MUNICIPAL ATTORNEYS NEWSLETTER
Missouri Municipal Attorneys Association
1727 Southridge Drive, Jefferson City, MO 65109
Editor Howard C. Wright 417-569-0386
Asst. Editor Ragan Wright
573-635-9134, Fax: 573-635-9009

March 09, Issue #3-09

FEDERAL CASES

GOVERNMENT SPEECH NOT SUBJECT TO THE FIRST AMENDMENT FREE SPEECH CLAUSE. Pioneer Park, a public park in Pleasant Grove City (City), Utah has at least 11 permanent, privately donated displays including a Ten Commandments monument. The Seven Aphorisms of Summum requested permission to erect a monument in the park containing the Seven Aphorisms of Summum. Summum is a group from Salt Lake City that was founded in 1975 that believes that the Seven Aphorisms of Summum were handed down to Moses before the Ten Commandments on Mount Sinai but Moses did not believe the Israelites were ready to receive them so he destroyed the original tablets. The City rejected the request by Summum on the grounds that the City limited monuments in city parks to those directly related to the City's history or to groups with longstanding community ties. The Summum sued the City on the grounds that the First Amendment right of free speech entitled them to place a permanent monument in a city park in which other monuments were previously erected and in particular the Ten Commandments monument. The federal district court rejected this claim but the Tenth Circuit reversed on the grounds that their claim was private speech and subject to strict scrutiny under the First Amendment free speech clause. The United State Supreme Court, in a case of first impression, reversed that decision by holding that monuments in public parks were a form of government speech even if the monument was privately donated. The free speech clause in the Constitution does not apply to government speech; therefore, the action of the City in denying the request to erect the monuments was not subject to the First Amendment free speech clause. The Court held that the denial was rationally related to a government objective because park space is limited and allowing unlimited requests would put an impossible burden on government by using permanent park space which is limited. The Court noted that throughout history, monuments have been allowed in parks and while a park is a traditional public forum, monuments are different from speech because monuments are permanent while a person speaking in the public forum no matter how long winded will eventually complete his or her speech. *Pleasant Grove City v. Summum*, (No.07-665, 02/24/09).

Comment Howard. All judges concurred in the analysis that the monument was government speech. Some of the judges recognized that the government speech analysis created a potential conflict with respect to the separation of church and state issues. In this case, Summum abandoned its separation of church and state argument so the separation of church and state issue was not before the court although under the facts in this case some judges hinted that this would not make a difference. The public speech analysis takes us down a new path. It is likely we will need to continue to monitor future monument cases to understand the full implications of this case. Get ready because it is likely that you will get a request to erect a religious monument in city parks and on other public property.

NO CONSTITUTIONAL RIGHT TO UNION DUES CHECK OFF FOR POLITICAL CONTRIBUTIONS. The Idaho right to work law provides that public employees have the right to payroll deductions for union dues except it bans payroll deductions for public employees for political contributions. Public employees contend that the ban violates their First and Fourteenth Amendment rights. The district court upheld the ban, but this decision was reversed by the 9th Circuit with respect to local government. The U. S. Supreme Court granted certiorari to review the matter. While content based restrictions are presumptively invalid and subject to strict scrutiny the First Amendment right of free speech does not require the government to subsidize speech. The state need only demonstrate that there is rational basis to justify the ban. In this case, the ban can be justified because it furthers the state's interest in separating the operation of government from partisan politics. *Ysursa, et al. v. Pocatello Education Association et al.* (No 07-869, 02/24/09)

MIRANDA WARNING DOES NOT APPLY TO VOLUNTARY STATEMENT. A Miranda warning was not necessary when officer stopped McGlothen, who was driving, to execute a search warrant on McGlothen. During the stop, the defendant's vehicle was searched and a gun was found. The officer showed the defendant the gun and stated that he would be charged with unlawful possession of a firearm. McGlothen then made a voluntary statement that "he owned the gun and he purchased it to protect himself." There was no violation of his rights even though he had not been given a Miranda warning because his statement was voluntary and he was not being interrogated. *U. S. v. McGlothen*, (No. 08-1549, 02/13/09),

RACIAL PROFILING. State trooper stopped motor vehicle driven by Ballard an African American who was driving a rented vehicle with two other African American occupants. The trooper had observed the vehicle speeding and following another car too close. When asked to produce the rental agreement, the trooper noted that the occupants of the car avoided looking at a certain Adidas bag; the information provided was inconsistent; and at least two of the occupants had drug related criminal histories. The trooper obtained permission to search the vehicle and the occupants' luggage. When the Adidas bag was searched, the trooper discovered cocaine. The driver admitted that the bag belonged to him. The Lincoln County attorney's office filed criminal charges against Ballard, but the evidence was suppressed on the grounds that the officer did not have consent to search the vehicle and the search was not supported by probable cause. The Lincoln County Court also stated that racial profiling was implicated in the trooper's decision to search, but no such finding was made with respect to the decision to stop the vehicle. Thereafter, Ballard filed a 1983 action in federal district court against the troopers who filed a motion for summary judgment. In opposition to the motion for summary judgment, Ballard filed a copy of the Lincoln County judge's opinion and a Nebraska Commission on Law Enforcement and Criminal Justice report that found that African-American drivers were more likely than white drivers to be stopped, searched, and arrested during a traffic stop. The trooper moved for summary judgment, which was granted and Ballard appealed to the 8th Circuit. The 8th Circuit affirmed on the grounds that Ballard did not show any specific facts to connect the arrest for improper driving to racial profiling. The report of the Nebraska Commission on Law Enforcement and Criminal Justice, showing statistics that blacks are more likely to be stopped for traffic violations, did not prove that the stop in this case was based on racial profiling. *Ballard v. Heineman*, (No. 08-1103, 12/01/08).

STATE CASES

"LATE BREAKING NEWS" -- SUPREME COURT DECIDES SOUTH METRO ANNEXATION CASE IN FAVOR OF LEE'S SUMMIT. The Missouri Supreme Court just recently decided the South Metropolitan Fire Protection (South Metro) case in favor of Lee's Summit (City) which is of great interest to our members. Since the opinion arrived after the deadline for review of cases I will only provide a brief summary and will cover the decision in more detail next month. As you will recall, South Metro won the case in circuit court with the court holding that a provision in what appeared to be part of the Boundary Commission law applied to non-boundary commission counties thereby requiring the City to pay South Metro annually what the City would have levied on the taxable property in the annexed area. The City contended that the only payment required by the City to South Metro was for any bonded indebtedness that South Metro owed in the annexed area. The Supreme Court decided the case based on statutory construction holding in "context" that the section cited by South Metro applied only in counties that had a boundary commission. In addition, the earlier decision in *Battlefield Fire Protection District v. City of Springfield,* interpreting Section 321.320 RSMo supported the position of the City. A copy of this decision can be obtained by following the link at the end of the *Newsletter* to the "Missouri Supreme Court." Congratulations to Paul Campo, who represented the city of Lee's Summit.

TIF PROJECT BY THE NUMBERS. Sometimes the most routine case provides the best framework for showing how to establish critical elements for your case. This is true in *Meramac Valley R-III School District v. City of Eureka and JBA Eureka, L.L.C.* (ED91678, 02/24/09). The matter involved a challenge to a TIF project by the Meramec Valley R-III School District (School), to a TIF established by the city of Eureka (City), Mo. The City after several starts and stops approved a TIF project for a 938-acre redevelopment project. It employed PGAV, a consulting firm, to develop a detailed plan for the redevelopment of the area that included an analysis of blight in the project area. The City adopted the plan and determined that the area was blighted based on the PGVA report. The TIF Commission designated the redevelopment area and adopted the redevelopment plan and the project. The School challenged the project on a number of grounds including the finding of blight. The circuit court found for the City and the School appealed to the Eastern District. On appeal, the court held that in approving the redevelopment plan the City acted in a legislative capacity and the court's review is limited to determining whether the legislative determination was induced by fraud, collusion, bad faith, or whether the City exceeded its powers. The School argued unsuccessfully that the blight statement should consider each area within the project as a separate area instead of as a whole. The court ruled under the statute, that a piecemeal analysis was not contemplated. The argument by the School that the finding in the blight report – that the street layout and platting was inadequate and was based on future uses not current uses – was also rejected. The fact that the City failed to maintain vacant houses and outbuildings it purchased, did not impact the finding of blight. Why site improvements had deteriorated was irrelevant under the TIF statute. The ownership of properties by the City resulted in a loss of about $1,000,000 in assessed valuation due to the tax exempt status of City owned property. This reduction in value could not be considered as argued by the School, since to hold otherwise would require the City to acquire the property prior to instigating the TIF. The trial court's decision that the project area had not been subject to growth and development through private enterprise and would not be reasonably anticipated to be developed without the adoption of the redevelopment plan, satisfied the "but for" test. Since this decision is fairly debatable the Court will affirm. In applying the "but for" test, the court considered the area as a whole and not piecemeal. For those who are looking for a

model of how to do a TIF project, this case stands out and merits your consideration. *Meramac Valley R-III School District v. City of Eureka and JBA Eureka, L.L.C.* (ED91678, 02/24/09).

DEFINITION OF BLIGHT UNDER TIF STATUTE REQUIRES FINDING OF BIGHT FOR ECONOMIC REASONS OR SOCIAL LIABILITIES. Kansas City (City) condemned land that was blighted under the TIF statute. The circuit court entered an order allowing the City to proceed with condemnation and the property owner appealed to the Western District. The property owners contended that the City failed to negotiate in good faith, and in particular, the City appraisal did not meet the statutory standard for appraisals under Section 339.535 RSMo that requires appraisals to be made in accordance with the Uniform Standards of Professional Appraisal Practice. The City contended that Section 523.253.2(2) RSMo controls and only requires that the appraisal be made by a state licensed or certified appraiser "using generally accepted appraisal practices." The Western District held that where two statutes conflict the more specific controls over the more general; therefore section 523.253.2(2) RSMo controls which requires that the appraisal only be made in accordance with "generally accepted appraisal practices." The property owners also contended that the determination of blight was not supported by substantial evidence and was therefore arbitrary, capricious, and induced by fraud, collusion, or bad faith. They relied on the *Centene Plaza Redevelopment Corporation v. Mint Properties* decided by the Missouri Supreme Court in 2007 that held under the definition of blight in Chapter 353 – the City had to prove both economic **and** social liability. In this case, the City was proceeding under the TIF statute that has a different definition of blight that provides the City to show either economic **or** social liability. The definition of blight in the TIF statute as set forth in Section 99.805(1) RSMo controls because it is the more specific statute. The property owner also contended that the City did not consider each parcel of property in the redevelopment area individually as to whether or not the parcel met the statutory definition of blight. This argument ignores the statute that provided: "If the condemning authority finds a preponderance of the defined area is blighted, it may proceed with the condemnation of any parcels in such area." In addition, there was evidence that showed the City considered each parcel in the redevelopment area with regard to whether the parcel met the relevant statutory definition of blight and found that a preponderance of the area was blighted. Judgment is affirmed. *City of Kansas City v. Ku et al.*, (WD69807, 02/17/09).

Comment Howard. This case provides a good walk through for those who are considering the necessary steps that need to be followed in condemning property for redevelopment under the eminent domain law that was changed several years ago.

ANOTHER NAIL IN EMPLOYERS COFFIN WHEN DEFENDING MISSOURI EMPLOYMENT DISCRIMINATION CASES. The Missouri Supreme Court held in *Daugherty v. Maryland Heights* that the Missouri Human Rights Act (MHRA) defined discrimination as "**any** unfair treatment based on race, color, religion, national origin, ancestry, sex, age" as it relates to employment that was combined with MAI 31.24 to provide a "contributing factor" test thereby providing a different test for Missouri employment discrimination cases than under federal law. In addition, in *Daugherty* the Court rejected the shifting burden analysis followed in *McDonnell Douglas Corp. v. Green* for MHRA cases. With these two actions, the Court significantly changed the balance in favor of employees in MHRA cases. Against this backdrop, *Hill v. Ford Motor Company*, (SC88981) was decided. Hill was an employee at the Ford Motor plant in Hazelwood. She alleged she was harassed by her supervisor and that she complained along with other employees to her group leader who brought this matter to the attention of the supervisor of the harassing supervisor. She further claimed that when she was reassigned to work the harassing supervisor would again supervise her work. The

supervisor refused to accept her reassignment and was told by her supervisor she needed psychiatric help. One thing led to another and she was terminated for reasons that allegedly were related to her work. Hill sued and the circuit court granted Ford Motor Company summary judgment involving a hostile work environment and retaliation claim. On appeal to the Missouri Supreme Court, *Ford* argued that the retaliation claims should follow the analysis prior to *Daugherty* because retaliation claims are in a different section of the MHRA than the section considered in *Daugherty*. That argument was rejected by the Court. The hostile work defense offered by *Ford* was also rejected by the Court. In a hostile work environment case, the plaintiff meets his or her burden by showing that plaintiff is a member of a protected class; was subject to unwelcome sexual harassment; plaintiff's gender was a contributing factor; and a term, condition or privilege of employment was affected by the harassment. A plaintiff can prove that a term or condition of employment was affected by showing that the harassment contributed to cause a "tangible employment action" that is defined as a "significant change in employment status" and as "the means by which the supervisor brings the official power of the enterprise to bear on subordinates." Such an action does not always involve direct economic harm as shown by the examples listing undesirable reassignments and work assignments shown by the Code of State Regulations. Once it is shown that the harassment culminates in a tangible employment action, the employer does not have the affirmative defense that the employer exercised reasonable care to prevent and correct the behavior and that the complaining employee failed to take advantage of the corrective opportunities provided by the employer. If the harassment did not result in a tangible employment action, the employer may raise an affirmative defense by providing proof by the preponderance of the evidence showing that the employer exercised reasonable care to prevent and correct the behavior and that the complaining employee failed to take advantage of the corrective opportunities provided by the employer. The Court reversed the summary judgment and remanded for further proceedings. *Hill v. Ford Motor Company*, (SC88981, 2/24/09)

Comment Howard. Except in the most favorable situations, it is difficult to imagine that under Missouri law, an employer will be able to resolve an employment discrimination or a retaliation case based on a motion for summary judgment. While *Daugherty* would have seemed to resolve all doubts concerning Missouri law this case makes it clear the *Daugherty* analysis **applies to** retaliation cases and hammers home the difficulties employers face by drilling down into the definitions set forth in the State Code of Regulations to further limit employer defenses.

PUBLIC POLICY EXEMPTION PROTECTS NURSE WHO REFUSED TO RE-WRITE HER PROGRESS NOTES. Margaret Hughes a nurse (Nurse) was licensed under the Nursing Practice Act (NPA) by the state of Missouri. She was employed with Freeman Health System (Hospital). She was assigned to a patient at the Hospital. During the course and care for the patient, she kept progress notes and worked with physicians in the administration of certain prescribed drugs. She reported to the physician the patient's condition and reaction to the drugs. Two days after making progress notes she was asked to "take out and rewrite" certain portions of her notes that had been bracketed by her supervisor. The bracketed portion of the notes referred to the physician's refusal to allow an early administration of Serax and his decision to have Cogentin administered to the patient. The Hospital had a written policy that stated "previously written notes shall not be altered at a later date." The Nurse rewrote the notes as requested and was asked to return the original progress notes that had been marked with the brackets. The Nurse refused stating that she had been advised by a fellow employee to do so and that she was protecting herself. Later that afternoon the supervisor brought the Nurse the revised notes and told her that it wasn't exactly what he wanted to do and asked the Nurse to make an addendum to her progress notes to which the Nurse replied, "Sure, I can make an addendum… but I won't

lie." The supervisor then said, "Well we don't want to do this," and put the revised notes in the shredding machine. Two days later the Hospital terminated the employment of the Nurse on the grounds that the Nurse did not accurately assess the patient's condition which resulted in miscommunication to the physician so he could determine the appropriate response resulting in a loss of confidence and trust in the Nurse's ability to go forward with sound judgment with respect to patient care. The Nurse sued the Hospital claiming that she was wrongfully discharged because she refused to rewrite certain progress notes that were critical of the Hospital's physicians. The Hospital filed a motion for summary judgment on the grounds that the Nurse had been terminated because she did not provide proper patient care which motion was sustained. On appeal to the Southern District, the Nurse contended that she was fired because she refused to follow directives that if they had been followed they would have been contrary to a strong mandate of public policy. Missouri recognizes the public policy exception to employment at-will. The Nurse was an at-will employee and as such the Hospital had the right to dismiss the Nurse for good or bad reasons or for any reason at all so long as the Hospital did not violate the public policy exceptions to the at-will status of the Nurse. One of the exceptions provides that an employee has a cause of action if the employer discharges the employee for "an act contrary to a strong mandate of public policy." In this case, the Nurse was licensed under the NPA that provides coordination and assistance that involves accurately documenting what actions are taken in the delivery in relation to the patient's care. The request to delete progress notes by the Hospital supervisor was in conflict with the NPA policy. The court noted that summary judgment should seldom be used in employment discrimination cases because these cases are inherently fact based and often depend on inferences rather than direct evidence. Case reversed and remanded. *Hughes v. Freeman Health System*, (SD28921, 02/13/09).

Comment Howard. It seems that one of the critical mistakes employers make in handling these cases is the timing of their response. To fire an employee when there is an allegation of sexual harassment or a dispute that brings into play possible violations of the public policy exceptions to the employment at-will doctrine is asking for trouble. Our clients need to understand that Missouri law almost always insures that these cases will be heard by a jury who will usually favor the employee.

TWENTY MINUTES TO CALL ATTORNEY BEGINS FROM TIME THE DRIVER IS INFORMED THAT THE OFFICER WILL REQUIRE THE DRIVER TO TAKE THE BREATHALYZER TEST. Sonja Williams (Driver) was driving her vehicle when the police observed her car weaving on the road. She was stopped and the officer smelled a moderate odor of alcohol on her breath at that time he administered a filed sobriety test which she failed. She was taken to the police station and given her Miranda warning approximately 1:30 a.m. at which time she asked to contact her attorney. She tried unsuccessfully to contact her attorney and was informed by the officer that she had 15 minutes left to contact her attorney to which she replied, "Well, I ain't going to talk to him." At 1:45 a.m., the officer read to her the "Implied Consent" from the alcohol influence report and asked her to submit to the breathalyzer test. She did not make an additional request to speak to her attorney and refused to take the test. The circuit court affirmed the decision of the director to revoke her driver's license and the Driver appealed to the Southern District. The Southern District followed the Eastern District by holding that Section 577.041 RSMo is not ambiguous because it states unequivocally that if a person when requested to submit to any test pursuant to 577.020 RSMo asks to speak to an attorney, the person shall be granted 20 minutes in which to contact an attorney. The Western District interpreted the statute to mean that the 20 minutes begins to run after the driver is informed that he or she will be required to take the breathalyzer test. *Williams v. Director of Revenue*, (SD28910, 02/06/09).

OTHER INFORMATION

MEDIATION WITH OTHER GOVERNMENTAL AGENCIES. Litigation between governmental agencies can be very nasty and can set back relationships for years. IMLA reports that the Institute for Local Government has launched a new project to encourage the use of dispute resolution between public agencies as an alternative to litigation. As part of this effort, the project recently released two pamphlets: "A Local Official's Guide to Intergovernmental Conflict Resolution," and "Alternative Dispute Resolution: Navigating Special Legal Issues in Public Agency Disputes." The pamphlets alert local agency counsel and dispute resolution professionals to the special legal issues that can arise when using alternative dispute resolution with public agencies. It includes a sample resolution to help address some of these issues. Both guides are available without charge in electronic form at www.ca-ilg.org/Intergovtconflict resolution. This site also has more information about this effort.

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 e-mail 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.*