

MUNICIPAL ATTORNEYS NEWSLETTER
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#09/07

CASE OUTLINES (MISSOURI)

SEXUAL INNUENDO IN THE WORK PLACE. Officer Barekman, a male, worked for the city of Republic (City) as a police officer. Officer Sweet a female officer at the time Barekman started work in 1995 would make sexually explicit jokes to Barekman. The work environment was full of sexual innuendo and one of the games was to tell sexually explicit jokes until Barekman would get red in the face and walk away. Barekman transferred to the investigative division and later asked that Officer Sweet be transferred to this division. Barekman was the supervisor of Sweet. The sexual innuendo continued. Barekman gave gifts to Sweet and would rub her back and they exchanged cards signed "Love." Sweet eventually filed a complaint against Barekman alleging that he was sexually harassing her and that he used city offices and time for outside business. The City investigated the matter and asked Barekman to respond. Barekman in his written response to the complaint denied the allegations and complained that he had been subject to repeated sexual harassment by Sweet at work and that he had not complained before since he thought no one would take him seriously since he was a male. After an investigation the City asked that he resign immediately because of recent comments made by Barekman showed that he would "continue to engage in hostile retaliatory behavior" and the investigation showed multiple instances in which he used city property for his own business. Barekman resigned under protest giving the reason that he did not want to lose his unused vacation and compensatory time and if he was fired he might lose his state certification as a police officer which would eliminate his ability to work as a police officer. Barekman then filed a complaint with the Missouri Commission on Human Rights alleging he had been sexually harassed by Sweet and he reported her conduct to the City and they forced him to resign. He also alleged that the conduct of the City was retaliatory on the part of the City for raising the sexual harassment and hostile work environment created by Sweet and that the city administrator told him nothing would be done about his complaint. Barekman sued the City alleging a sexually hostile work environment that embarrassed him and that he had been constructively discharged in retaliation for complaining about Sweet's behavior. City filed motion for summary judgment that was sustained and Barekman appealed to the Southern District. On appeal, the court sustained the motion for summary judgment on the sexually hostile work environment but reversed on Barekman's retaliation claim. On the hostile work environment, the court held that Barekman failed to establish that his gender was a contributing factor to the employment action. While the actions of city employees may have been boorish, vulgar, and inappropriate it did not rise to the level of gender discrimination. In order to prove sexual harassment, the sexual conduct must create an "intimidating, hostile, or offensive work environment or has the purpose or effect of

unreasonably interfering with an individual's work performance." On the complaint of the retaliatory discharge, the court found that there were material issues of fact in dispute and reversed the summary judgment. *Barekman v. City of Republic*, (27939, 09/11/07).

Comment Howard. This is a good case for reviewing the line between a hostile work environment and just sexual innuendo in the work place. The case also shows the difficulties with retaliation claims since they generally raise significant factual issues with respect to retaliation that should be resolved by a jury.

PROOF OF INTOXICATION WHEN REMOTE FROM DRIVING VEHICLE IS INSUFFICIENT. Proof of intoxication at the time of the arrest when remote from the operation of the vehicle that the person was driving is insufficient in itself to prove intoxication at the time the person was driving. *State of Missouri v. Ollison*, (WD66722, 09/11/07).

DELAY IN CONDEMNATION. The city of Gladstone (City) declared the property owned by Clay County Realty Co. and Edith Investment (Owners) blighted in 2003. The City was not able to find a developer for the property resulting in undue delay in the acquisition of the property. As a result of the delay, the Owners lost tenants and suffered damages. Owners brought an inverse condemnation suit claiming that the delay was a taking of property under the Missouri Constitution. Circuit court sustains City's motion to dismiss for failure to state a cause of action and the Owners' appeals. The Western District notes that the plaintiff could not state a claim for delay under an inverse condemnation theory in Missouri. However, under Missouri law a property owner can state a claim under a tort theory for "aggravated delay or untoward activity" but that this claim was not yet ripe for resolution. The Owners must wait until the City institutes condemnation proceedings or abandons the project before the claim is ripe. Case is remanded with directions to the circuit court to dismiss the petition for lack of jurisdiction *Clay County Realty Company and Edith Investment Company v. City of Gladstone*, (WD67534, 09/11/07).

FIVE YEAR STATUTE OF LIMITATIONS APPLIES TO CLAIM FOR BACK PAY. Dennis Cox, plaintiff and former Ripley County Sheriff (Sheriff), claims that Ripley County (County) and the County Commissioners under compensated him for the years he served as Ripley County Sheriff from January 1, 1993 to December 31, 1996. He filed motion to be added to existing suit brought by former sheriff on December 31, 2001, against the County and the County Commissioners. The County filed motion to dismiss on grounds that the claim was barred by the three year statute of limitations set forth in Section 516.130.1 RSMo which motion was sustained. On appeal, the Southern District held that the five year statute of limitations applies. The five year statute applies to an action upon a liability created by a statute other than a penalty or forfeiture. The underlying claim was based on the failure of the County to properly compute the amount as set forth in the statute contrary to Missouri law. The three year statute applies to an action brought against an officer upon a liability incurred by any omission of an official duty. The three year statute more appropriately applies when only one official is acting. In this case, all three commissioners acted to authorize the County. The court goes on at great length to distinguish cases that applied the three year statute instead of the five year

statute of limitations and determines that the facts in this case are closer to cases falling within the five year statute of limitations. The court also held that the Sheriff commenced his action when the motion to amend the petition was filed not when the motion to amend was granted. [*Cox v. Ripley County*](#), (27808, 08/23/07).

Comment Howard. This case does give you the framework to decide if a five year or three year statute applies but does require a careful read of the cases cited.

UNCORROBORATED TESTIMONY IS SUFFICIENT WHEN VARIANCE IS SIGNIFICANT BETWEEN POSTED SPEED AND ESTIMATED SPEED OF VEHICLE. Kimes was charged with violation of Section 303.130 RSMo and found guilty after a court tried the case. He was sentenced to serve 10 days in jail, execution of which was suspended and to complete defensive driving school. Kimes appealed contending that the uncorroborated testimony of a police officer that he was speeding was insufficient to find him guilty beyond a reasonable doubt within the meaning of *City of Kansas City v. Oakley*. Officer from Greene County used a radar gun to track the speed of Kimes' car. The Officer first saw Kimes' car when it was approximately 100 yards away. He testified that in his opinion the car was traveling about 35 miles per hour in a 20 mile per hour school zone. When asked about what the speed the radar unit showed, defense counsel objected on the ground that a proper foundation was not laid – objection was sustained. Defendant did not cross examine the Officer and state rested and defendant did not offer any evidence. Based on the evidence, the court found the defendant guilty and he appealed. The sole issue on appeal was whether or not the uncorroborated testimony of the officer was sufficient to convict. The court distinguished cases upon which the defendant relied on the grounds that the difference between the speed limit and the speed of the car was slight versus this case in which the difference was substantial. The court found that where the difference between the speed of the car and the speed limit is substantial, uncorroborated testimony is sufficient. The Court sua sponte reviewed the sentencing for an infraction and determined that the penalty for the infraction did not include jail time and remanded the circuit court for re-sentencing. [*State of Missouri v. Kimes*](#), (28138, 08/15/07).

Comment Howard. The court notes that this decision is the first case to address the question of whether or not uncorroborated testimony is sufficient when the variance between the estimated speed and the speed limit is not slight. In this case, there was a 75 percent variance and in other cases there were variances ranging from 29 percent to 37 percent that were determined to be slight. This decision makes sense but your guess is as good as mine as to how much of a variance over 37 percent is sufficient. If you are depending on the uncorroborated testimony of the officer to make your speeding case, you need to read this case.

SUSPENDED IMPOSITION OF SENTENCE IS NOT A FINAL JUDGMENT AND CANNOT BE APPEALED. Defendant pled guilty to a speeding charge on July 3, 2006, paid his fine of \$110. Some six weeks later Defendant moved to withdraw his guilty plea under Rule 29.07 because he realized that the guilty plea would result in points resulting in the loss of his driver's license. Defendant's motion to withdraw the guilty plea was granted and the court allowed the Defendant to enter a new guilty plea to the same citation. On August 30, 2006, the court suspended imposition of sentence on the

new guilty plea and placed Norris on probation for 12 months. The state appealed the order setting aside the guilty plea. The appeal was dismissed by the Western District on the grounds that a suspended imposition of sentence is not a final judgment under Rule 29. Appeal is dismissed for lack of appellate court jurisdiction. The correct remedy is Writ of Mandamus. [*State of Missouri v. Norris*](#), (WD67406, 08/12/07).

Comment Howard. This one-half page opinion is confounding. The Western District cites as authority in an earlier case where a motion to withdraw a guilty plea had been denied as the basis for the mandamus action to challenge the decision. In that case, the petitioners wanted the lower court to consider a motion to set aside a guilty plea. In this case, the motion to withdraw the guilty plea was granted so a writ of mandamus (commanding an official to take action) hardly seems like the correct remedy.

HOW DOES ETHICS COMMISSION APPLY DECISION HOLDING CAMPAIGN CONTRIBUTION LAW UNCONSTITUTIONAL? If you want to know the affect of declaring a law unconstitutional the recent Supplemental Opinion in *Trout v. State of Missouri*, (SC88476, 08/27/07) is required reading. After holding House Bill No. 1900 unconstitutional, the Supreme Court invited letter briefs as to the appropriate remedy and issued its Supplemental Opinion. As you might expect stating the rule is easier than its application. The rule is that an unconstitutional statute is no law and confers no rights. This is true from the date of its enactment and not merely from the date of the decision branding it unconstitutional. Solely prospective application of a decision is the exception and not the norm. One may be excepted from the retroactive application of the decision to the extent retroactive application causes injustice to persons who have acted in good faith and showed reasonable reliance. Whether or not those impacted by the decision relied on the validity of prior statutes is a matter that will have to be developed based on a record. In applying these rules, the court uses a balancing test to determine the hardship or injustice that would justify making an exception to the retroactive application of the decision. As to campaigns that have been concluded, the application of the decision would work a manifest injustice. As to the plaintiff James Trout, the only candidate who was a party to the decision, freely admits retroactive application of the decision will not work an injustice. As to everyone else not parties to this suit the Ethics Commission must apply the law within the framework established by the Court in determining if the retroactive application will work a hardship. The Ethics Commission must avoid creating an un-level playing field that would work an injustice for the other candidates. Stay tuned.

TRIAL COURT IS FREE TO DISBELIEVE EVEN UNCONTRADICTED EVIDENCE AND TESTIMONY. Director of Revenue appeals decision of trial court that set aside the Director's revocation of Furne's driver's license for refusal to take breathalyzer test. Furne conceded he had been arrested and refused to take the test so the only issue in the case was whether or not the trooper had reasonable grounds to believe that Furne had been driving while intoxicated. The trial court found that Furne's evidence was more credible even though Furne relied on cross examination of the officer and did not present any evidence. The Western District affirmed on grounds that under *Murphy v. Carron* the trial court is free to disbelieve even uncontradicted evidence and testimony. [*Furne v. Director of Revenue*](#), (WD66416, 08/29/07).

CASE OUTLINES (FEDERAL)

RANDOM DRUG TESTING POLICY. The Missouri Department of Mental Health (DMH), who provides health services to thousands of Missouri residents, instituted a drug testing policy for its employees. All employees were subject to random selection for testing. Under the policy, 10 percent are randomly selected for testing. If the employee refuses to submit, or tests positive the employee is placed on administrative leave pending further review. In addition to random testing, DMH's drug policy requires that employees submit to drug testing "when there is a reasonable suspicion that the employee is using, possessing, or distributing controlled substances on or off duty, or when there is a reasonable suspicion that an employee is impaired by alcohol or drug use while on duty." According to DMH, it developed the drug testing policy because of its belief that illicit drugs were being used by some DMH employees and its belief that each of its employees is a care-giver and role model for clients of DMH and must be drug free. Three employees filed suit challenging the drug testing rules as unconstitutional on its face and as applied, requesting that DMH be permanently enjoined from enforcing the policy. The case was submitted to the court on a stipulation of fact. In reviewing the law, the district court noted that the Fourth Amendment normally requires a search warrant unless the search is based on special needs beyond the normal need for law enforcement. When a governmental agency alleges a "special need" the "courts must undertake a context specific-inquiry, examining closely the competing private and public interests advanced by the parties." The special need must be substantially important enough to override the individual's private interests to suppress the Fourth Amendment's normal requirement of individualized suspicion. The district court held that DMH sustained its burden to show special needs with respect to the need for random testing for drugs at its rehabilitation centers. Patients in those facilities are particularly vulnerable and employees work in a closed environment making it difficult for DMH to supervise these employees. DMH also showed drug usage and inability to stop this usage at these facilities. Plaintiffs worked at the Mid-Missouri Mental health Center and the Southeast Missouri Mental Health Center. There was no evidence that the Plaintiffs had access to drugs at these facilities. They also worked in a secured area and did not have responsibility for patient care. The justification that the employees were role models was not sufficient to create a special need; therefore the evidence failed to show that the random drug testing of Plaintiffs who worked at the Mid-Missouri and Southeast Missouri Mental Health Centers met the special needs test. The district court determined that the policy was valid in certain situations; therefore it was not facially unconstitutional but as to the Plaintiffs the policy as applied was unconstitutional because DMH failed to prove its case as to the institutions where the Plaintiffs worked. *Jakubowicz v. Dittmore*, (United States District Court for the Western District of Missouri, Central Division, Case No. 05-4135-CV-C-NKL). A copy of this case is on the MML Web site un the MMAA materials section.

Comment Howard. This is a well-written opinion and answers questions that periodically are asked on our list serv. While the court is very critical of DMH it would appear that the criticisms were directed at the failure of proof by DMH.

NOT PLEADING THAT OFFICIALS WERE ACTING INDIVIDUALLY IS FATAL IN 1983 ACTION. Failure of plaintiff to plead that officials were acting in their individual capacity is fatal to 1983 claim against individual officers resulting in dismissal of original lawsuit. Since failure to plead that officials were acting in their individual capacity was not pled in the first action that was dismissed the statute of limitations was not tolled while first action was pending, resulting in the dismissal of second complaint based on three year statute of limitations. *Baker v. Chisom*, (8th Cir. 08/28/07).

LEGISLATION, NEWS, AND OTHER MATTERS

HIPAA PRIVACY. For those concerned with the HIPAA privacy and security act there is a 60-minute audio conference hosted by the National Constitution Center, HIPAA Update: Top Privacy and Security Developments for 2008 on Wednesday, October 17, 2007, 1:00-2:00 p.m. ET. See <https://www.constitutionconferences.com/main.asp?G=1&E=1096&I=1>. Priced at \$199. Use a speakerphone and as many people as you want can listen at no extra costs.

WATER QUALITY SEMINAR. A water quality seminar will be held on October 10 – 11, at Stoney Creek Inn, Columbia, Missouri. There are a number of items on the program that relate directly to legal issues and enforcement. Information about the program and costs may be accessed at <http://www.mpua.org/seminars/>.

TALK TO US. We are interested in your thoughts and opinions. If you have an interesting case or something that you think may be of interest to our members like a seminar, book, or case contact me at howardcwright@mchsi.com.

HOW TO OBTAIN OPINIONS

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

Missouri: <http://www.courts.mo.gov/courts/pubopinions.nsf>.,

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.