QUINN JOHNSTON

HENDERSON - PRETORIUS - CERULO

GOVERNMENT & LIABILITY SEMINAR

WEDNESDAY, OCTOBER 25, 2017

Section 1983 and Law Enforcement Liability Update – The Shifting 7th Circuit

Peter Jennetten
309.674.1133
pjennetten@quinnjohnston.com

U.S. Supreme Court

Fourth Amendment and Due Process Claims

Manuel v. Joliet, 137 S.Ct. 911 (2017)

"The Fourth Amendment… establishes 'the standards and procedures' governing pretrial detention. And those constitutional protections apply even after the start of 'legal process' in a criminal case…"

County of Los Angeles, Calif. v. Mendez, 137 S. Ct. 1539 (2017)

Rejecting the "provocation rule"

"A different Fourth Amendment violation cannot transform a later, reasonable use of force into an unreasonable seizure."

Nelson v. Colorado, 137 S.Ct. 1249 (2017)

"To comport with due process, a State may not impose anything more than minimal procedures on the refund of exactions dependent upon a conviction subsequently invalidated."

White v. Pauly, 137 S.Ct. 548 (2017) (per curiam)

"Clearly established federal law does not prohibit a reasonable officer who arrives late to an ongoing police action …from assuming that proper procedures… have already been followed."

7th Circuit cases

Due Process, Deliberate Indifference,
and Monell Claims

Petties v. Carter, 836 F.3d 722 (7th Cir. 2016)

- "an inmate is not required to show that he was literally ignored by prison staff to demonstrate deliberate indifference."
- "an action that reflects sub-minimal competence and crosses the threshold into deliberate indifference."

Petties v. Carter, 836 F.3d 722 (7th Cir. 2016)

"qualified immunity does not apply to private medical personnel in prisons."

The New *Monell* Standard

Thomas v. Cook Cnty. Sheriff's Dep't, 604 F.3d 293 (7th Cir. 2010).

"a municipality can be held liable under *Monell*, even when its officers are not, unless such a finding would create an *inconsistent* verdict."

Glisson v. Indiana Department of Corrections, 849 F.3d 372 (2017).

"if institutional policies are themselves deliberately indifferent to the quality of care provided, institutional liability is possible."

Illinois Courts

Malicious Prosecution and

Searching Liquor Establishments

Beaman v. Freesmeyer, 2017 IL App (4th) 160527

"to find a police officer usurped the State's Attorney's decision-making role and that officer is responsible for commencing or continuing a criminal action… the plaintiff must establish that officer pressured or exerted influence on the prosecutor's decision or made knowing misstatements upon which the prosecutor relied"

59th & State St. Corp. v. Emanuel, 2016 IL App (1st) 153098

- "statute authorizing the warrantless search of premises licensed to sell liquor …failed to satisfy the third criteria for reasonableness… as neither placed a limit on the timing of an administrative search."
- "the exclusionary rule should not have been applied in the instant case."

Conclusion

Liability for Injuries Occurring on Public Property

Adam Chaddock
309.674.1133
achaddock@quinnjohnston.com

Noah Menold
309.674.1133
nmenold@quinnjohnston.com

Common Law Premises Liability

- Premises liability involves the liability imposed upon possessors of land for injuries occurring on their property.
- Prior to 1984, the scope of the duty owed by a possessor of land depended on whether the entrant was a licensee (i.e., a social guest), an invitee (i.e., a business customer), or a trespasser. In 1984, the Illinois General Assembly enacted the Premises Liability Act, 740 ILCS 130/1, *et seq*, which eliminated the distinction between licensees and invitees.

Illinois Premises Liability Act

The Premises Liability Act now provides that the duty owed by a possessor of land to a lawful entrant is that of reasonable care under the circumstances regarding the state of the premises or acts done or omitted on them.
740 ILCS 130/2; *see also* ***Clifford v. Wharton Business Group, L.L.C.***, 353 Ill. App. 3d 34, 42, 817 N.E.2d 1207, 1214 (1st Dist. 2004)

Traditional Tort Duty Analysis

- The plaintiff and the defendant must have a relationship to one another that obligates the defendant to act reasonably for the protection of the plaintiff. ***Ziemba v. Mierzwa***, 142 Ill. 2d 42, 566 N.E.2d 1365 (1991). The question of whether a duty exists is one of law for the courts to determine at the outset. ***Cunis v. Brennan***, 56 Ill. 2d 372, 308 N.E.2d 617 (1974).

- "[T]he concept of duty . . . is very involved, complex and indeed nebulous… this court has identified certain factors" ***Ward v. K Mart Corp.***, 136 Ill. 2d 132, 554 N.E.2d 223 (1990).

- The factors weighed by the court to determine the existence of a duty include:
  - Reasonable foreseeability of injury;
  - Likelihood of injury;
  - Magnitude of the burden of guarding against it; and
  - Consequences of placing that burden upon the defendant.

Elements of a Premises Liability Claim

To recover in a premises-liability case, a plaintiff must prove the following elements:

1. Condition on the property presented an unreasonable risk of harm to people on the property;
2. Defendant knew or in the exercise of ordinary care should have known of both the condition and the risk;
3. Defendant could reasonably expect that people on the property would not discover or realize the danger or would fail to protect themselves against such danger;
4. Defendant was negligent in one or more ways;
5. Plaintiff was injured; and
6. Defendant's negligence was a proximate cause of the plaintiff's injury.

See ***Hope v. Hope***, 398 Ill. App. 3d 216, 219, 924 N.E.2d 581, 584 (4th Dist. 2010).

Notice of the Condition

Actual Notice: Did the defendant know of the dangerous condition?

- Prior complaints
  - ***Bloom v. Bistro Restaurant Limited Partnership***, 304 Ill.App.3d 707, 710 N.E.2d 121 (1st Dist. 1999) (a restaurant patron injured when ice fell from the canopy entrance of the restaurant used prior complaints of falling ice to establish that the restaurant had actual notice of the dangerous condition);

Notice of the Condition

- *Prior accidents/near misses*
  - ***Sullivan-Coughlin v. Palos Country Club, Inc.***, 349 Ill.App.3d 553, 812 N.E.2d 496 (1st Dist. 2004) (a golfer injured when she was struck by a golf ball while riding in a golf cart near the pro shop and cart return area established that the golf course had notice of the dangerous condition by introducing evidence that golf balls occasionally landed in that area);

Notice of the Condition

Constructive Notice: Should the defendant have been aware of the dangerous condition?

- Constructive notice exists when "the dangerous condition existed for a sufficient time or was so conspicuous that the defendant should have discovered the condition through the exercise of reasonable care."
  Smolek v. K.W. Landscaping, 266 Ill. App. 3d 226, 639 N.E.2d 974 (2d Dist. 1994).

Frequently-Used Common Law Affirmative Defenses

- Open and Obvious Doctrine
- Natural Accumulation Doctrine
- *De Minimis* Rule
- Contributory Negligence

Open and Obvious Doctrine

- Persons who own, occupy, or control and maintain land are not ordinarily required to foresee and protect against injuries from potentially dangerous conditions that are open and obvious. ***Bucheleres v. Chicago Park District***, 171 Ill. 2d 435, 665 N.E.2d 826 (1996)
- In cases involving obvious and common conditions, such as fire, height, and bodies of water, the law generally assumes that persons who encounter these conditions will take care to avoid any danger inherent in such condition. The open and obvious nature of the condition itself gives caution and therefore the risk of harm is considered slight; people are expected to appreciate and avoid obvious risks. *See* ***id.***

Exceptions to the Open and Obvious Doctrine

The open and obvious doctrine does not apply if there is a:

- **Distraction**—The possessor has reason to expect that an entrant's attention may be distracted, so that he or she will not discover what is obvious, or will forget what he or she has discovered, or fail to protect himself or herself.
- **Deliberate Encounter**—The possessor has reason to expect that the entrant will proceed to encounter a known or obvious danger because the advantages of doing so would outweigh the apparent risk.

Examples of the Open and Obvious Doctrine

- ***Bruns v. City of Centralia***, 2014 IL 116998, 21 N.E.3d 684 (city owed no legal duty to warn or protect a pedestrian from tripping on a crack in a sidewalk caused by roots from a nearby tree making the sidewalk uneven, as the condition constituted an open and obvious danger);
- ***Bucheleres v. Chicago Park District***, 171 Ill. 2d 435 (1996) (park district owed no legal duty to warn of or protect against the risks associated with diving off of concrete seawalls into Lake Michigan, since it is generally known that water levels of a lake will fluctuate, and that storms and strong currents change conditions of water; the fact that park district had added sand to lake bottom, thereby lessening depth of water, did not alter open and obvious nature of the condition);

Examples of the Open and Obvious Doctrine

- ***Zumbahlen v. Morris Community High School, District No. 101***, 205 Ill. App.3d 601, 563 N.E.2d 1228 (3d Dist. 1990) (a spectator at a high school football game left the ticket booth in a crowded area and tripped over a concrete parking curb while trying to avoid the crowd and the curb)

- ***Durham v. Forest Preserve District of Cook County***, 152 Ill. App. 3d 472 (1st Dist. 1987) (local public entity owed no legal duty to warn of or protect 16-year-old from danger of drowning after jumping into muddy pond);

Natural Accumulation Doctrine

- Possessors of land are not liable for injuries resulting from the natural accumulation of ice, snow, or water.
  Handy v. Sears, Roebuck & Co., 182 Ill. App. 3d 969, 971, 538 N.E.2d 846, 848 (1st Dist. 1989).
- A possessor of land does have a duty, and therefore may be liable, where an injury is a result of an unnatural or artificial accumulation, or a natural condition aggravated by the owner.
  Bernard v. Sears, Roebuck & Co., 166 Ill. App. 3d 533, 535 (1st Dist. 1988).
- Since possessors of land are not liable for failing to remove natural accumulations of ice, snow, or water, they have no duty to warn of such conditions

De Minimis Rule

- Municipalities are not obligated to keep sidewalks in perfect condition at all times. ***Putman v. Village of Bensenville***, 337 Ill. App. 3d 197, 786 N.E.2d 203 (2d Dist. 2003)
- A municipality has no duty to repair sidewalk defects unless a reasonably prudent person should anticipate danger to persons walking on the sidewalk; thus, *de minimis* or slight defects frequently found in traversed areas are not actionable as a matter of law.
- The *de minimis* rule stems largely from the recognition that placing such a duty on a municipality would create an intolerable economic burden.

De Minimis Rule (Cont'd)

- There is no bright line to determine whether a condition is de minimis; each case must be determined on its own facts.
- The size of the defect or the height differential from the rest of the sidewalk often has a key role in the determination of whether the defect is de minimis.
- For example, several cases involving variations of less than 2 inches to be *de minimis* and thus not actionable as a matter of law:
  - ***Putman v. Village of Bensonville***, 337 Ill. App. 3d 197, 202 (2d Dist. 2003) (1 inch);
  - ***St. Martin v. First Hospitality Group, Inc.***, 2014 IL App (2d) 130505, ¶ 4 (2d Dist. 2014) (1½ - 1¾ inches); and
  - ***Birck v. City of Quincy***, 241 Ill. App. 3d 119, 122 (4th Dist. 1993) (1-7/8 inches)

Contributory Negligence

- "Contributory negligence" is defined as a lack of due care for one's own safety as measured by an objective reasonable person standard.
  Drakeford v. University of Chicago Hospitals, 2013 IL App (1st) 111366, 994 N.E.2d 119 (1st Dist. 2013); 735 ILCS 5/2-613(d).
- Under the comparative fault statute, if the plaintiff is more than 50% liable for the negligent act, then the plaintiff is barred from recovery; if the plaintiff liability is less than that then his or her damages are reduced accordingly.
  735 ILCS 5/2-1116

Sovereign Immunity

- Our legal system is based on the English common law.
- Ancient legal doctrine of sovereign immunity prevents the government from being liable for *any* type of injury or harm it causes.
- Sovereign immunity is a remnant of the idea that "the King can do no wrong."
- The government simply could not be sued in Illinois up until 1959, when the Illinois Supreme Court abolished sovereign immunity altogether due to its "rotten foundation."

Claims against the Federal Government

- Claims against the federal government are subject to the Federal Tort Claims Act (FTCA).
- The FTCA authorizes the imposition of tort liability on the federal government "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. §1346(b)(1).
- The FTCA provides that jurisdiction for such cases is in the federal court system, and it also sets forth certain procedures that must be followed to present such a claim and to file suit. *See* 28 U.S.C. §2671, *et seq.*

Claims against the State of Illinois

- Claims against the State of Illinois fall under the Court of Claims Act, 705 ILCS 505/1, *et seq.*, which provides a special Court of Claims with exclusive jurisdiction over all tort claims against the state.
- The "state" includes all offices, agencies, etc., and any state employees acting in the scope of their employment. 705 ILCS 505/8(d). The Court of Claims Act limits the state's liability for most tort claims to the amount of $100,000.

Claims against Local Public Entities

- The Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act), 745 ILCS 10/1-101, *et seq.*, governs whether and in what situations local public entities are immune from civil liability.
- The stated purpose of the Tort Immunity Act is to protect local public entities and public employees from liability arising from the operation of government.
- The Tort Immunity Act provides a wide range of immunities for various governmental bodies performing various functions. There are sections ranging from recreational activities to traffic signals and just about everything in between. See 745 ILCS 10/3-101, *et seq.*
- The Act generally shortens the statute of limitations to one year.

Definition of a local public entity

The Tort Immunity Act defines a public entity as:

> a county, township, municipality, municipal corporation, school district, school board, educational service region, regional board of school trustees, trustees of schools of townships, treasurers of schools of townships, community college district, community college board, forest preserve district, park district, fire protection district, sanitary district, museum district, emergency telephone system board, and all other local governmental bodies. "Local public entity" also includes library systems and any intergovernmental agency or similar entity formed pursuant to the Constitution of the State of Illinois or the Intergovernmental Cooperation Act as well as any not-for-profit corporation organized for the purpose of conducting public business. It does not include the State or any office, officer, department, division, bureau, board, commission, university or similar agency of the State.
> 745 ILCS 10/1-206.

Immunity for Claims Arising from Maintenance of Property

Section 3-102 of the Tort Immunity Act provides:

- **a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used**, *and shall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a condition that is not reasonably safe in reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition.*
- In other words, the Tort Immunity Act imposes a duty of ordinary care on local public entities only for intended users. A local public entity cannot be liable for an injury unless it is proven that the entity had actual or constructive notice of the dangerous condition in reasonably adequate to time to remedy or protect against the condition.

Immunity for Claims Arising from Maintenance of Property

- Section 3-102 effectively strengthens the elements than the common law cause of action.
- However, once a local entity embarks on a repair, it then has a duty to perform the repair in a reasonably safe and skillful manner, with reasonable care, and in a nonnegligent manner.

  See ***Robinson v. Washington Township***, 2012 IL App (3d) 110177, 976 N.E.2d 610 (3d Dist. 2010) (The defendant township's act of repairing potholes on the roadway required the defendant to make the repairs in a reasonably safe manner).

Immunity for Claims Arising from the Failure to Provide Traffic Signals and Signs

Section 3-104 of the Tort Immunity Act provides:

- Neither a local public entity nor a public employee is liable under this Act for an injury caused by the failure to initially provide regulatory traffic control devices, stop signs, yield right-of-way signs, speed restriction signs, distinctive roadway markings or any other traffic regulating or warning sign, device or marking, signs, overhead lights, traffic separating or restraining devices or barriers. 745 ILCS 10/3-102.
  - ***Hoxsey v. Houchlei***, 135 Ill.App.3d 176, 481 N.E.2d 990 (5th Dist. 1985) (Where flooding of road under jurisdiction and maintenance of township and its road commissioner resulted from weather conditions, and not from any action taken by township, or road commissioner, widower of motorist who drowned when swept away by flood waters while attempting to walk to high ground after her truck had stalled in attempt to cross flooded portion of road could not recover from road commissioner or township for failure to erect barricades or signs indicating alternate routes)
  - ***West v. Kirkham***, 147 Ill. 2d 1, 4, 588 N.E.2d 1104, 1105 (1992) (Under Section 3-104, city had no obligation to warn motorists of dip in roadway or place speed control sign at dip).

Immunity for Claims Arising from the Effects of Weather

Section 3-105 of the Tort Immunity Act provides:

- **Neither a local public entity nor a public employee is liable for an injury caused by the effect of weather conditions as such on the use of streets, highways, alleys, sidewalks or other public ways, or places, or the ways adjoining any of the foregoing . . . . For the purpose of this section, the effect of weather conditions as such includes but is not limited to the effect of wind, rain, flood**, hail, ice or snow but does not include physical damage to or deterioration of streets, highways, alleys, sidewalks, or other public ways or place or the ways adjoining any of the foregoing, or the signals, signs, markings, traffic or pedestrian control devices, equipment or structures on or near any of the foregoing or the ways adjoining any of the foregoing resulting from weather conditions.
  745 ILCS 10/3-105.

- ***Patch v. Township of Persifer***, Ill. App. 3d 108, 573 N.E.2d 834 (3d Dist. 1991) (Township had no duty to post warning signs at rail crossing to warn motorists of icy conditions of roadway and therefore was not liable to motorist who slid into railroad crossing)

Immunity for Claims Arising from Property Used for Recreational Purposes

Section 3-106 of the Tort Immunity Act provides:

- Neither a local public entity nor a public employee is liable for an injury where the liability is based on the existence of a condition of any public property intended or permitted to be used for recreational purposes, including but not limited to parks, playgrounds, open areas, buildings or other enclosed recreational facilities, **unless such local entity or public employee is guilty of willful and wanton conduct proximately causing such injury**.
  745 ILCS 10/3-106.

- The Tort Immunity defines "willful and wanton conduct" as "a *course of action* which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property. This definition shall apply in any case where a "willful and wanton" exception is incorporated into any immunity under this Act. 745 ILCS 10/1-210.

Examples of 3-106 Immunity

- ***Foley v. City of LaSalle***, 241 Ill. App. 3d 54 (3d Dist. 1993) (6 to 12-inch-wide ruts *created by defendant's truck tires, and post holes which had been dug for erection of fence on softball field*, were insufficient to establish willful and wanton misconduct in maintenance of field);
- ***Bielema v. River Bend Community School District No. 2***, 2013 IL App (3d) 120808 (the failure to effectively warn of *a known danger or hazard*—there, a "puddle" caused by a spilled drink on a gymnasium floor—did not rise to the level of willful and wanton conduct as a matter of law, because "the District took some action to remedy the danger posed by the spill and reduce the risk of harm to others", even if those actions were ineffectual)

Examples of 3-106 Immunity (Cont'd)

- ***Pomaro v. Community Consolidated School District 21***, 278 Ill. App. 3d 266 (1st Dist. 1995) (*Directing* fifth grade student to run 50-yard-dash across school's 51-yard long blacktop surface, which terminated in loose and broken sections of asphalt (*i.e., a known defect and tripping hazard*), did not rise to level of willful and wanton misconduct);
- ***Rooney v. Franklin Park Park District***, 256 Ill. App. 3d 1058 (1st Dist. 1993) (Re-positioning of unsecured gym mats in front of bleacher openings by park district referees, *despite knowledge that mats periodically fell onto floor hockey field and created a tripping hazard*, held insufficient to state cause of action for willful and wanton misconduct against park district)

Immunity for Claims Arising from Recreational Access Roads or Trails

Section 3-107 of the Tort Immunity Act provides:

- Neither a local public entity nor a public employee is liable for an injury caused by a condition of: (a) Any road which provides access to fishing, hunting, or primitive camping, recreational, or scenic areas and which is not a (1) city, town or village street, (2) county, state or federal highway or (3) a township or other road district highway. (b) Any hiking, riding, fishing or hunting trail. 745 ILCS 10/3-107.

- ***Corbett v. Cty. of Lake***, 2016 IL App (2d) 160035, 64 N.E.3d 90, ***appeal allowed***, 77 N.E.3d 81 (Ill. 2017) (Paved bicycle path in developed city park was not located within a forest or mountainous region, and thus was not a riding "trail" within meaning of statute providing local governments immunity in connection with injuries caused by the condition of such trails; bike path was bordered merely by narrow bands of greenway containing shrubs and a few trees, and was surrounded by industrial development, residential neighborhoods, parking lots, railroad tracks, and major vehicular thoroughfares).

- ***Scott v. Rockford Park Dist.***, 263 Ill. App. 3d 853, 636 N.E.2d 1075 (2d Dist. 1994) (Parents brought personal injury action against park district and city for injuries suffered by their son when the bicycle he was riding over a bridge allegedly struck a crack in bridge and son was thrown over side of bridge into creek and the Appellate Court held that the defendants were fully immune from liability for any negligent actions connected with bridge because it was part of the access road to a recreational park).

Immunity for Claims Arising from Failure to Supervise

Section 3-108 of the Tort Immunity Act provides:

a) Except as otherwise provided in this Act, neither a local public entity nor a public employee who undertakes to supervise an activity on or the use of any public property is liable for an injury unless the local public entity or public employee is guilty of willful and wanton conduct in its supervision proximately causing such injury.

b) Except as otherwise provided in this Act, neither a local public entity nor a public employee is liable for an injury caused by a failure to supervise an activity on or the use of any public property unless the employee or the local public entity has a duty to provide supervision imposed by common law, statute, ordinance, code or regulation and the local public entity or public employee is guilty of willful and wanton conduct in its failure to provide supervision proximately causing such injury.
745 ILCS 10/3-108

Examples of 3-108 Immunity

- ***Barnett v. Zion Park District***, 171 Ill. 2d 378, 665 N.E.2d 808 (1996) (Park district was immune, under Section 3-108, from liability arising out of drowning death of patron in pool owned and operated by district where 11 lifeguards were physically present and were actually supervising pool during operating hours posted for pool)

- ***Jarvis v. Herrin City Park District***, 6 Ill. App. 3d 516, 285 N.E.2d 564 (5th Dist. 1972) (Minor plaintiff who sustained injuries on children's sliding board-jungle bars combination owned and possessed by park district and located in park operated by district, could not maintain action against district on theories of negligence or failure to supervise)

Examples of 3-108 Immunity (Cont'd)

- ***Flores v. Palmer Marketing., Inc.***, 361 Ill. App. 3d 172, 836 N.E.2d 792 (1st Dist. 2005) (Park district was immune from third-party claims for contribution for failure to supervise a park district volunteer who caused injury to a park district employee while sliding down inflatable water slide manufactured by third-party plaintiff, as to negligence claim of injured park district employee against owner and manufacturer of slide; slide was located on park district property and was being used for recreational purposes)

- ***Lorenc v. Forest Preserve District of Will County***, 2016 IL App (3d) 150424, 59 N.E.3d 899 (3d Dist. 2016) (County forest preserve district's alleged conduct of placing trail sentinels along path of bicycle riding event conducted by preserve district, to monitor path and notify participants of upcoming changes in path, if proven, did not rise to level of willful and wanton conduct as would defeat preserve district's immunity defense under Section 3-108 to wrongful death claim; trail sentinel's alleged negligent act of suddenly stepping into path to warn bicyclist of upcoming bridge, thereby causing bicyclist to crash, at best amounted to inadvertence or negligence)

Immunity for Claims Arising from Hazardous Recreational Activity

Section 3-109 of the Tort Immunity Act provides:

a) Neither a local public entity nor a public employee is liable to any person who participates in a hazardous recreational activity, including any person who assists the participant, or to any spectator who knew or reasonably should have known that the hazardous recreational activity created a substantial risk of injury to himself or herself and was voluntarily in the place of risk, or having the ability to do so failed to leave, for any damage or injury to property or persons arising out of that hazardous recreational activity.

b) As used in this Section, "hazardous recreational activity" means a recreational activity conducted on property of a local public entity which creates a substantial (as distinguished from a minor, trivial, or insignificant) risk of injury to a participant or a spectator.

"Hazardous recreational activity" also means:

1) Water contact activities, except diving, in places where or at a time when lifeguards are not provided and reasonable warning thereof has been given or the injured party should reasonably have known that there was no lifeguard provided at the time.

2) Diving at any place or from any structure where diving is prohibited and reasonable warning as to the specific dangers present has been given.

3) Animal racing, archery, bicycle racing or jumping, off-trail bicycling, boat racing, cross-country and downhill skiing, sledding, tobogganing, participating in an equine activity as defined in the Equine Activity Liability Act,[1] hang gliding, kayaking, motorized vehicle racing, off-road motorcycling or four-wheel driving of any kind, orienteering, pistol and rifle shooting, rock climbing, rocketeering, rodeo, spelunking, sky diving, sport parachuting, body contact sports (i.e., sports in which it is reasonably foreseeable that there will be rough bodily contact with one or more participants), surfing, trampolining, tree climbing, tree rope swinging where the person or persons furnished their own rope, water skiing, white water rafting, and wind surfing. 745 ILCS 10/3-109.

Immunity for Claims Arising from Injuries Related to Bodies of Water

Section 3-109 of the Tort Immunity Act provides:

- Neither a local public entity nor a public employee is liable for any injury occurring on, in, or adjacent to any waterway, lake, pond, river or stream not owned, supervised, maintained, operated, managed or controlled by the local public entity. 745 ILCS 10/3-110.

- ***McCoy v. Illinois International Port District***, 334 Ill. App. 3d 462 (1st Dist. 2002) (where port district maintained a seawall adjacent to the Calumet River, but did not own, supervise, maintain, operate, manage or control the river itself, the port district was absolutely immune from liability pursuant to section 3-110 for a drowning which took place in the Calumet River).

Strategies for Avoiding Premises Liability

- Routine inspections
- Preventative maintenance/actions
- Conspicuous warnings
- Create and maintain records
- Early investigation of incidents/claims

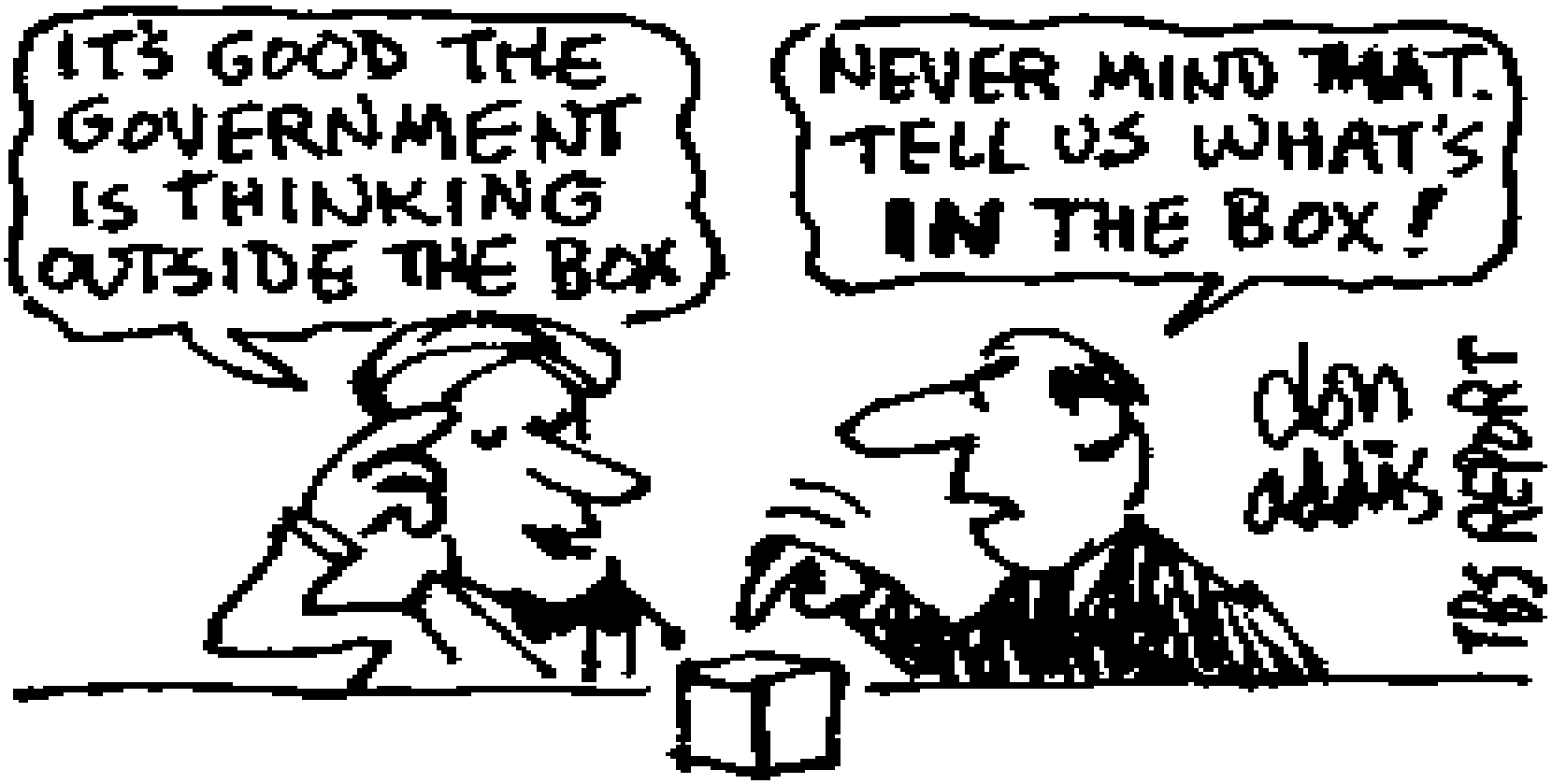
How to Investigate an Incident

- Notify the entity's insurer and/or legal counsel
- Take photographs
- Take measurements/make diagrams
- Interview witnesses
- Meet with employees involved
- Collect/record all media reports
- Obtain any police reports, dispatch/police/fire audio recordings
- Direct any incident report prepared to the entity's insurer and/or legal counsel
  - Note: Internal incident reports are often discoverable
- Formulate a public relations plan, if necessary
- Meet with entity personnel to discuss current practices and how these practices comply with existing rules and ordinances
- Avoid spoliation by retaining all evidence

Freedom of Information and Open Meeting Acts

Update and Tools to Simplify the Approach

Christopher Crawford
309.674.1133
ccrawford@quinnjohnston.com


IT'S GOOD THE GOVERNMENT IS THINKING OUTSIDE THE BOX
NEVER MIND THAT. TELL US WHAT'S IN THE BOX!

FOIA 5 ILCS 140/1 et. seq.

- A general right of access to information held by public entities
- Sets out the procedures for public entities and citizens to make or respond to FOIA requests
- Provides for administrative (the PAC) and judicial review of public entity decisions

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FOIA 5 ILCS 140/1 et. seq.

Who does it govern?

- Public Bodies - all legislative, executive, administrative, or advisory bodies of the State
- state universities and colleges
- counties, townships, cities, villages, incorporated towns, school districts
- Individual governmental officers

FOIA 5 ILCS 140/1 et. seq.

Who can access information?

- any individual, corporation, partnership, firm, organization or association, acting individually or as a group
- Advocacy Groups

FOIA 5 ILCS 140/1 et. seq.

What can they access?

- All "public records"
- Public record – pertains to the transaction of public business and having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body

FOIA 5 ILCS 140/1 et. seq.

What don't you have to do?

- YOU DO NOT HAVE TO CREATE RECORDS
- YOU DO NOT HAVE TO ANSWER QUESTIONS
- YOU DO NOT HAVE TO EXPLAIN THE DOCUMENTS
- YOU DO NOT HAVE TO COMPILE DATE YOU DON'T MAINTAIN
- HAVE POLICIES AND PROCEDURES THAT LIMIT ORAL COMMUNICATIONS.

FOIA Exemptions (commonly used)

- Prohibited from disclosure by federal or state laws
- Private Information
- Personal Information
- Interfere with administrative or law enforcement proceedings
- Preliminary drafts, note, recommendations…
- Proposals and bids
- Records relating to collective negotiating matters between public bodies and their employees or representatives

Minimizing FOIA Requests

- Publish Records Online (140/8.5)
  - Do this contemporaneously with their creation
  - Identify documents of interest to the public
  - Alongside directions for FOIA request, link to records frequently requested
  - Post records released in response to FOIA request.
  - Publish Online Indexes of Disclosed Records

Minimizing FOIA Requests

- Categorize records
- Required to list categories of disclosable records (140/5).
- Decide which public records are regularly created, not exempt and if those are records regularly requested
  - Building inspection reports
  - Budgets

Handling FOIA Requests

- Allow for requests to be made online
- Allow for fulfillment to be accomplished via e-mail.
- Allow for a tracking number for requestors so they can track response
- Notify requestors if original request is going to be routed to different agency.

Fulfilling FOIA Requests

- Make a template for responses: grants, partial denials, full denials and appeal rights.
- Identify exemption used, identify document(s) withheld, clearly explain why exemptions applies, rights to appeal.
- Burden is on public entity to prove by clear and convincing evidence that exemption applies.

Fulfilling FOIA Response

- 5 business Days to Respond
- Notification of Extension, but no more than 5 days. 140/3(e)
  - Docs not on site
  - Substantial records requested
  - Request is categorical
  - Records have not been located in routine searc

Different timelines for recurrent and commercial requests.

FOIA Responses

Costs/charges

- Can charge for the **actual cost** of purchasing the medium electronic records are stored on (i.e. CDs)
- No fee for first 50 pages of black/white copies, less than 15 cents per page afterwards
- Can charge **actual cost** of color or alternative size records
- Waiver or Reduction of Fees

FOIA- Cases

- The Public Access Counselor
  - Requests for view by persons denied records
  - Consultations with public bodies
- Judicial Review
  - Attorneys fees to requestor
  - Under what standard are fees awarded
  - Refusing to comply with binding opinion (140/11.6).- Civil Penalties

Example Litigation

- Chicago Alliance for Neighborhood Safety v. City of Chicago, 348 Illapp.3d188

  – Plaintiff wanted to collect information to see if response to FOIA requests were dictated by race and location of requestor. Wanted identify of individuals attending beat meetings. Also, all records of denials from 1998 on. Challenged indexing of same. Challenged City's vague description of records available.

Example Litigation

- Chicago Alliance for Neighborhood Safety v. City of Chicago, 348 Illapp.3d188 cont……
  - Court found no waiver, despite prior disclosure of citizens. Upheld award of attorney fees. Found manner of indexing in compliance with FOIA. Held that Illinois is not identical to Federal FOIA, but Federal cases are to be considered.

Example Litigation

- Rockford Police Benvolent v. Morrissey
  - College students conduct survey at request of PD and gives same to City. City will not disclose with FOIA. It's not an audit and it's not a personnel matter, it's a survey. Commercial purpose argument in seeking to get award of fees overturned did not work.

Open Meetings Act 5ILCS 120/1

- Applies to nearly every public body that is supported by or expends tax revenue.
- All meetings are to be in the open
- Exceptions when discussing issues of compensation, bargaining, land purchase, selecting a replacement member, quasi-adjudicative proceedings, litigation discussions, self-evaluation, safeguarding complaints having to do with fair housing, student discipline.
- Final actions must be made in open with description of confidentiality.

OMA

- Agendas posted 48 hours in advance
- Until regular meeting is concluded
- Issue properly noticed shall not be affected by other errors on agenda
- Reconvened meetings, must be done within 24 hours, no new 48 hour requirement

OMA- Speakers

- Public must be given opportunity to address others at open meeting.
- What to do to keep it clean, brief and not be the primary focus of the meeting.
  - Have to let others vent.

FOIA and OMA Overlap

- Disclosure of lawsuit outcomes
- The effectiveness of confidentiality agreements

HANDLING WORKPLACE INVESTIGATIONS

The Who, What, Why, When and How to Conducting a Proper Investigation in the Public Sector

Stephen M. Buck
309.636.7258
sbuck@quinnjohnston.com

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Handling Workplace Investigations

Why Bother?

- Because a "proper and objective" investigation can help protect the employer from liability or mitigate damages
- James Castelluccio v. IBM
  - Worked at IBM starting in 1968
  - 2005 promoted to V.P. of Integrated Technology
    - Supervised 2500 employees/Excellent performance reviews
  - 2007 his supervisor retires
  - At first meeting with new supervisor, she asks him how old he is and when he plans to retire
    - He was 61 at time, with no plans to retire anytime soon
  - Asked several more times when he plans to retire
  - Castelluccio reports her comments to HR

Handling Workplace Investigations

- HR conducts age discrimination investigation
  - Announces it will be an "open door" investigation
- Shortly thereafter, Castelluccio gets fired
  - HR investigation exonerates IBM from any wrongdoing
- Castelluccio sues IBM for Age Discrimination
  - Jury finds IBM terminated him because of his age
  - Awards him $2.5MM in damages, Federal Judge adds another $1.2MM to award for attorney fees

Handling Workplace Investigations

But wait – IBM conducted an investigation??!!!

Federal Judge refused to allow HR Investigation Report into evidence:

- Judge found report only "purported" to make objective findings while containing no information favorable to Castelluccio, including his account of the firing and his favorable performance reviews

- Judge wrote: "The purpose of the investigation was more to exonerate IBM than to determine if Mr. Castelluccio was treated fairly."

Handling Workplace Investigations

Be Objective

Be Impartial

Handling Workplace Investigations

Why conduct One?

- Avoid mistakes and/or embarrassment (by disciplining someone for something they did not do)
- Self-monitoring tool (ensures staff are complying with applicable laws and company policies/guidelines)
- Allows employer to gather relevant facts that can lead to proper employment decision
- Prompt investigation may well satisfy an otherwise upset or hostile employee (and possibly avoid a lawsuit)
- Proper and thorough investigation may serve as a defense in any lawsuit related to conduct at issue

Handling Workplace Investigations

When to conduct – What are the possible Triggering Events:

- Potential violations of Employment Discrimination Law
  - Civil Rights Act of 1964, ADA, ADEA, GINA, State Law (IHRA)
- Health and Safety Law violations
  - OSHA (also includes workplace violence, stalking, etc.)
- Retaliation or Whistleblowing claims
  - Most workplace laws prohibit retaliation against employees who report misconduct or discrimination/harassment
- Sudden change in performance or morale
- Complaint by employee
- Knowledge of supervisor or management

Handling Workplace Investigations

- Investigation can be used to limit liability of employer under Title VII of Civil Rights Act of 1964
  - Faragher v. City of Boca Raton, 524 U.S. 775 (1998)
  - Burlington Industries v. Ellerth, 524 U.S. 742 (1998)

- U.S. Supreme Court held employers are strictly liable for discrimination/harassment by supervisors, but only vicariously liable for discrimination/harassment by co-workers

- Employer may avoid liability for co-worker's conduct if:
  - 1) it shows exercise of reasonable care to prevent/correct behavior;
  - 2) employee failed to take advantage of corrective opportunities

Handling Workplace Investigations

"I complained, but the company did nothing"

- In cases where alleged misconduct is minor, many attorneys will focus on employer investigation

- If fail to promptly and properly investigate, the employee will use this to make the employer look bad – as either complicit, inept or indifferent.

Handling Workplace Investigations

Who should conduct the investigation?

- Knowledgeable about applicable laws, employer policies, and/or collective bargaining agreement
- Experience with investigations, skilled in interviewing and assessing credibility
  - IMPORTANT: Will he/she make a good witness
- Unbiased, no relationships with parties involved, ability to remain impartial
  - IMPORTANT: Must also be perceived as unbiased
- Job Titles/Positions of employees involved in alleged misconduct or wrongdoing

Handling Workplace Investigations

HR Professionals

- Appropriate in many cases
- Consider position of the employee or target of investigation, may not be appropriate for department heads or elected officials
- Consider working relationship or reporting relationship with those involved in alleged misconduct

Gov't Attorney/State's Atty

- Consider duties/role of atty and issues of the attorney-client privilege
- Consider relationships between gov't attorney and agency employees or department heads, if these are targets of investigation

Handling Workplace Investigations

Outside Attorney

- Likely to lose attorney – client privilege
  - EEOC v. Spitzer (2008)
  - Employer sanctioned $300K for not producing attorney notes
- Will become "witness" and disqualified to represent in any litigation
- May appear to be biased as wanting to protect employer/client

Outside Investigator

- Likely to have needed experience
- Need to show that truly unbiased
  - Pay not tied to result achieved
- Consider expense in light of nature of alleged misconduct

Handling Workplace Investigations

- Formal vs. Informal Investigation
  - Consider nature of complaint, need for action
  - May be that talking to complainant and accused is all that is necessary

- Is Interim Action Needed
  - Is alleged misconduct serious? Involve health or safety in workplace? Risk of violence?
  - At times may be necessary to remove accused employee from workplace
    - Done not for discipline purposes, but to facilitate investigation, minimize complaints of retaliation, avoid further risk of adverse conduct

Handling Workplace Investigations

Make a Plan for the Investigation

1. What is being investigated?
2. What employer policies, guidelines or terms of a collective bargaining agreement apply?
3. What type of documentary or other evidence is likely to exist and/or needs to be collected?
4. Who will be interviewed (and in what order)?
5. How has agency/employer handled similar situations in the past (better to be consistent)
6. Is specialized expertise needed to understand the situation, laws or policies at issue?

Handling Workplace Investigations

Preparing for the Interviews

- Don't just go into the interview and plan to wing it
- Gather as much documentary evidence as possible before commencing the interviews
- Consider the order of the witnesses to be questioned
  - Start with the complaining employee
  - Interviewing other identified witnesses next, considering:
    - Likelihood the witness has actual or relevant knowledge;
    - Risk of that employee witness feeding the rumor mill;
    - Bias of the witness
  - Generally prefer to conclude with the accused employee
- Outline and compile the questions you wish to ask each witness

Handling Workplace Investigations

OTHER CONSIDERATIONS RELATED TO INTERVIEWS:

- What are the rights of the employee in any investigation?
  - Garrity Rights
    - Right of public employee not to be compelled by employer to incriminate themselves – provides "use" immunity in any criminal prosecution
  - Uniform Police Officer Disciplinary Act (UPODA)
    - Illinois statute provides any police officer who is questioned during a formal investigation the right to counsel during questioning as well as the names of the complainants
- Rights specific to union employees:
  - Weingarten Rights [NLRB v. Weingarten (1975)]
    - Gives union employees a right to representation at interview if it could lead to discipline
    - Is an Unfair Labor Practice (ULP) to violate an employees' Weingarten rights
  - Loudermill Letter/Hearing [Cleveland Bd. of Ed. v. Loudermill]
    - Public sector employee entitled to notice of intent to terminate and pre-termination hearing before discharge – due process rights

Handling Workplace Investigations

Conducting the Interview

- Establish a rapport, put the witness at ease
  - Explain the purpose of interview
  - Assure that no conclusion has been reached
  - Assure that there will be no retaliation or reprisals
  - Will keep discussions confidential to the extent allowable, "request" that employee witness not discuss investigation or interfere in investigation
- Request the employee provide any related documents and identify any other witnesses

Handling Workplace Investigations

Conducting the Interview

- Remain neutral and professional – don't take sides
- Begin with Open-Ended Questions
  - You want witness to tell you what they know, not other way around
  - Ask generally about parties involved, how they get along, management styles, prior disagreements, etc.
  - Explore bias: ask what they think about the complainant and the accused wrong-doer
- Phase into more specific questions
  - Anyone ever complain to you about behavior of parties?
  - Were you present when . . . ?; Who else was present?
  - What did you see? What did you hear?
  - What did you do?
  - What did other people do?

Handling Workplace Investigations

Conducting the Interview

- Take Notes (take a lot of notes)
  - Consider having another person sit in on the interview
    - Particularly for interview of the complainant and the accused
  - One person takes notes while the other questions witness
    - Interviewer should still feel fee to take own notes as well
- Assess the Credibility of the Witness [EEOC Factors]
  - Demeanor: Is witness nervous, combative? Appear truthful?
  - Motive: Does the witness have a reason to lie?
  - Plausible: Does the witness' story make sense?
  - Supportable: Are there documents/evidence which support story?
  - Prior Record: What is the disciplinary or performance review history of the witness?

Handling Workplace Investigations

Interviewing Witnesses

- If possible, prepare formal statement that summarizes testimony for witness to sign
  - This allows witness to sign-off on accuracy of interview
  - Let the witness make changes if request, may lead to more info
- If not possible to prepare statement, consider having witness review notes and initial them to signify approval
  - Do not include your own thoughts and impressions in notes of testimony
  - Use separate document to summarize thoughts on credibility, consistency, bias, etc. of witness

Handling Workplace Investigations

Interviewing the Complainant

- Assure the employee of impartiality, no pre-judgment
- Inform that you will limit disclosure of info to people who need to know – but cannot guarantee confidentiality
- Tell employee you need his/her cooperation and will follow up from time to time
- Look for consistency or inconsistency in story
- Seek input from employee of how he/she thinks the matter should be resolved
- Tell employee that while their input is important and will be seriously considered, the company will make the final determination as to the best resolution of the issue

Handling Workplace Investigations

Interviewing the Accused

- Explain that you want his/her side of the story
- Need as much information as possible about event in order to resolve issue
  - Push for details, including documents and other witnesses
- If he/she refuses to cooperate, may consider directing the employee to answer questions [Garrity Rights]
- tell him/her that your investigation will proceed nonetheless, and that you will consider the lack of cooperation in making a decision
- If accused says the complainant is lying, ask the accused the complainant's reason or motive for lying

Handling Workplace Investigations

Other Considerations in Course of Investigation:

- Record the Interviews?
  - May make witness more hesitant to open up
  - Cannot record without consent
    - Violates Illinois Eavesdropping Act to record without consent of all parties, Act makes it a criminal offense in Illinois
- Review of Emails and/or Text Messages
  - Do you go into accused's computer at work and start reviewing?
  - Again must have consent of the parties to do so
  - Can have implied consent based on Employer's computer usage policies – but the policy must be clear that all work emails are monitored and no privacy expectation by employees
  - Run the risk of violating Electronic Communication Privacy Act, Stored Communication Act, and even Illinois Eavesdropping Act

Handling Workplace Investigations

Can you require Confidentiality?

1) The NLRB says NO BLANKET CONFIDENTIALITY

- NLRA applies to both union and non-union workplaces
- Section 7 of the NLRA provides employees the right: "to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection."
  - These rights apply to both union and non-union workforces
- The NLRB considers an employees' ability to discuss work conditions a protected activity
  - Including potentially discussing workplace incidents or investigation
- As such, NLRB does not allow an employer to impose a policy of confidentiality which would cover all workplace investigations

Handling Workplace Investigations

Can you require Confidentiality?

- NLRB does allow an employer to make a case-by-case determination of whether Confidentiality is required:
  - A) If a witness needs protection;
  - B) If there is a danger of evidence being destroyed;
  - C) If there is a danger that testimony will be fabricated; or
  - D) There is a need to prevent a cover up

2) EEOC also discourages blanket Confidentiality
   - Issued an opinion that employer policy prohibiting the discussion of alleged discrimination with others was a violation of Title VII of the Civil Rights Act
   - Could be construed as prohibiting a report to the EEOC

Handling Workplace Investigations

Double-Check Fairness/Completeness

- Did you objectively attempt to get both sides of story?
- Did you interview all the witnesses identified during investigation?
  - There is a risk that investigation will be held to have been unfair if key witnesses are ignored or overlooked
- Review documents and testimony for consistency
- Decide if any follow-up is needed:
  - Need additional documents?
  - Follow-up interviews with complainant? Accused?
- Determine if need to contact attorney to discuss legal requirements and obligations

Handling Workplace Investigations

Prepare the Report

- Recommend it be prepared by interviewer/investigator
- Should Include:
  - Summary of Incident being investigated
  - Identify applicable employer policies and guidelines
  - Dates of relevant steps of investigation
  - Key factual findings and conclusions of the investigator, including credibility of witnesses
  - Identify any factual issues that were not resolved, with a summary of why the issue could not be resolved
  - Identify the person making any decisions on actions to be taken based on the findings within the report

Handlings Workplace Investigations

Make Conclusions and Take Action

1. Have a meeting to discuss Report/Make Decision
   - Investigator should present Report to Decision Makers
   - Decision Makers should include HR Director, relevant Managers and/or Department Heads, and even agency or outside attorney if deemed appropriate
   - Answer Question: Were employer policies violated and/or did misconduct occur?
2. Make the Decision as to what action should be taken based on conclusions, facts and information contained in the report, and on the advice of counsel as necessary

Handling Workplace Investigations

If Harassment/Discrimination Occurred:

- Employer MUST remedy harassment/discrimination
- Remedies as to the accused wrong-doer include (depending on severity and aggravating and mitigating factors):
  - Transfer, demotion, loss of bonus, reduction in pay
  - Counseling
  - Training
  - Discipline (including suspension without pay, written reprimand in file, verbal warning, etc.)
  - Termination of employment

Handling Workplace Investigation

If Harassment/Discrimination Occurred:

- May include Remedies for the Complainant/Victim:
  - Offer paid leave
  - Offer paid counseling
  - Payment for losses incurred due to harassment (loss time from work, medical treatment, lost benefits, lost pay, etc.)
  - Offer to transfer the employee
    - BE CAREFUL: Do not force a transfer or any other action that could be viewed as retaliation or an adverse employment action against the complainant

Handling Workplace Investigations

Follow Up with Complainant after Investigation

- Prepare a written memo and meet with complainant to inform of the findings/conclusions of the investigation
- Confirm what action, if any, will be taken as a result of the investigation
- Confirm that retaliation against the complainant is prohibited, and request that complainant immediately report any perceived retaliation
- Encourage complainant to discuss any concerns or disappointment with results and/or action taken

Handling Workplace Investigation

Follow Up with Accused Wrong-Doer

- Prepare memo and meet with the Accused and Union Rep, if applicable, to advise of conclusions and findings of the investigation and any action to be taken
- Remind accused of prohibition against retaliation and consequences of same
- Inform accused that he may discuss any concerns or disappointment with results and/or action taken (unless the decision is to terminate, then do not engage in discussion/argument during termination)
- If terminating, advise accused to put concerns in writing to the company for appropriate response

Handling Workplace Investigations

Common Mistakes/Failures to Avoid:

1. Failing to Plan
2. Ignoring complaints/problems
3. Delaying investigation/taking too long to investigate
4. Taking sides with either complainant or accused
5. Being too aggressive in interviews
6. Not conducting thorough investigation
7. Promising confidentiality to parties and witnesses
8. Failing to properly document investigation
9. Failure to reach a conclusion and take action
10. Failure to follow up with complainant and accused

Disability Leave Under the FMLA, ADA and the Illinois Workers' Compensation Act –

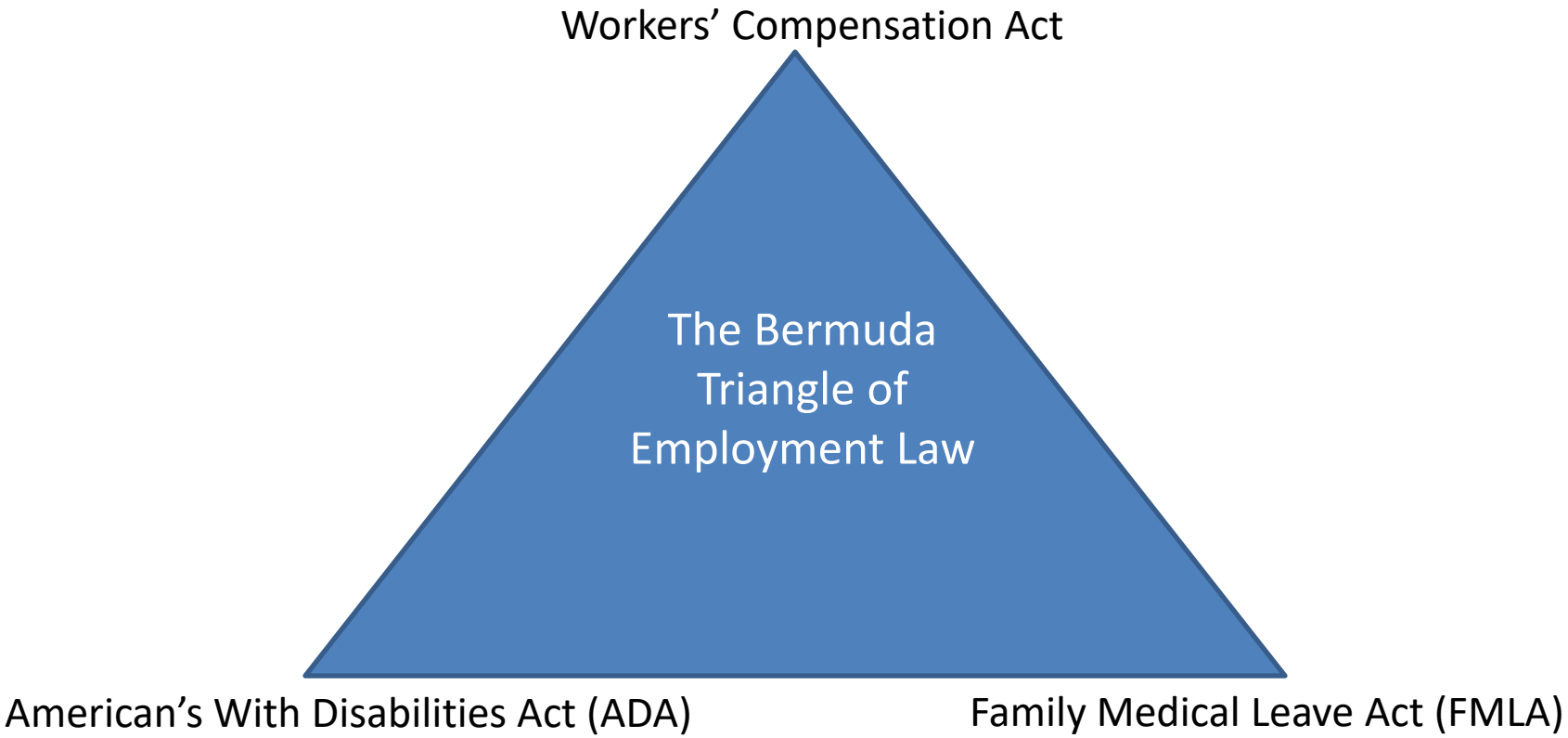
Navigating Conflicting Laws in the Management of an Employees' Medical Leave

John F. Kamin

309.674.1133

jkamin@quinnjohnston.com

The Bermuda Triangle



Determine If Law Applies to Employer/ Employee

- FMLA (Federal Law):
  - 50 or more employees for each working day during each of 20 or more weeks in the current or preceding calendar
  - Eligible Employee: (1) has been employed by the employer for at least 12 months (need not be consecutive); (2) worked at least 1250 hours for employer during the 12 month period immediately preceding the requested leave; and (3) employed at a worksite where 50 or more employees are employed by the employer within a 75 mile radius
  - Enforced by The U.S. Labor Department's Wage and Hour Division
- ADA (Federal Law):
  - 15 or more employees for each working day in each of 20 or more calendar work weeks during the current or preceding year
  - Enforced by the U.S. Equal Employment Opportunity Commission
- Worker's Compensation (State Law):
  - Worker's Compensation Laws vary from state to state
  - Can apply to business with as few as one employee
  - Covers all employees upon hire

Be Informed About Each Law's Requirements

- FMLA (Federal Law)
  - Provides for 12 weeks (total) of unpaid leave for an employee's own or family member's "serious health condition," the birth or adoption of a child and for military exigencies
  - Employer must return employee to the same or equivalent position
- ADA (Federal Law)
  - Prohibits employer from discriminating against job applicants and employees on the basis of a disability
  - Protects individuals that (1) have a physical or mental impairment that **substantially limits** one or more of an individual's major life activities (ex: walking, seeing, working, eating, lifting, bending, thinking, using major bodily functions); (2) have a record of such an impairment; and (3) are regarded as having such an impairment
  - Does not explicitly provide payment or leave rights to employee but requires an employer to make reasonable accommodations, such as providing a modified work schedule, period of leave, light duty work, if that accommodation is necessary for the employee to perform the essential functions of the job.
- Worker's compensation (State law)
  - Requires employer to compensate an employee for injuries arising out of and in the course and scope of employment
  - Employer may not retaliate against an employee for filing a workers' compensation claim
  - Provides for health care and income replacement, but does not necessarily provide for job protection
  - In return for workers' compensation benefits, the Act generally indicates that an employee relinquish the right to sue his/her employer for work-related injuries

"Substantially Limited"

- In March, 2011, the EEOC released new regulations, which became effective in May, 2011, for the ADA which focused on making it easier for an employee or applicant to qualify for the protections of the ADA
- Prior to the new regulations, the Supreme Court held that a person was "substantially limited" in a major life activity only if the impairment *prevented* or *severely restricted* the person from engaging in the activity → Congress now rejects this interpretation
- In the new regulations the EEOC declined to provide a new definition of the term "substantially limits" and instead provides rules of construction that are to be applied in determining whether an impairment "substantially limits" a major life activity
  - Determining whether an impairment causes an individual to be "substantially limited" requires an "individualized assessment"
- Prior to the new regulations, most courts held that a temporary condition lasting just a few months did not qualify as a disability under the ADA. The new regulations provide that the effects of an impairment lasting or expecting to last for six months or less can be substantially limiting (if sufficiently severe) and thus qualify as a disability under the ADA.
- Under the new regulations, if an impairment that is in remission or inactive would "substantially limit" an individual from engaging in a major life activity if it were active, it is a disability under the ADA
- Note: Impairments resulting from occupational injuries (worker's comp. disability) may not be severe enough to substantially limit a major life activity, thus may not trigger the ADA

Rules Of Construction

Final regulations adopted rules of construction to use when determining if an individual is "substantially limited" in performing a major life activity under the ADA. Rules of Construction include the following:

- **Rule 1.** The term "substantially limits" shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. "Substantially limits" is not meant to be a demanding standard.
- **Rule 2.** An impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.
- **Rule 3.** The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment "substantially limits" a major life activity should not demand extensive analysis.
- **Rule 4.** The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term "substantially limits" must be interpreted and applied to require a degree of functional limitation that is lower than the standard for "substantially limits" applied previously.
- **Rule 5.** The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. The regulations, however, do not prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.
- **Rule 6.** The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures.

Know the Overlap Among the Statutes

- Employees may be eligible for leave under one or more than one of these statutes
- Important for employer to understand how these statutes work together in order to avoid a violation resulting in damages
- Employer's should be aware that the definition of a job-related injury or disability for workers' compensation purposes is different from the ADA's definition of "disability" or the FMLA's definition of "serious health condition"
  - ❑ An FMLA "serious health condition" is "an illness, injury, impairment, or physical or mental condition that involves . . . [i]npatient care . . . Or [c]ontinuing treatment by a health care provider"
  - ❑ ADA "disability" is an impairment that substantially limits one or more major life activity (record of & regarded as)
  - ❑ Some FMLA "serious health conditions" may be ADA disabilities (ex: cancer & strokes vs pregnancy or broken leg)
  - ❑ Temporary conditions can constitute a "serious health condition" under the FMLA, but generally not a "disability" under the ADA unless it is sufficiently severe and "substantially limits" a major life activity
- Work related injury entitling an employee to workers' compensation may result in a disability or serious health condition triggering an employer to have to make reasonable accommodations for any disability under the ADA (such as leave from work or light duty work) or allowing the employee leave time for any serious health condition under the FMLA
  - FMLA and Worker's Compensation Act overlap in that a leave from work under the worker's compensation act can run concurrently with FMLA leave time, if employer properly designate it and notifies the employer
  - Not all occupational injuries qualify as a "disability" within the meaning of the ADA

Benefits While on Leave & Returning to Work

- FMLA
  - Can be unpaid, but employer must maintain the employee's health care benefits for the entire leave period in the same manner as if the employee were working
  - When the employee returns to work after their leave, employee must be restored to the same or equivalent position with equivalent pay and benefits

- ADA
  - Reasonable accommodations
    - ADA does not require employer to provide a reasonable accommodation for an employee with an occupational injury who does not have a "disability" as defined by the ADA
  - Employer can reduce the benefits provided to employee when employee's reduced work schedule, as a "reasonable accommodation," drops the employee's hours below that required for the applicable benefit plan coverage.
  - Required reinstatement to previous job unless doing so would create an undue hardship on the employer.

Benefits While on Leave & Returning to Work

- Workers' Compensation
  - Paid Leave
  - No per se leave mandates, leave is impliedly considered part of receiving medical treatment for on the job injuries
  - If an employee suffers a work injury which qualifies them for workers' compensation and as disabled under the ADA, the employee must be allowed to come back to work after a leave of absence unless
    - » The person can't perform, with or without accommodation, the essential functions of the job that a person holds or desires; or
    - » The person would pose a significant risk of substantial harm that could not be reduced to an acceptable level with a reasonable accommodation
- Interaction
  - FMLA and ADA recognize exceptions to an employee's reinstatement right if an injured worker can't do a job's essential functions without posing a risk of harm to one's self or others.
  - An injured worker may lack any right to reinstatement to the job that they held before injury under the worker's compensation law and even the FMLA, but may still have that right und
  - Employer cannot substitute vocational rehabilitation services in place of a reasonable accommodation required by the ADA for an employee with a disability-related occupational injury
    - Employee's rights under the ADA are separate from entitlements under worker's comp law.

Issues With Leave Policies

- Automatic termination polices
  - Right to reapply/rehire
  - EEOC says such blanket policies violate the ADA

- Random or unpredictable absences
  - Most courts hold that an employer need not modify its attendance or leave polices to allow for sporadic or unpredictable absences where it can show that regular and predictable attendance is an essential function of the particular job.
  - However, the EEOC holds that attendance can't be considered an essential job function, because the ADA itself recognizes that leaves of absence and modified work schedules are reasonable accommodations in certain circumstances

- Replacement of employee while on leave
  - Can employer hire another employee to do the work of the employee on FMLA, ADA, or Workers' Compensation Leave?

Light Duty Option

- Employers can create light duty work to allow an employee on leave and receiving workers' compensation to return to work in order to reduce worker's compensation liability
  - Light duty work→position created specifically for the purpose of providing work for employees who are unable to perform their normal duties
- Worker's Compensation: Employee risks losing worker's compensation benefits for refusing the light work option
- FMLA: During the 12 week period of FMLA leave, an employee can choose to accept or deny a light work option
- Worker's Compensation & FMLA: If employee is taking a FMLA leave and worker's compensation leave concurrently, employee may lose worker's compensation benefits for refusing the light duty option, but would still be entitled to continue on unpaid FMLA leave until they have exhausted the 12 week time period or they are able to return to the same or an equivalent job.
- ADA: No requirement for an employer to create a light duty position if an acceptable one does not already exist, however, a less demanding job may be considered a reasonable accommodation
- Regulations allow employer to differentiate between occupational and non-occupational disability for creation of light-duty jobs

Impact on Workers' Compensation Claim Exposure If Permanent Restriction Not Accommodated

- Vocational rehabilitation
- Maintenance
- Increased permanent partial disability
- Wage differential
- Odd lot permanent total disability

➢ Two-Edged Sword

Medical Examinations

- ADA
  - Prohibited: Pre-employment questions about disabilities, illnesses and past injures if they have any potential of revealing information concerning the existence, nature, or severity of an applicant's disability
  - Allowed: Medical questions about an applicant that are job-related and consistent with a business necessity (ex: whether an employee can perform the essential functions of the job, with or without a reasonable accommodation)
  - An employer may require a medical examination after a conditional offer of employment provided all employees in the same job category are examined the same and the examination does not single out employees with a disability
- FMLA
  - Employer may require an employee to submit a doctor's certification of a serious health condition prior to approval for leave and can require a 2nd and 3rd opinion
  - Return to work certification
- Interaction
  - If an employee is on an FMLA leave running concurrently with a workers' compensation absence, and the Worker's Compensation Act allows the employer to have direct contact with the workers' compensation healthcare provider, the employer may follow the workers' compensation provisions
  - Employer must avoid violating the ADA when requiring an employee to submit to a medical examination when requesting FMLA time off
  - Employer should narrowly tailor requests and scope of medical exam to the employee's ability to perform the essential functions of the job, with or without a reasonable accommodation

Medical Examinations under Illinois Workers' Compensation Act

- Independent Medical Examination (IME) permitted
- Section 12 of the Illinois Workers Compensation Act:
  - "An employee entitled to receive disability payments shall be required, if requested by the employer, to submit himself, at the expense of the employer, for examination to a duly qualified medical practitioner or surgeon selected by the employer, at any time and place reasonably convenient for the employee, either within or without the State of Illinois, for the purpose of determining the nature, extent and probable duration of the injury received by the employee, and for the purpose of ascertaining the amount of compensation which may be due the employee from time to time for disability according to the provisions of this Act."
- Refusal to submit to IME can result in temporary suspension of compensation payments
- Employer may reasonably rely on IME
- Adverse employment action is a violation of Section 4(h) of the IWCA – prohibition on retaliation

Disability-Related Questions and Medical Exams in ADA Enforcement

- Employer may ask questions about an applicant's prior worker's compensation claims or occupational injuries **after** they have made a conditional offer of employment, **but before** employment has begun, as long as the employer asks the same questions off all entering employees in the job
- Employer may require a medical exam to obtain information about applicant's prior occupational injuries, **after** it has made a conditional offer of employment, **but before** employment has begun, as long as it requires all entering employees to have a medical exam
- **No information on prior claims or injuries may be obtained by applicant or third parties prior to making a conditional offer of employment**
- Employer may ask disability-related questions or require a medical examination of an employee at the time employee experiences an occupational injury or when employee seeks to return to the job following injury.
  - Questions may not exceed the scope of the specific occupational injury and its effect on the employee's ability, with or without reasonable accommodation, to perform essential job functions or to work without posing a direct threat

Important Areas of Interplay Between The Three Laws:

1. Employer Coverage
2. Employee Eligibility
3. Length of Leave
4. Medical Documentation
5. Restricted or Light Duty
6. Fitness-to-Return-to-Work Certification
7. Benefits While on Leave
8. Reinstatement

Case Example #1

Escriba v. Foster Poultry Farms, Inc. (2014)

- **Facts:** Employee requested a two-week paid vacation to visit her sick father in Guatemala, which was approved by her employer. Employee then requested an additional 1-2 weeks of unpaid time off, which was denied by her employer. Employee told her supervisor that she did not want her time off to be counted as FMLA leave but instead as vacation time. Employee then took her approved two-week time off and remained off work for an additional 16 days after her approved time had ended. Employee was fired as a result due to the employer's "three day no-show, no-call rule." Employee then filed an FMLA retaliation claim. She claimed her underlying reason for her leave-caring for her sick father-leave triggered FMLA protections, so her employer was required to designate her leave as such.

- **Holding:** Ninth Circuit held that an employee can affirmatively decline to use FMLA leave, even if they qualify for it. The Court concluded that under certain circumstances an employee might seek time off but still decline to invoke FMLA leave, in order to preserve their FMLA rights for future use.

- **What this case means for employers:** This ruling conceivably allows an employee to take paid leave and then FMLA leave, instead of taking them concurrently which is standard procedure in most businesses. In order to avoid factual disputes, employers should require employees to declare in writing whether they intend to take FMLA leave when they are eligible to take it.

- **Considerations:** Escriba, did not address whether an employee could decline FMLA leave—thereby saving it for future use—when demanding a leave to accommodate the employee's own disability (as defined by the ADA). An employer in that situation could potentially argue that it is entitled to count the leave against the employee's FMLA time, because a leave to accommodate the employee's disability that did not also exhaust any FMLA leave would not be a reasonable accommodation under the ADA.

Case Example # 2

Attiobge-Tay v. Southeast Rolling Hills LLC (2013)

- **Facts:** Employee (nurse) returned to work after 12 weeks of FMLA leave related to a knee-replacement surgery. Employee provided employer with a note explaining that she could return to work with restrictions on knelling, squatting, and lifting. She asked for either additional leave or an accommodation. The employer denied her request and she was terminated. Employee filed an ADA suit against the employer.

- **Holding:** Court held that the employee's requests would present an undue hardship on the employer. Accommodating her lifting restrictions would mean she could not do an essential part of her job (lifting patients) and her request for additional leave would cause an undue hardship because the employer had already spent $8,000 to replace her during her FMLA leave. In addition, the company showed the employee's continued absence would negatively affect her co-workers' performance.

- **What this case means for employers:** An employer is not under an obligation to reinstate an employee after FMLA leave if they remain unable to perform the essential functions of their job. Additional leave may be a reasonable accommodation under the ADA, but employer's do not have to provide additional leave as an accommodation if they can prove it would present an "undue hardship."

Case Example #3

Dotson v. BRP US Incorporated, et al (2008)

- **Facts:** Employee was terminated after filing a workers' compensation claim. In support of the termination, the employer stated that the employee's absence from work exceeded the amount of time allowed by the FMLA. The employer had an automatic termination policy upon expiration of 12 weeks of FMLA leave, if an employee was unable to return to work. Employee sued the employer alleging that his employer had wrongfully required him to utilize FMLA leave rather than giving him temporary total disability time and that his employer wrongfully terminated him for filing a workers' compensation claim.

- **Holding:** The U.S. Department of Labor regulations specifically permit the running of FMLA leave concurrently with workers' compensation where the employee's on-the-job inquiry also constitutes an FMLA-covered "serious health condition." The Court further held, "Illinois law does not require an employer to retain an at-will employee who is medically unable to perform the job." "Nor is the employer obliged to reassign the employee to another position rather than terminate the employee. Finally, and most importantly in this case, 'an employer may fire an employee for excess absenteeism, even if the absenteeism is caused by a compensable injury."

- **What this means for employers:** FMLA leave and workers' compensation leave can run concurrently if the reason for the employee's absence is due to a qualifying serious illness or injury and the employer properly notifies the employee in writing that the leave will be counted as FMLA leave.

Case Example #4

Simpson v. Illinois Workers' Comp. Comm'n,
2017 IL App (3d) 160024WC, ¶¶ 4-5, 79 N.E.3d 643, 646

- The claimant was a 33-year veteran of the fire department who suffered a heart attack after becoming Assistant Fire Chief. At the time of his heart attack he was working in an administrative capacity. The Illinois Worker's Compensation Commission found that the City of Peoria overcame the rebuttable presumption that the claimant's heart attack arouse out of and in the course of his employment and denied the claim. The City rebutted the presumption "by providing strong evidence through its experts' opinions along with [the claimant's] own health history, work history and [the claimant's] own testimony to show there were other causes of [the claimant's] cardiovascular problems and his condition is not related to his employment as a firefighter."

- The Appellate Court found that even though Claimant was currently serving in an administrative capacity he was still a "firefighter" under section 6(f) because he had served as a front line firefighter for 22 years before serving in managerial capacities for the past 11 years. Regarding the statutory presumption, the Court found that "once the employer introduces some evidence of another potential cause of the claimant's condition, the presumption ceases to exist and the Commission is free to determine the factual question of whether the occupation exposure was a cause of the claimant's condition based on the evidence before it but without the benefit of the presumption to the claimant."

Case Example #5

Brown v. Milwaukee Bd. of Sch. Directors, 855 F.3d 818, 818(7th Cir. 2017)

- Plaintiff was an assistant principal for Milwaukee Public School until she badly injured her knee while restraining a student. When she returned to work after surgery she told her employer she could not be "in the vicinity of potentially unruly students." The school attempted to find her a new position that did not involve contact with students. She was fired after her 3-year leave of absence expired before a suitable position was found. She sued under the ADA, claiming the school failed to reasonably accommodate her disability.
- The Court noted that, "[i]dentifying reasonable accommodations for a disabled employee requires both employer and employee to engage in a flexible, interactive process. *(Cites Omitted)*. Both parties are responsible for that process. If a reasonable accommodation was available but the employer prevented its identification by failing to engage in the interactive process, that failure is actionable. *(Cites Omitted)*. On the other hand, if the employee "does not provide sufficient information to the employer to determine the necessary accommodations, the employer cannot be held liable for failing to accommodate the disabled employee." *(Cites Omitted)*.
- The Court found that Plaintiff presented the School with a broad restriction for a school system-avoid potentially unruly students. Essentially all students are "potentially unruly." The school argued that with or without reasonable accommodation, Plaintiff was not qualified for either the Assistant Principal position or four of the alternative vacant positions because those positions required her to be around potential "unruly" children, which she stated she was unable to do. Plaintiff argued the school misunderstood her ability and limitiations, however, the record showed that Plaintiff never told the school this. "The undisputed facts show that Milwaukee Schools acted consistently with the restrictions imposed by Brown's doctors, which said that Brown simply could not work in the vicinity of potentially unruly students. To the extent Brown is arguing that her restrictions were less severe than Milwaukee Schools believed, the undisputed facts show that Brown "failed to hold up her end of the interactive process by clarifying the extent of her medical restrictions." Milwaukee Schools accordingly cannot be held liable for failing to put her in a position it believed would exceed those restrictions."