint at a hot tub party. The Officer spoke to one of the female guests at the party and later began to follow and harass her while he was on duty. She complained to the City about the harassment and the Officer was warned to stop his activities by his supervisor; however, the supervisor did not follow procedures established by the City with respect to a full investigation and did not report the incident to the City's police chief. The police chief did not learn of this until after the city Employee filed a sexual harassment complaint. On appeal, the Employer alleged that the policy met the two prong test established by the United States Supreme Court as articulated by the 8th Circuit that requires an employer to show that it exercised reasonable care to prevent and promptly corrected any sexual harassment behavior upon learning of the sexual harassment. The Eastern District held that the distribution of a valid anti-harassment policy and immediate action to end the harassment was not sufficient because the employer must also show implementation of the policy. In this case, there were facts in dispute which might lead the trier of fact to conclude that the Employer failed to take reasonable steps to implement the policy, making this a question of fact for the jury. In particular, the City failed to follow up at the time of employment of the Officer by not inquiring into the past history of the Officer's employment record when all it received from the previous employer was the date of hire and termination. In addition, the City failed to follow its own policy concerning investigation of citizen complaint involving sexual harassment of a citizen by the Officer. *Herndon v. City of Manchester*, (ED91175, 03/24/09).

Comment Howard. This is a very difficult opinion requiring employers to rethink some very basic procedures. Employers have generally followed a policy of only providing the dates when the employee started and ended employment (whether the employee was good or bad) and have not provided written or oral references, good or bad. Sometimes when the prospective employer follows up after receiving information showing the start and end dates for employment the employer may provide additional information or it may refuse to provide any additional information, good or bad. Prospective employees may be required to sign a release allowing the city to get this information from a prior employer but at best this information is hard to obtain.

This case seems to require a prospective employer to at least see if it can obtain additional information from prior employers when all that is provided is the start and end date for prior employment. In addition, this case requires the employer to assimilate information and use that information in a reasonable manner when the matter is not related to the sexual harassment of an employee. Weeding out employees who engage in this type of activity is of course necessary and appropriate, but the connection to harassment of fellow employees under the city policy seems tenuous. In any event, this case requires study, discussion, and possible revamping of existing personnel policies.

CITY OF LEE'S SUMMIT AND MML. Last month we reported on *South Metropolitian Fire Protection District v. City of Lee's Summit*, (SC89558) reporting a significant victory for the City of Lee's Summit and the MML who filed an amicus brief in support of Lee's Summit. The direct link to this case is http://www.courts.mo.gov/file/Opinion_SC89558.pdf.

CASE OUTLINES (FEDERAL CASES)

ARREST BASED ON CLERICAL ERROR DID NOT TRIGGER EXCLUSIONARY RULE. When Herring came to pick up something at a police vehicle impound lot, an investigator asked the county warrant clerk to check and see if there were any outstanding warrants for Herring. There were no warrants for the County but a clerk in an adjoining county advised there was an outstanding warrant in that jurisdiction. Herring was arrested and searched incidental to the arrest which resulted in drugs and a gun being located on his person. Herring was a convicted felon and was not allowed to be carrying a gun. Shortly after the arrest, the county warrant clerk was advised that the arrest warrant had been withdrawn five months earlier. Herring sought to suppress the evidence from the search claiming it was the result of an illegal search that was overruled. On appeal, the 11th Circuit held that the arresting officers were entirely innocent of any wrongdoing or carelessness and the failure to update the records was simple negligence. The United States Supreme Court affirmed holding that the exclusionary rule did not require suppression of evidence when evidence was seized in violation of the Fourth Amendment because of a clerical error. To trigger the exclusionary rule, the police misconduct must be sufficiently deliberate that the exclusionary rule can deter the police misconduct. *Herring v. U. S.*, (U.S. No. 07-513, 01/21/09)

UNION MAY CHARGE NON MEMBERS FOR NATIONAL LITIGATION SERVICES IF SERVICES RELATE TO POTENTIAL BENEFITS LOCAL UNION MEMBERS MAY ENJOY AND THERE IS RECIPROCITY OF LITIGATION BENEFITS. Locke was a state employee. Under the collective bargaining agreement, the local union (Union) was the exclusive bargaining agent for certain state employees. The Union was required to provide

certain services to employees regardless of whether or not they were members for which it was entitled to receive a service fee from nonmember employees. The amount of the fee was equal to the portion of union dues that related to ordinary representational activities (collective bargaining or contract administration) but excluded activities for political, public relations, or lobbying activities. The service fee also included a charge for "an affiliation fee" that the local paid the national union and the cost of litigation by the local and the national that was germane to collective bargaining. Nonmembers who objected could arbitrate the fee. Fees that were arbitrated were held in an interest bearing escrow account. Certain nonmembers challenged the fee in a 1983 civil rights suit alleging that the service fee related to the extra-unit litigation on behalf of other bargaining units violated their First Amendment Rights of Free Speech under the United States Constitution. Motion for summary judgment for the Union was granted by the district court which was upheld by the First Circuit. On appeal to the United States Supreme Court, the Court upheld this charge provided the subject of the fee would be chargeable if the litigation were local and was reciprocal in nature. *Locke v. Karass,* (U. S. No. 07-610, 01/21/09).

EMPLOYEE WHO PROVIDES INFORMATION TO EMPLOYER AS PART OF INVESTIGATION INTO SEXUAL HARASSMENT COMPLAINT IS PROTECTED FROM RETALIATORY DISCHARGE. Vicki Crawford (Employee) was interviewed by her Employer as part of investigation by the Employer of Employee's supervisor. When interviewed she advised her Employer that she and other employees had been sexually harassed by her supervisor but she had not filed a complaint or notified her Employer. The Employer did not take any disciplinary action against her supervisor although Employee was fired for embezzlement – a charge later found to be groundless. Employee files suit under Title VII, claiming the Employer fired her in retaliation for reporting her supervisor's sexual harassment. Federal law makes it unlawful for an employer to discriminate against any employee who has **opposed** any practice made unlawful under this subchapter or who has made a charge, testified, assisted, or participated in any investigation under this subchapter. The 6th Circuit affirmed the dismissal of her complaint and the United States Supreme Court took the case. The word "opposed" was not defined therefore the Court applied its ordinary meaning. Even though she did not file a complaint or provide notice, her statement to the investigators was covered because "oppose" can include "an ostensibly disapproving account of sexually obnoxious behavior toward her by a fellow employee." To hold otherwise, would result in a "freakish rule" that would protect her if she reported the actions but would not cover the actions if she responded to a question by her employer. *Crawford v. Metropolitan Government of Nashville,* (U. S. No. 06-1595, 01/26/09).

ROLLING DOWN OF WAISTBAND TO TAKE PICTURE OF TATTOO DID NOT VIOLATE ARRESTEE'S RIGHTS. Requiring arrestee to roll down her waistband so the booking office could photograph a tattoo located two inches above her hipbone was not an unlawful and unreasonable search amounting to a strip search. The actions of the officer did not violate arrestee's civil rights under 42 U.S. C. 1983. The 8th Circuit affirmed the district courts order sustaining defendant's motion for summary judgment. *Schmidt v. City of Bella Vista,* (8th Cir. No. 07-3053, 03/02/09*)*

SEARCH OF PRIVATE COMPUTER BY FELLOW EMPLOYEE WAS NOT AN UNLAWFUL SEARCH. Search of private computer kept at the work site by fellow employees who noticed icons suggesting child pornography was not an illegal search where employees

contacted the police who subsequently obtained a search warrant and found child pornography on the computer. *U. S. v. Inman,* (8th Cir. No. 07-1881, 03/05/09).

LEVEL THREE UPDATE. We also note that the United States Supreme Court has asked the Solicitor General to express the views of the United States in *Level 3 Communications, LLC v. St. Louis,* (No. 08626) a highly favorable decision to municipalities dealing with the preemption of state and local regulation of wireless and fiber optic services. Currently there is a split in the Circuits on this issue. We will keep you informed of developments.

HOW TO OBTAIN OPINIONS

The material contained in this *Newsletter* was summarized as a service to MMAA members. Almost everything cited in the *Newsletter* is available on the Internet. There are a variety of places to search for cases on the internet. Below are several sites that I use for research. If you have questions or comments please feel free to email me at howardcwright@mchsi.com.

Missouri: **http://www.courts.mo.gov/page.asp?id=12086&dist=Opinions**
Federal: **http://www.ca8.uscourts.gov/onestop.html**.
Supreme Court: http://www.supremecourtus.gov/
Other sources: **www.findlaw.com** and **http://www.molawyersweekly.com/**.

The opinions cited in this Newsletter *may be subject to revision or withdrawal prior to publication.*