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Elected Officials Liability Bulletin — Special Insert

EMPLOYEES GONE WILD: THE RISKS OF TOLERATING A CULTURE OF HAZING

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Editor's Note: Elected officials play a critical role in avoiding or attracting liability for the public entities they represent. Throughout 2008, we plan to use this new column, the **Elected Officials Liability Bulletin**, *to focus on some of the key liability issues faced by elected officials, and the ways in which those issues can be governed towards a positive outcome. If you have an elected officials' liability-related topic you'd like addressed, please feel free to let Tami know at tami@cirsa.org.*

As an elected official, you may be aware of municipal departments that maintain a rough-and-tumble work culture. Pranks, jokes, horseplay, bullying, and hazing may be part of the employees' workday, and may be tolerated or even encouraged by supervisors and managers. But a recent order of the U.S. District Court for Colorado highlights the risks to the entity, and to individual public officials, of allowing a culture of hazing to take hold in any department. The case is *Martin v. North Metro Fire Rescue District*, 2007 WL 4442373 (D. Colo. Dec. 13, 2007).

THE ALLEGATIONS

Jonathan Martin was a newly hired firefighter in a fire district. His allegations[i] included the following:

- He and other probationary firefighters were told during their first week of training that they would be treated "like s___" for a year, and if they complained, the treatment would worsen; and that "anyone can take anything for a year."

- For several months, a supervisor routinely used epithets to refer to Martin in front of others, including "f___-face," "a__-face," "dumb-f___," and "s___-for-brains."

- In one incident, a co-worker struck Martin on the buttocks with a large ceramic plate so hard that he almost dropped to his knees in pain.

- In other incidents, a co-worker stood just outside Martin's door with his pants down and his hands on his buttocks, spreading them apart, with the intent that Martin would run into them; and a co-worker snuck into his room with his pants pulled down and touched Martin's face with his genitals. Martin alleged that this type of sexual harassment was not included in the harassment of female employees.

- A supervisory employee had observed this type of lewd behavior in the past.

Martin alleged that his complaints to both his union representative and the station lieutenant were not addressed. Indeed, the lieutenant allegedly

responded that it was part of the history and culture of the district to engage in the hazing of probationary employees. Martin alleged that, following his complaints, his co-workers stopped communicating with him except when they had to for work purposes. Subsequently, the division chief allegedly told Martin that he should resign, because if he did not, the division chief would make

it impossible for Martin to find another firefighter job in Colorado. Martin allegedly resigned under duress, then filed a lawsuit against the fire district and the division chief.

THE SUIT

Martin made claims under both federal and state law. He made equal protection claims pursuant to 42 U.S.C. Section 1983 for disparate treatment based on his status as a probationary employee, and for sexual harassment based on his gender. He also made a claim under state law that the division chief was negligent in his supervisory responsibilities.

These claims were the subject of the defendants' motion to dismiss. The Court, in its order, declined to dismiss any of these claims, including most surprisingly, the negligent supervision claim under state law. We'll focus on this state law claim because the Court's order is of serious concern to supervisors and managers from a personal liability standpoint under state law.

THE STATE LAW CLAIM

Along with his federal claims, Martin made a claim, pursuant to the Governmental Immunity Act (GIA), of "willful and wanton" conduct against Joseph Bruce, his division chief. Martin alleged that the district's management was "complicit" in the incidents about which he complained, and that Bruce, as the district's operations chief, was responsible for supervising Martin's supervisors and managers. He alleged that Bruce knew of Martin's harassment allegations but was among the managers and policy-makers who "allowed, condoned and were deliberately indifferent to" the harassment and hazing of Martin and other probationary employees.

THE GIA AND "WILLFUL AND WANTON" CLAIMS

Under the GIA, public officials enjoy significant immunities where state law claims are concerned. They are generally immune from tort claims unless a claim is one that falls within seven limited areas for which governmental immunity has been waived, or unless the act or omission causing the injury was either outside the scope and performance of the official's duties, or "willful and wanton" in nature.

"Willful and wanton" is not specifically defined in the GIA. Courts have looked to other statutes to provide guidance as to what the term means in the context of the GIA. *See, e.g., Moody v. Ungerer*, 885 P.2d 200 (Colo. 1994). For instance, under the statute governing exemplary or punitive damages in civil actions, "willful and wanton conduct" is generally defined as "conduct purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, with regard to consequences, or of the rights and safety of others, particularly the plaintiff." C.R.S. Section 13-21-101(1)(b). A case interpreting the automobile guest statute defined "willful and wanton" as "wholly disregardful of the rights, feelings, and safety of others . . . . at times even imply[ing] an element of evil." *Pettingell v. Moede*, 129 Colo. 484, 491, 271 P.2d 1038. 1042

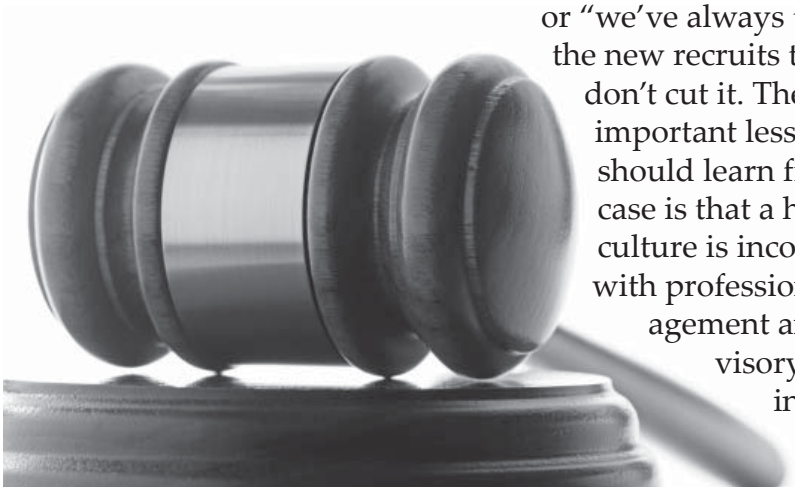
(1954). Black's Law Dictionary states that "willful and wanton" misconduct must "exhibit conscious disregard for safety of others."

As these definitions show, there's a high bar for what constitutes "willful and wanton" conduct; the term implies a level of disregard that is beyond negligent, indeed beyond reckless. Any determination that a public official could have engaged in "willful and wanton" conduct is of great concern for a number of reasons:

- Of course, the protections of the GIA are lost when such conduct is found to have occurred. You won't have the right to be defended at the expense of your public entity, or to have any judgment or settlement against you paid by the entity; you also won't have the benefit of any monetary limitations on your liability.

- Such conduct, because it is not considered to be within the scope of any public official's duties, also carries the risk that liability insurance coverages will be lost.

- Finally, such conduct carries the risk that a jury will choose to award punitive or exemplary damages against a public official. Punitive damages are almost universally excluded from liability insurance coverage.



LESSONS

"It ain't over 'til it's over" applies to the status of the *Martin* case, and it's possible that the district and its division chief will be vindicated at trial. However, we can glean some lessons from the District Court order even at this stage of the proceedings:

- **A work culture of pranks, jokes, horseplay, bullying, or hazing is unacceptable**. No municipal department should be run like a fraternity house! Excuses like "hazing builds camaraderie" or "we've always treated the new recruits this way" don't cut it. The most important lesson we should learn from this case is that a hazing culture is incompatible with professional management and supervisory practices in this day and age, and those who participate in or tolerate it will face harsh legal consequences.

- **Don't tolerate retaliation against those who complain about hazing**. In the *Martin* case, the alleged acts of violence, physical assault, harassment, and humiliation in the name of hazing were not the only problem. Martin also alleged that "ostracism and eventual forced departure from his position" resulted from his complaints. "Shooting the messenger" is not the appropriate remedy when these kinds of complaints are made; it will only multiply your legal woes. Ensure that no acts of reprisal or retaliation are made against the complainant at any level. Make sure appropriate disciplinary action is taken against anyone who participates in such acts.

- **If adverse working conditions of this nature are called to your attention as an elected official, don't disregard them. Ensure that allegations are appropriately investigated and followed up**. You don't have to step into the shoes of your city or town manager/administrator or try to micro-manage the situation; but make certain your entity has the proper values, policies, procedures, accountability, and training

in place to address these issues before they become problems. It doesn't appear that the district's elected officials were parties in the *Martin* case. However, it's easy to envision a scenario where elected officials could be individually named in a suit like this along with managers and supervisors. For instance, if allegations of hazing came to the attention of governing body members, and were ignored by them, they could easily be swept into a suit like this. Make sure the mechanisms are in place to deal with issues like this, and hold your top management accountable for seeing that the mechanisms you've put into place are followed.

THE BOTTOM LINE

At CIRSA, we've generally counseled that public officials should have immunity from most state law negligence torts in the employment context, such as negligent hiring, supervisory, and training practices. However, as the *Martin* case reflects, if the public official's conduct with respect to such practices is not just negligent, but sufficiently beyond reckless to be "willful and wanton," that immunity will be lost. The consequence is a significant personal liability exposure for the public official. So the bottom line is that public officials can't afford to rest on the hope of immunity if they don't act responsibly with respect to hiring, supervision, and training practices.

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[i] It's important to note that this order was in response to a motion by the defendants to dismiss the case. Therefore, the Court accepted, only for purposes of deciding the motion, that the allegations made by Martin were true. Because of the stage of litigation in which the motion was decided, the actual circumstances of the case are yet to be proven.