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Just A Few Of The Latest Court Gems:

Change In Legal Status of Drug Teams; Horse Play Can Be Harassment; When Is A Contract Not A Contract

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This issue of the LEAF Newsletter will review some of the latest cases coming out of the Michigan Supreme and Appeals Courts. We will discuss the issue of juridical entity, the latest Michigan court cases where same sex horseplay rose to the level of Sexual Harassment, and the continued strict enforcement of at-will provisions in employment contracts, including severance agreements.

Drug Team Won Case But Still Appealed; Now Its Status Has Been Defined!

The Michigan Supreme Court recently ruled that entities formed under the Urban Cooperation Act of 1967 are "juridical entities." This means they are recognized as having a distinct legal identity and legal personality and have the rights and duties associated with this status. It also means that drug teams, swat teams and training consortiums, to mention a few, are potentially exposed to liability that is independent of the entities that formed them.

This all started in 1999 when a drug informant got mad at the way a drug team, formed under an interlocal agreement between local, state and federal government, handled and paid him. The informant and the team were in a partnership for several years before he felt that the team had negligently exposed him and his family as having cooperated with law enforcement, thus exposing them to danger several times. The informant ultimately filed suit against the drug team, the entities that formed the team as well as individuals on the team for gross negligence, infliction of emotional stress, violation of constitutional rights by subjecting him to a state-created danger, and breach-of-contract.

The trial court granted summary disposition with prejudice to all defendants on all counts. The court dismissed the breach of contract claim with prejudice because the law required a written contract between the parties. The case was appealed to the Michigan Court of Appeals. The Appeals Court upheld the trial court on all but the breach of contract claim. The court ruled that since the drug team was operated by the Michigan state police the team

was a state agency. In addition, the court ruled that the claim should go to the Court of Claims (not circuit court) and that the informant could bring suit in that venue.

Not liking that decision, even though the Court of Appeals had upheld all the summary judgments given by the trial court, "someone" decided that a drug team formed under the Urban Cooperation Act should not be considered a "state agency" and appealed to the Michigan Supreme Court.

In *Manuel v Gill, 481 Mich 637 (2008)*, the Michigan Supreme Court took on the issue of whether an entity formed by multiple governmental entities, under the supervision of the Michigan state police, was a "state agency". The court first had to decide whether the drug team had standing to appeal since they had won everything. The court ruled that a party must be aggrieved to file an appeal. They determined that a prevailing party may appeal, even though they had won, if the party suffered a concrete and particularized injury as a result of the Court of Appeal's decision. In this case, the concrete and particularized injury was being labeled a "state agency."

The court's ruling was that the drug team was a juridical entity meaning it can be sued. The court held it is a "separate legal or administrative entity created by an interlocal agreement." The second sentence of MCL 124.507(2) enumerates a range of activities that such an entity "may be . . . authorized" to undertake, such as entering contracts and acquiring buildings. The phrase "may be authorized" indicates that the entity is not necessarily entitled to undertake such actions; rather, the entity "may be authorized" to do so, but absent an authorization the entity would not be able to act.

In contrast to the second sentence of MCL 124.507(2), the third sentence simply states: "The entity may sue and be sued in its own name." This language indicates that an entity created pursuant to the Urban Cooperation Act, such as a drug team, may be sued. The third sentence does not contain the qualifying language of the second sentence, which lists certain activities in which an entity "may be *authorized*" to engage. This difference in language strongly suggests that the Legislature intended to distinguish between activities that must be authorized and activities that do not require authorization.

Because the third sentence of MCL 124.507(2) states categorically that an entity may sue and be sued, the court concluded that the drug team is a "juridical entity" subject to suit. Further, the court ruled that the drug team was not a "state agency" using *Hanselman v Wayne Co Concealed Weapon Licensing Bd*, 419 Mich 168; 351 NW2d 544 (1984), in which the court had considered whether a concealed weapons licensing board was a "state board" under the Administrative Procedures Act of 1969, which defines "agency" as "a state . . . board . . . created by the constitution, statute, or agency action." MCL 24.203(2).

In light of the relevant statutes and the tests in *Hanselman*, the court said:

> . . . We conclude that the drug team is not a state agency because it was created pursuant to an agreement between various local entities, as well as the MSP and the Federal Bureau of Investigation. The drug team was not specifically created by any state constitutional provision, state statute, or state agency action; rather, local actors were required to take affirmative steps to create the drug

team. Second, the drug team is not ultimately controlled by any state entity or official. Although the MSP exercises control over the daily operations of the drug team. Rather, the drug team is preponderantly governed by local officials. Third, according to the briefs of the parties, the drug team is not funded by the state government, thereby further suggesting that the drug team is not a state agency. Finally, the drug team primarily serves predominantly local purposes. The object of the drug team is to fight drug distribution within three counties that make up the drug team."

What Does All This Mean?

LEAF posed this question to LEAF Legal Advisor Audrey Forbush from Plunkett Cooney because there are some significant issues involved in *Manuel v Gill, 481 Mich 637 (2008)* for entities that have formed specialized teams or training consortiums under the Urban Cooperation Act of 1967 (MCL 124.501-1512).

Audrey first pointed out that any entity formed under the Urban Cooperation Act would have benefit of Michigan's Governmental Immunity statutes because all governmental agencies that exercise or discharge a governmental function have, with some exceptions, governmental immunity (MCL 691.1407). She also pointed out that the job functions of a drug team may involve the operation of motor vehicles and that the negligent operation of a government owned motor vehicle is a way to penetrate governmental immunity. Specifically she cited MCL 691.1405 (a): "Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner." For that reason, officers operating team vehicles need to receive training in the laws of vehicle operation and the discretion that they may exercise while they are performing their job function. Unfortunately, the operation of an undercover vehicle has its risks. Because of their special activities, they can not always conform to general police practices. That means there is a significant liability exposure to drug teams or any undercover team's operation of a motor vehicle.

Audrey added that MCL 691.1407 (2) grants individual officers immunity if their actions meet three conditions:

(a) The … employee … is acting or reasonably believes he or she is acting within the scope of his or her authority.
(b) The governmental agency is engaged in the exercise or discharge of a governmental function.
(c) The … employee's … conduct does not amount to *gross negligence* that is the *proximate cause* of the injury or damage.

So, even though the entity may be subject to suit, the officers have immunity unless it can be proven their actions were grossly negligent. This does not excuse bad driving behavior but, at least, it offers officers some protection from liability.

The discussion then turned to civil rights issues. Audrey pointed out that claims can be brought claiming civil rights violations under the U.S. Constitution through Title 42, U.S.C. §1983. Again, the team members are entitled to the defense of qualified immunity. She went on

to say that the entity needs to be aware that their policies and practices must be constitutionally sound since they can now come under scrutiny. Problems arise when the officers' actual practices when performing their daily activities deviate from team policies. This can cause considerable controversy as we have seen in New York, Los Angeles, Detroit, New Orleans, and Miami over the past several years.

The U.S. Supreme Court dealt with the issue of officers being prepared to perform their job tasks in *City of Canton v. Harris*, 109 S.Ct. 1197 (1989). At "famous footnote 10" the court noted examples of when liability would arise under a policy of deliberate indifference. One such example would be if the city armed its officers with firearms in order to permit them to arrest fleeing felons but failed to train them on the use of deadly force. This could be said to be "so obvious" that the failure to train could be characterized as "deliberate indifference" to the constitutional rights of a municipality's inhabitants.

The Sixth Circuit dealt with a similar issue in *Gregory v City of Louisville, 444 F.3d 725 (6th Circuit, 2006).* In this case a former inmate brought a civil rights claim under §1983. The inmate alleged that members of an investigatory team involved in his criminal conviction withheld evidence causing him to serve seven years in custody. This case points to Canton's deliberate indifference standard in assessing liability. The Sixth Circuit ruled in the *Gregory* case that failure to train officers in their duty to reveal all of the evidence they possess, even that which was favorable to the criminal defendant as required by *Brady v. Maryland,* 373 U.S. 83 S.Ct. (1963), has a *highly predictable consequence* of leading to a constitutional violation.

Audrey pointed out that this philosophy also extends to top-level management's responsibility for the actions of their employees. This is relevant to street encounters, searches, and arrest situations. The entity must ensure that employees receive appropriate supervision and that any behavior that is not appropriate in the workplace is eliminated. This can be difficult situation in a drug team where the day to day supervision is flexible at best. The activity of the group has to remain very fluid; its members must show initiative and are given significant discretion in doing so. To maintain an appropriate safety net to combat the potential for abuse, the entity needs to ensure it has up to date policies and procedures with which officers know they must comply.

In light of *Canton* and with the Courts looking at the *highly predictable consequences* of the actions of employees, Audrey opines that if a municipal entity has police officers, the officers must receive training on any task or responsibility that the department expects them to fulfill regularly. The training does not have to be formal classroom instruction, but the department has an obligation to educate its officers and to document all such activities. There then needs to be an administrative review or audit to ensure things are working as expected. This is particularly important when you have officers performing specialized tasks such as those of a drug team.

Personnel and employment decisions fall under another category of law. Audrey said this is how it works: on the federal level *Title VII of the Federal Civil Rights Act* and, in Michigan, the *Elliott-Larsen Civil Rights Act, MCL 37.2102*, prohibit harassment and discrimination. People have the right to be in the workplace and not be subject to inappropriate or offensive behavior.

Since people have that right, it is top management's responsibility, in this case the administrative board, to make sure harassment or discrimination does not happen. Audrey points out two 1998 United States Supreme Court decisions, *Faragher* v. *City of Boca Raton,* 524 U. S.775 ––– (1998) and *Burlington Industries, Inc.* v. *Ellerth,* 524 U. S. 742––– (1998) that underscore the need for having and enforcing clear and understandable policies and procedures for supervisors, managers, and employees. Additionally, in Michigan, *Chambers v Trettco, Inc., 463 Mich 297; 614 NW2d 910 (2000)* establishes that a supervisor's knowledge assigns knowledge to the employer. These cases dealt with employment sexual harassment and established that management is liable if a person of authority in an organization knows of or is the perpetrator of harassment or discrimination.

Audrey suggests that *Manuel v Gill, 481 Mich 637 (2008)* makes it important for those who are involved in any joint operation developed under the Urban Cooperation Act to consult their legal advisors to determine if there is a need to change the way it operates. This is especially important if the entity has assets, vehicles, or owns property. All are now exposed should litigation occur. A review of this case may be germane to determine if the actual entity should procure its own insurance coverage. It is also important to ensure the chartering agreement provides protection for the entity's individual board members.

Employment Issues Matter

LEAF emphasizes employment practice issues because, when it comes to costly litigation, bad employment practice decisions made by public officials rank as one of the most expensive loss areas to the members of the MML Liability and Property Pool. All indications lead to employment practice as becoming one of the most active areas of litigation in the future. Public safety organizations are very vulnerable to these charges because top management is often influenced by rigid beliefs, tradition, and past practice rather than the industry standard and legal requirements.

Poor employment decisions are also a major factor in the ultimate cost of claims for the MML Workers' Compensation Fund. Employers who fail to follow industry standard practices when hiring new employees often have problems. By emphasizing the hiring of fit employees who already have a safe working philosophy, employers are better assured that employees will work safely and are less likely to engage in activity that will cause complaints and litigation.

Horse Play Between the Boys Can Be Sexual Harassment! Watch Out For Hazing.

Between 2001 and 2003, Robert Robinson was an employee of the Ford Motor Company in Michigan. During that time a co-worker named Darren Smith, who prior to working with Robinson, was regularly engaged in horse play with other employees including sneaking up behind each other and hitting one another on the bottom with a paddle. The group would also squirt fire extinguishers and throw snow at each other. After being transferred to a new job, Smith focused on Robinson as the butt of his pranks. Throughout this time, Smith's behavior became even cruder and took on a sexual nature. Robinson and his co-workers did not welcome this behavior.

Robinson testified that Smith slapped his bottom, pinched his nipples, pulled down his pants. He told how Smith would expose his genitals and grab Robinson's hand to try and

force him to touch them or Smith would reach down Robinson's pants and stick his finger between his buttocks. Smith also made references to having anal sex with Robinson and how he owned him.

Because of the constant harassment, Robinson claims he had a breakdown. The final assault came when Smith jumped on his back and forced a dirty gloved finger down his throat. During this time Robinson reported the incidents to his supervisor but no relief was forthcoming. Robinson filed suit under the Michigan Civil Rights Act (MCRA) when Ford would not deal with the situation. Ford asked for summary disposition alleging that horseplay of a sexual nature by a heterosexual male directed toward another male did not fit the statutory definition of sexual harassment.

The case found its way to the Michigan Court of Appeals as *Robinson v. Ford Motor Co.*, Mich. App., No. 271395 (Oct. 30, 2007). The court had to look to the U.S. Supreme Court concerning federal claims in *Oncale v Sundowner Offshore Services, Inc.*, 523 US 75, 80:118 S Ct 998; 140 L Ed 2d 201 (1998) since the Michigan Supreme Court had not addressed the issue of same sex hostile work environment. The Michigan Court of Appeals relied on the Supreme Court interpretation of the phrase "discrimination because of sex in the terms or conditions of employment" found under Title VII which is also found in MCRA. The Appeals Court said that MCRA does not exclude same-gender harassment claims and rejected Ford's claim that MCRA excluded same-sex hostile work environment claims. In *Oncale* the Supreme Court wrote:

> We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits 'discriminat [ion] . . . because of . . . sex' in the 'terms' or 'conditions' of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.

Since the analysis contemplates that the harassment had to be of a homosexual nature, Ford continued to argue that since Smith was heterosexual the acts were not of a sexual desire and the law did not apply. The Court of Appeals said the law prohibits "physical conduct or communication of a sexual nature" and that Robinson's list of behavior was more than enough to prove the point.

The Michigan Court of Appeals maintained their consistency with *Oncale,* and interpreted the MCRA to present a threshold question whether the same-gender harasser's conduct "constituted discrimina[tion] . . . because of . . .sex." *Oncale, supra* at 81." In *Oncale*, the Supreme Court noted example evidentiary routes that allow plaintiffs to establish a hostile work environment claim based on same-gender harassment:

> (1) where the harasser making sexual advances is acting out of sexual desire; (2) where the harasser is motivated by

> general hostility to the presence of men in the workplace; and (3) where the plaintiff offers 'direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.' *Vickers v Fairfield Medical Center,* 453 F3d 757, 765 (CA 6, 2006), citing *Oncale, supra* at 80-81.

The court could not determine, based on the evidence presented, whether Smith acted out of same gender sexual desire or whether he was generally hostile toward males in the workplace. There was also no evidence to determine how he treated workers of both genders. The Court of Appeals returned the case to the trial court to gather further evidence. The trial courts denial of the Ford request for summary disposition was affirmed.

According to LEAF Legal Advisor Audrey Forbush, Plunkett Cooney, the message here is to take all claims of harassment seriously and move quickly to address them. This is notice that the courts in Michigan now believe in same sex harassment and any sexually aggressive behavior or actions, by anyone, can not be tolerated in the workplace or at any company sponsored or supported events. **See** Leaf Newsletter, September, 2005 **LEAF's New Legal Advisor Shares Vision for Law Enforcement Executives to Avoid Entrapment!,** at mml.org in the Insurance section.

When Is A Contract Not A Contract?

Historically, the Michigan Supreme Court has upheld the at-will status of employment in the state. In *Pandy v Board of Water and Light, Mich 480 Mich 899 (2007)*, Pandy had a contract that allowed the board to terminate him at-will although the board had to pay him his salary and benefits through the end of the contract. If the board had cause, it could terminate Pandy and his severance would run only to the end of the fiscal year. The terms of the employment contract said that if Pandy was employed on June 30th of that year, the contract would renew perpetually on July 1st for the next five years.

After ten years the board reviewed the contract and determined that they could not enter in to a five year contract when their terms were only four years. The law does not allow a board to encumber future boards. The board was stuck with keeping Pandy as director or firing him and paying a big severance. They chose to declare the employment contract invalid and terminated Pandy with no severance. He sued for breach of contract and the Michigan Court of Appeals ultimately denied a request for summary disposition by the board. The board appealed to the Michigan Supreme Court.

In a very short opinion the Michigan Supreme Court ruled:

> On order of the Court, the application for leave to appeal the November 28, 2006 judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(G) (1), in lieu of granting leave to appeal, we REVERSE the judgment of the Court of Appeals. In this case, the Lansing City Charter § 5 202.1 provides that the Director of the Board of Water and Light shall serve "at its pleasure." The parties entered into a contract that specifically stated that the agreement could be terminated any time during its term "with or without cause." That means that the plaintiff served "at

> the pleasure" of the Board. The remaining provisions governing the plaintiff's termination define the severance pay owed to the plaintiff depending on whether his termination was for cause, as defined by the contract, or without cause. We REMAND this case to the Ingham Circuit Court for further proceedings not inconsistent with this order.

It is important for municipal entities to remember they only have authority to hire an employee for the time they are in office so they do not bind future boards to a long term employment contract *Hazel Park v Potter,* 426 NW 2d 789 (1988).

Audrey cautions public employers to know the limits of their charters and the law when entering in to employment contracts. When entering into an employment contract ensure that the title contains the language that defines the terms as at-will. If the employer agrees to add a severance benefit, it should be expressly defined as a specific severance payment. An attorney experienced in public employment should review all employment contracts.

The LEAF Committee of the Michigan Municipal League Liability and Property Pool and Workers' Compensation Fund continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the Michigan Municipal League's Risk Management Services at 734-669-6344 or MML Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

While compliance with the loss prevention techniques suggested herein might reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our readers are encouraged to consult with their attorneys for specific legal advice.

LAW ENFORCEMENT ACTION FORUM (LEAF) is a group of Michigan law enforcement executives convened for the purpose of assisting loss control with the development of law enforcement model policy and procedure language for the Manual of Law Enforcement Risk Reduction. Members of the LEAF Committee include chiefs, sheriffs, and public safety directors from agencies of all sizes from around the State.

The LEAF Committee meets several times yearly to exchange information and ideas relating to law enforcement issues and, specifically, to address risk reduction efforts that affect losses from employee accidents and incidents resulting from officers' participation in high-risk police activities.

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