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Milwaukee County Judge Strikes Down City of Milwaukee's Residency Requirement

On January 27, 2014, Milwaukee County Circuit Court Judge Paul Van Grunsven declared the City of Milwaukee's long-standing residency requirement to be unenforceable. The City's rules, which required all employees of the City to live within the City limits, have been in place since 1938, but some City employees have challenged the requirement over the years. City employees gained a promising basis for challenging the rule last year when the state legislature passed a law specifically prohibiting residency requirements. The new law, Wis. Stat. § 66.0502, was signed by Governor Walker and took effect on July 2, 2013.

The law declares that "pubic residency requirements are a matter of statewide concern" and prohibits "local government units," including cities, villages, towns, counties and school districts, from requiring, "as a condition of employment, that any employee or prospective employee reside within any jurisdictional limit." The law provides an exception for residency rules requiring non-volunteer law enforcement, fire, or emergency personnel to reside within 15 miles of the jurisdictional boundaries of the local government unit.

Immediately following the enactment of Wis. Stat. § 66.0502, the City of Milwaukee's Common Council passed a resolution directing City officials to continue enforcing the City's residency requirement on the grounds that the new state law violated the City's home rule authority under the Wisconsin Constitution. The Milwaukee Police Association filed a lawsuit challenging the City's residency ordinance and the Common Council's resolution; the Milwaukee Professional Fire Fighters Association Local 215 later joined the suit. The police and firefighters argued that the City's residency requirements were preempted by the new state law, and also that the new law created a "liberty interest," protected by the United States Constitution, giving municipal employees the right to be free from residency requirements as a condition of employment.

In response, the City argued that residency requirements for municipal employees are a matter of local

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concern, not statewide concern. Thus, under its constitutional right to home rule, the City, not the state, has the authority to regulate such matters. The City explained that the residency requirements are necessary to protect the City's tax base and ensure that City employees are motivated and invested in the City and its future.

Judge Van Grunsven acknowledged that the residency of municipal employees is a local issue in some respects because, among other things, municipalities have an interest in ensuring loyalty and longevity among their employees. However, Judge Van Grunsven concluded that residency requirements are *primarily* a matter of statewide concern. In particular, the legislature has a clear interest in governing terms and conditions of employment, including prohibiting discrimination in employment and protecting employees from unfairly restrictive employment conditions. Because the new state law governs a matter primarily of statewide concern, the legislature could prohibit municipalities from enacting contrary ordinances without violating a municipality's home rule authority. Judge Van Gunsven also agreed with the police and firefighters' arguments that Wis. Stat. § 66.0502 created a constitutional "liberty interest" for public employees to be free from residency requirements as a condition of employment. Therefore, if the City were to enforce its residency rules, the City would be violating the United States Constitution.

Because the City's residency requirements violated state and constitutional law, Judge Van Grunsven declared the requirements to be void and unenforceable. The City has announced that it intends to appeal the decision to the Wisconsin Court of Appeals.

— Sarah B. Painter

Lack of Evidence of Municipal Negligence Results in Dismissal of Sewer Backup Case

In order to proceed with a sewer backup claim, a plaintiff must provide evidence that the public entity who owns the sewer system is negligent. A public entity that owns a sewer system is not deemed to be negligent under the doctrine of *res ipsa loquitur* just because repeated sewer backups occur. *Davis v. City of Milwaukee*, Appeal No. 2013AP 741, Ct. App, decided December 27, 013, unpublished.

In *Davis*, plaintiff alleged that four sewage backups, occurring between 2008 and 2010 at his residential property, resulted from the negligence of the City of Milwaukee (City) and the Milwaukee Metropolitan Sewerage District (MMSD). Plaintiff claimed that under the doctrine of *res ipsa loquitur*, negligence could be inferred from the fact that multiple sewage backups occurred in a two-year time span. The trial court disagreed, and after the conclusion of plaintiff's case at trial, the trial court dismissed plaintiff's claims against both MMSD and the City because plaintiff failed to provide evidence that either the City, MMSD, or both together, caused any of the backups. Plaintiff appealed the trial court's directed verdict. The Court of Appeals affirmed the trial court.

The Court of Appeals held that the doctrine of *res ipsa loquitur* did not apply in this case. *Res ipsa loquitur* permits a factfinder to infer that negligence caused damage or injuries when the following three conditions are met:

> (a) either a layman is able to determine as a matter of common knowledge or an expert testifies that the result which occurred does not ordinarily occur in the absence of negligence; (b) the agent or instrumentality causing the harm was within the exclusive control of the defendant; and (c) the evidence offered is sufficient to remove the causation question from the realm of conjecture, but not so substantial that it provides a full and complete explanation of the event.

The Court of Appeals found that based upon the evidence provided at trial, these three conditions could not be met in this case. While the City and MMSD were each involved in providing the sewer system, no expert testimony or other evidence was offered at trial that suggested the City or MMSD, individually or collectively, caused the backups. To the contrary, City and MMSD witnesses testified without contradiction that the unusually heavy rains in the summers of 2008 and 2010 -- over which they obviously had no control -- could

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Manure Is Not an Excluded "Pollutant" Under Farmowner's Insurance Policy

Manure is not an excluded "pollutant" under a farmowner's insurance policy, the Court of Appeals held in *Wilson Mutual Insurance Co. v. Falk*, Appeal No. 2013AP691 & 2013AP776 Ct. App., decided December 11, 2013 (recommended for publication). Insurance coverage is therefore potentially available to cover claims that a farmer's manure spreading resulted in contamination of neighboring wells.

The Falks own and operate a dairy farm and use manure from their cows as fertilizer for their fields. In 2011, the DNR notified the Falks that manure from their farm had polluted a local aquifer and contaminated their neighbors' water wells. Several neighbors demanded compensation for the well contamination. The Falks notified Wilson Mutual, the provider of their farmowner's insurance policy, of the claims. Wilson Mutual sought a court declaration that it had no duty to defend or indemnify the Falks for any damages arising out of the water well contamination because manure is a "pollutant" under the farmowners policy's pollution exclusion clause. The circuit court agreed with Wilson Mutual. The Falks appealed.

On appeal, the question was whether cow manure falls within the definition of a "pollutant" under Wilson Mutual's farmowners policy. The policy provides that the insurer will pay all sums the Falks become liable by law to pay because of property damage or bodily injury caused by an occurrence to which coverage under the policy applies. The policy expressly excludes losses resulting from the discharge of "pollutants." "Pollutant" is defined in the policy as "any solid, liquid, gaseous … irritant or contaminant, including … waste. Waste includes materials to be recycled, reclaimed, or reconditioned, as well as disposed of."

The Court of Appeals noted that the insurance policy's definition of "pollutant" is broad and virtually boundless "for there is virtually no substance or chemical in existence that would not irritate or damage some person or property." In order to apply a reasonable interpretation to the term "pollutant," the term must be considered "as understood by a reasonable person *in the position of the insured*," the Court stated.

According to the Court, a reasonable farmer would not consider manure to be a "pollutant," an "irritant," a "contaminant," or "waste."

> Manure is an everyday, expected substance on a farm that is not rendered a pollutant under the policy merely because it may become harmful in abnormally high concentrations or under unusual circumstances. (citation omitted.) Manure is a matter of perspective; while an average person may consider cow manure to be "waste," a farmer sees manure as liquid gold. Manure in normal, customary use by a farmer is not an irritant or a contaminant, it is a nutrient that feeds the farmer's fields that in turn feeds the cows so as to produce quality grade milk. Manure in the hands of a dairy farmer is not a "waste" product; it is a natural fertilizer. While bat guano is "waste" to a homeowner, and lead paint chips are universally understood by apartment building owners to be dangerous and pollutants, manure is beneficial to a dairy farmer. Manure, by act of nature, has always been universally present on dairy farms and, if utilized in normal farming operations, is not dangerous.

Since a reasonable farmer would not consider manure to be a pollutant, it should not be considered to be "pollutant" excluded from coverage under the farmowner's insurance policy, the Court concluded.

— Lawrie Kobza

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have overwhelmed the sewer system and caused the backup. Given these facts, plaintiff could not rely upon the doctrine of *res ipsa loquitur* to infer that negligence by the City and MMSD caused the sewer backups.

In order to proceed with his claims, plaintiff was required to provide evidence the City and MMSD were negligent in their operation and maintenance of their sewer systems and that their negligence caused the sewer backups and plaintiff's damages. Plaintiff failed to do that at trial, and his case against the City and MMSD was properly dismissed by the trial court.

— Lawrie Kobza

Grievance Policy Found to Violate Act 10

Under 2011 Wisconsin Act 10, municipalities were required to adopt by October 2011 a grievance policy that established a procedure for "terminations," "discipline" and "workplace safety." §66.0509, Stats. However, the statute did not define those terms and municipalities universally undertook to define them in their discretion. In doing so, most policies excluded certain employment actions from the grievance process. For example, "terminations" has been generally defined across the state to exclude situations, among others, in which an employee voluntarily quit, was laid off and retired. Some municipalities defined "discipline" to exclude verbal or written warnings.

With the passage of time since these policies were adopted, we are starting to see issues arise involving the application of the procedures to actual grievances--for example, the use of the standard used by the Impartial Hearing Officer and governing body when judging the administrative action. In *Dodge County Professional Employees Local 1323-A, AFSCME, AFL-CIO and Heidi Burden v. Dodge County*, 2013AP535 (Ct. App. Dec. 5, 2013), the Court of Appeals addressed the ability of municipal bodies to define what constitutes a "termination" as that term is used in §66.0509, Stats.

The issue arose with respect to Dodge County's definition of termination that excluded from the grievance procedures a "termination of employment due to … lack of qualification…" Burden's job required that she not have been convicted of operating a motor vehicle while intoxicated within the past twelve months. When Burden was convicted of OWI, the County immediately dismissed her from employment. Burden sought to grieve her dismissal under the County's grievance system, but was advised that her dismissal was not a termination under the policy so as to allow her to utilize it.

Burden filed a declaratory judgment action in circuit court contending that Dodge County's grievance system violated §66.0509, contending that her dismissal constituted a "termination" as used in the statute. The circuit court held that Dodge County had broad discretion to define "termination" under the statute and that by excluding dismissals for "lack of qualification," Dodge County did not violate the statute. Burden appealed this decision and the Court of Appeals ruled in her favor, reversing the circuit court decision.

In reaching its decision, the Court of Appeals was required to establish what the legislature meant by the word "termination." In doing so, the court looked to the dictionary which defined a "termination" as the discontinuation of employment or dismissal. Dodge County contended that §66.0509 authorized municipalities to exclude some forms of terminations from its coverage. The Court of Appeals agreed with the proposition that all forms of separation from employment are not "terminations," for example, voluntary quits or retirement, and further acknowledged that "in all situations it will [not] be clear whether a 'termination' within the meaning of the statute has occurred." Notwithstanding this, the Court of Appeals concluded that Burden's dismissal was a "termination" within the plain meaning

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DNR Must Consider Impacts from Proposed New Wells In Conjunction with Impacts from Existing Wells When Conducting A Cumulative Impacts Analysis

In *Family Farm Defenders, Inc. v. DNR*, Appeal No. 2012AP1882, Ct. App., decided December 19, 2013, the Wisconsin Court of Appeals decided that the environmental assessment of two proposed high capacity water wells at a new large dairy by theWisconsin Department of Natural Resources (DNR) was insufficient. The court ordered that on remand the DNR must consider the potential cumulative effects the two proposed wells, in conjunction with other existing wells, would have on the environment.

The case involves Richfield Dairy's proposal to construct a large dairy facility that would house approximately 4,300 dairy cows and 250 steers in Adams County. The dairy applied for a Wisconsin Pollutant Discharge Elimination System (WPDES) permit for the facility. Before granting a WPDES permit, the DNR is required to conduct an environmental assessment (EA). The purpose of the EA is to determine whether an environmental impact statement (EIS) must be conducted for a particular activity. One of the factors that must be considered in an EA is the cumulative effect of high capacity groundwater pumping on the environment within the region.

The DNR conducted an EA of the Dairy's two proposed high capacity wells and concluded that an EIS was not required for the construction of the wells. The primary issue in the case was whether the DNR properly considered the cumulative effects from the proposed high capacity wells as required by Wis. Admin. Code § NR 150.22(2)(a)2. The DNR took the position that its review of the potential impacts of the high capacity wells on the environment was limited to whether the two proposed wells would cause a potential significant adverse environmental impact. The DNR conducted its EA based upon this standard. Plaintiffs argued that DNR's review was too limited, and that the DNR must consider the impacts the proposed wells would have in conjunction with other existing and proposed future wells.

The Court of Appeals noted that there were no Wisconsin cases construing this requirement in § NR 150.22(2)(a)2. The court therefore turned to federal case law interpreting similar requirements. Based upon the reasoning set forth in several cited federal cases, the court concluded that § NR 150.22(2)(a)2. "requires an EA to include an analysis of the cumulative environmental effects of past, present, and 'reasonably anticipated' similar or related activities." The court further stated that, "[a]pplying this reading of § NR 150.22(2)(a)2. to the proposed activities in this case, this regulation requires the EA to reflect consideration by the DNR of the cumulative environmental effects of the two high capacity wells in conjunction with other past, present, and reasonably anticipated high capacity water pumping wells, and other activities affecting surface and underground water resources in the relevant geographical area."

The court found that the DNR's analysis did not comply with the analysis the court determined was required by § NR 150.22(2)(a)2. Since the DNR limited its consideration of the evidence from the effects of the two high capacity wells only, and did not consider the cumulative effects of the proposed high capacity wells in conjunction with other high capacity wells in the region, the DNR's EA was inadequate.

In an interesting footnote to its decision, the Court of Appeals admitted that it was not sure what a sufficient cumulative effects analysis would look like, but left that issue open for another day.

— Lawrie Kobza

Grievance Policy Found To Violate Act 10

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of the statute. The Court of Appeals found significant the fact that the Dodge County policy defined the employment action taken when an employee was found to "lack qualifications" for the position as a "termination."

Municipalities were given a short window in which to adopt grievances systems in 2011 and not much guidance from the legislature as to the details of what they should and could address. This case, and the growing body of grievances under the systems, is starting to provide a sufficient background of information to assess policies adopted in 2011. We recommend that sometime in the near future, municipalities review with legal counsel their Act 10 grievances policies.

— Steven C. Zach

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