PIERCE, DAVIS & PERRITANO, LLP WINTER 2009 NEWSLETTER

DEVELOPMENTS IN MUNICIPAL LAW

Legislative Update

Disability Discrimination – ADA Amendments Act Of 2008 Expands Key Terms

The ADA Amendments Act of 2008 ("the Act"), Pub. L. No. 110-325 (2008), took effect on January 1, 2009, approximately 19 years after Congress passed 42 U.S.C. §§ 12101-12213, the original Americans with Disabilities Act ("ADA"), in 1990.

Congress passed the new law to reverse the narrow ADA interpretations used by the United States Supreme Court ("Supreme Court") and the Equal Employment Opportunity Commission ("EEOC"). For example, the original ADA defined a person with a "disability" as someone who (i) has a physical or mental impairment that substantially limits one or more major life activities; (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment. In the case of Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999), however, the Supreme Court held that the effects of mitigating measures – like corrective lenses, medications, hearing aids, and prosthetic devices – must be considered when deciding whether an impairment is "substantially limiting" under the ADA. Three years later, the Supreme Court narrowly

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interpreted two key words used to define a disability under the ADA. First, the Supreme Court held that a "substantially limiting" impairment is one that is "considerably" limiting, or limiting "to a large degree." See Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184 (2002). Second, the Supreme Court held that a "major life activity" must be an activity of central importance to most people's daily lives. See Id. In passing the Act, Congress expressly rejected the Sutton and Williams decisions, as well as EEOC regulations containing similarly narrow ADA interpretations.

The Act contains a lengthy "Findings and Purposes" section which explains that the new law is designed to reject current Supreme Court case law concerning the ADA, which Congress deemed restrictive. "The question of whether an individual's impairment is a disability under [the ADA] should not demand extensive analysis." Rather, "the primary object of attention . . . should be whether entities covered under the ADA have complied with their obligations." Further, according to Congress, the Supreme Court and the EEOC misinterpreted the language of the original ADA, "thus eliminating protection for many individuals whom Congress intended to protect." The new law contains a number of ambiguities, the interpretation of which Congress directs certain federal agencies and courts to resolve using rules of construction that favor persons with disabilities.

The Act broadens the definition of many key ADA terms. The definition of "disability," for example, is to be "construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of the Act." As for the term "major life activities," the Act rejects the definition employed in Williams in favor of a non-exhaustive list of different major life activities, which include but are not limited to:

> [C]aring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working . . . [and] the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

Further, the phrase "substantially limits" must be "interpreted consistently with the findings and purposes" of the Act, and "[a]n impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability."

The Act's most significant change from the original ADA concerns the definition of the "regarded as" prong of the disability definition. Congress expressly rejected the Supreme Court's interpretation of that term in Sutton, as referenced above. Under the Act, an individual is now "regarded as" having an impairment "if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." Thus, individuals will be covered based on actual or perceived impairments, regardless of whether these impairments limit or are perceived to limit a major life activity.

Significantly, the "regarded as" prong does not apply to individuals with "transitory and minor" impairments. A "transitory" impairment is "an impairment with an actual or expected duration of 6 months or less." The Act also indicates that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." Therefore, episodic conditions such as diabetes should be assessed in their active states, rather than when the symptoms are less severe or controlled by treatment. The distinction between episodic and transitory appears to be that, with an episodic impairment, the active and less active or inactive states will recur, while with a transitory impairment, the active state ceases within "6 months or less." If a transitory impairment lasts more than six months, it should be considered a covered condition.

Another change made by the Act is the specification that "a determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures." Again, this rejects the ruling in the Sutton case. The Act lists such mitigating measures to include:

> (I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies; (II) use of assistive technology; (III) reasonable accommodations or auxiliary aids or services; or (IV) learned behavioral or adaptive neurological modifications.

In conclusion, employers should be aware that the Act changes the definition of "disability" in a number of significant ways that favor persons with disabilities. In addition, the Act strongly encourages federal regulatory agencies and courts to interpret the ADA in a manner that will benefit as many people with disabilities as possible. Congress spent a great deal of time in the "Findings and Purposes" section of the Act criticizing the federal courts and, to a lesser extent, the EEOC, for their constricted interpretation of the original ADA. Congress has decided to compel those very federal courts to interpret ADA language in new and expansive ways. The future of the ADA may depend on the substance of the regulations promulgated by federal agencies, and the willingness of the courts to obey Congress' directives for broad interpretation. Nonetheless, employers should expect that future disputes will no longer focus on whether an employee is disabled, but instead will concern whether the employer properly provided reasonable accommodations to its employee.

Case Comments

Deferential Review Of Administrative Proceedings Has Its Limits: Pollard v. Conservation Commission of Norfolk, 73 Mass. App. Ct. 340 (2008)

Judicial review of state administrative proceedings is supposed to be "highly deferential to the agency." Pursuant to G.L. c. 30A, § 14, due weight must be given "to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred

upon it." Flint v. Comm'r of Public Welfare, 412 Mass. 416, 420 (1992). Following a recent decision of the Massachusetts Appeals Court ("Appeals Court"), however, such review may be slightly less venerable in the future.

In 2002, Mr. and Mrs. Pollard filed a notice of intent with the Norfolk Conservation Commission ("Commission") to construct a single-family home with a private well and subsurface septic system on a 70,000 square foot undeveloped lot. In support of their notice, the Pollards offered evidence to demonstrate that the work they proposed within the 50-foot and 100-foot wetland buffer zones would not harm the interests protected by the Town of Norfolk's wetlands by-law (i.e., erosion control, protection of groundwater, wildlife habitat, etc . . .). Such evidence included the report and expert testimony of an environmental and engineering consultant who opined that the Pollards' proposed work would have "no impact" on the ability of the 50-foot buffer zone to protect the interests identified in the by-law. Further, the Pollards, in the consultant's view, had also made "reasonable efforts" to minimize the impact of their work within the 100-foot buffer zone.

Even though the evidence submitted was "essentially uncontested," the Commission concluded that the Pollards failed to make the required showing regarding work proposed in the buffer zones. Citing its prerogative to determine the probative value of an applicant's evidence, the Commission refused to credit the evidence submitted by the Pollards, including the opinions of their consultant. And, since the Pollards did not sustain their burden of proof, the Commission declined to issue them an order of conditions.

On appeal to the Norfolk Superior Court, the Commission maintained it was within its rights to disbelieve the Pollards' proffered evidence. Judge Dortch-Okara nonetheless reversed, finding the Commission's decision unsupported by substantial evidence. In her view, evidence contrary to the conclusion that the Pollards failed to sustain their burden of proof was "overwhelming."

The Appeals Court (Perretta, J.) affirmed the reversal in an opinion that sends a cautionary message to boards and agencies, rather than a rebuke. While the exclusive right of an agency to weigh the probative value of evidence "is not subject to debate," such evidence may not be disbelieved, warned the Appeals Court, without an explicit and objectively adequate reason. Moreover, this reason should be reflected in the administrative record. "As applicable to the matter before us, *there must be a basis in the record* for the rejection of uncontradicted expert opinion evidence or for remaining unpersuaded." (Emphasis added). This rule, reasoned the Appeals Court, "guard[s] against arbitrary rulings by administrative agencies." Because the Commission could point to nothing in the record to explain its rejection of the Pollards' evidence or perceived deficiencies in that evidence, the Appeals Court found itself "unable to determine with any reasonable degree of certainty that [the Commission's] decision was arrived at with fairness and without predisposition." It, therefore, affirmed the Superior Court decision.

Future boards and agencies should take heed. If an applicant's evidence is deficient, lacking, or merely not credible, the board or agency should make certain that such shortcomings are expressly reflected in the administrative record. Otherwise, a court – even a "deferential" one – may not give the board or agency the benefit of the doubt upon review of its decision.

"Scope Of Employment" Treated Expansively Under The Federal Tort Claims Act: McIntyre v. United States of America, 545 F.3d 27 (1st Cir. 2008)

The United States Court of Appeals for the First Circuit ("First Circuit") (Lipez, J.) recently upheld a Massachusetts federal district court decision holding that, under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680, the question of whether conduct is considered within the scope of an individual's employment should be answered expansively. McIntyre concerns the Boston Office of the Federal Bureau of Investigation's use of confidential informants. Two of those confidential informants, Steve Flemmi and James "Whitey" Bulger, were notorious South Boston gangland figures. Both men were assigned to a "handler" within the FBI's Boston office, Special Agent John Connolly. The FBI used information provided by Bulger and Flemmi to help bring down the New England Mafia, "La Cosa Nostra." While serving as confidential informants, Bulger and Flemmi are suspected of killing a number of people in the greater Boston area, including John McIntyre.

Families of a number of victims killed by Bulger and Flemmi, including Mr. McIntyre's family, brought suit under the FTCA against the United States and various FBI agents. The McIntyre family alleged that the FBI, through Agent Connolly and others, afforded information and protection to Bulger and Flemmi, which directly contributed to the death of Mr. McIntyre.

In upholding a decision for Mr. McIntyre's family on the FTCA claim, the First Circuit focused on the conduct of Agent Connolly. The evidence at trial was that Agent Connolly leaked information to Bulger and Flemmi which prompted them to murder Mr. McIntyre (and others). The issue was whether Agent Connolly, at the time he leaked such information, was acting within the scope of his employment for the FBI.

Whether an employee is acting within the scope of his employment for purposes of the FTCA is determined by the law of the state in which the relevant conduct occurred. See Aversa v. United States, 99 F.3d 1200 (1st Cir. 1996). Under Massachusetts law, an employee's conduct falls within the scope of his employment if (1) it is of the kind the employee was hired to perform, (2) it occurs within authorized time and space limits, and (3) it is motivated, at least in part, by a purpose to serve the employer. Pinshaw v. Metropolitan Dist. Com'n, 402 Mass. 687 (1988). The United States argued that, if Agent Connolly was in fact responsible for the conduct alleged, he acted on his own accord and not within the scope of his employment.

The First Circuit disagreed, noting that scope of employment should not be construed

restrictively, and may extend beyond the employee's explicit authority. While acknowledging that Agent Connolly was partially motivated by personal greed and by the desire to keep Bulger and Flemmi happy, the First Circuit concluded that Agent Connolly was motivated, at least in part, by a desire to promote the FBI's goals of using Bulger and Flemmi to help bring down La Cosa Nostra. Such motivation was within the scope of Agent Connolly's employment.

Arguably, this decision expands the type of conduct that can be considered within the scope of one's employment. This expansion is particularly relevant where, as here, the employee's conduct is motivated by a variety of factors. According to the First Circuit, a governmental employee acting with mixed motives, some of them unlawful, can nonetheless expose his employer to vicarious liability.

PD&P Decisions

Discrimination Based On Temporary Disability Held Not Actionable: Sullivan v. Mansfield, Norfolk Super. Ct., C.A. No. 06-00352-A (October 31, 2008)

PD&P obtained summary judgment for the Town of Mansfield and several Town officials against a former Department of Public Works employee claiming disability discrimination, based on a temporary asthmatic condition, and retaliation. The employee, a skilled laborer at the Town's wastewater treatment plant, was doing grounds keeping work when his breath became labored and he broke out in a rash. The employee had no history of allergies, and no doctors ever identified what, if anything, caused the allergic reaction. At no time did the employee request reassignment to another job, or any other accommodation, to alleviate his allergies. Several months after the allergy incident, the employee claimed a temporary disability, based on a scheduled sinus surgery allegedly related to his recent asthmatic reaction. The employee was eventually awarded workers' compensation benefits for his alleged temporary disability. According to the employee, his asthmatic troubles completely resolved within three months of the sinus surgery.

While the employee was out on temporary disability, the Town decided to terminate him at the end of his six-month probationary employment period. Because the termination occurred within the probationary period, the Town was under no obligation to show cause for its decision. Nonetheless, the Town pointed to several factors upon which the termination was based, including that the employee had missed 14 days of work, only three of which could be traced to his allergic reaction, and failed to obtain a commercial driver's license, which was a condition of his employment. Several months after his employment was terminated, the Town's municipal light department turned off the employee's electricity because his account was in arrears.

The employee filed a claim at the Massachusetts Commission Against Discrimination ("MCAD"), for which PD&P obtained a lack of probable cause finding. The employee then sued the Town in Norfolk Superior Court under the provisions of G.L. c. 151B, Massachusetts' anti-discrimination law, claiming disability discrimination and retaliation. On the Town's Motion for

Summary Judgment, the Superior Court (Sanders, J.) agreed that the employee's asthma condition was temporary in nature and could not, in this instance, be considered a disability within the meaning of Chapter 151B. The Superior Court also found no merit to the employee's retaliation claim. Because the alleged adverse employment actions – the electricity shut-off, as well the Town's apparent delay in processing the employee's workers' compensation documents – occurred well after the employee's termination, the employee's retaliation claim was temporally impossible. The Superior Court accordingly granted summary judgment in favor of the Town on both claims.

This decision joins several others in Massachusetts which hold that discrimination claims based upon temporary disabilities – particularly those where the injury is minor in nature, the plaintiff recovers quickly, and there is no evidence of any long-term residual effects of the injury – are not actionable. See, e.g., Dartt v. Browning-Ferris Industries, Inc., 427 Mass. 1, 17 (1998); Muse v. United Parcel Service, Inc., 71 Mass. App. Ct. 1103, * 4 (2008); Hallgren v. Integrated Financial Corp., 42 Mass. App. Ct. 686, 687-689 (1997). Municipalities should be cautioned, however, that a disability need not be permanent in order to support recovery. Adverse employment actions based on serious or prolonged, albeit temporary, injuries (i.e., more serious or prolonged than the one at issue here) may be recoverable under Chapter 151B. Each injury must still be analyzed on a case-by-case basis.

Plaintiff Unable To Take Advantage Of The "Mail Box" Rule: Juppe v. Salem, Essex Super. Ct., C.A. No. 08-00185 (November 20, 2008)

PD&P successfully argued a Motion to Dismiss based upon the plaintiff's failure to comply with the notice requirements contained in Sections 15, 18 & 19 of G.L. c. 84, the Massachusetts public way defect statute. The litigation stemmed from a January 10, 2007 trip and fall accident that plaintiff suffered as she exited a local business and stepped onto an allegedly uneven sidewalk in the City of Salem.

Plaintiff brought suit against the property owner, the commercial tenant, and the City for injuries and damages sustained as a result of the fall. Prior to bringing suit, plaintiff's counsel submitted a letter to the City dated February 26, 2007 (47 days after the accident), which the City Clerk received on March 7, 2007 (56 days after the accident). The letter stated that it was intended to satisfy the notice requirements of Chapter 84, which obligate a claimant to give written notice of her name and address, and the time, place and cause of her injury or damage, within 30 days of the accident, to the Mayor, City Clerk or Treasurer.

PD&P moved to dismiss plaintiff's Complaint based on her failure to timely submit written notice to the City. In her opposition, plaintiff did not dispute the late notice, but instead relied upon her affidavit, in which she explained that she obtained a written claim form from the City a couple of days after the accident and, "to the best of her memory," completed the form and mailed it back to the City within a week of the accident. Plaintiff further relied upon the so-called "mail box" rule, which stands for the proposition that if a letter is mailed, its receipt is presumed. The City admitted that plaintiff appeared at the City Clerk's Office within a few days of her accident and was given an incomplete claim form. However, together with its reply memorandum, the City also submitted an affidavit from the City

Clerk, who stated unequivocally that plaintiff's completed form was never received by the City.

The Essex Superior Court (McIntyre, J.) issued a three-page written decision after oral argument on the Motion to Dismiss, which the Court treated as a Motion for Summary Judgment. In its decision, the Court granted summary judgment in the City's favor, noting that the plaintiff was not afforded the protection of the "mail box" rule because she could not affirmatively show that she mailed the claim form back to the City. Timely notice is a prerequisite to bringing suit under Chapter 84. This case serves as a reminder that the burden of proving such timely notice rests with the plaintiff. Going forward, this decision should prove helpful in defending future Chapter 84 claims where plaintiff's notice is insufficient.

Section 10(j) Shields Town From Liability For Bowling Pin Accident: Anzalone v. Middleton, 73 Mass. App. Ct. 1105 (2008)

In a Rule 1:28 Decision, the Appeals Court affirmed that municipalities are immune from suit and liability to negligence claims based on injuries it did not originally cause. This case arises from an injury sustained by a second grade public school student who, at the end of a physical education class, crossed two toy plastic bowling pins on the floor, stepped on one of the pins, and popped it into his own face. The student filed suit in Essex Superior Court, alleging the Town was negligent in its maintenance and staffing of the school, its failure to adequately supervise the students, and its failure to provide the students with proper instruction. The Superior Court (Welch, J.) granted summary judgment in the Town's favor, holding the Town immune from plaintiff's negligent maintenance and staffing theory under G.L. c. 258, § 10(b) (the so-called "discretionary function" exception), and from the plaintiff's other two negligence theories under G.L. c. 258, § 10(j) (the so-called "public duty" rule). PD&P attorneys represented the Town.

PD&P offers this newsletter as a free informational service to clients, and others, interested in developments concerning municipal liability. This newsletter does not provide legal opinions or legal advice. For questions, suggestions or copies of materials referenced in the newsletter, please contact Mia Friedman.

The Appeals Court (Green, Smith & Fecteau, JJ.) affirmed the summary judgment granted to the Town, albeit on slightly different grounds. Choosing not to address Section 10(b), the Appeals Court instead held the Town immune from all three of plaintiff's claims (negligent maintenance and staffing, inadequate supervision of students, and failure to provide proper instruction) under Section 10(j), which bars any negligence claim against a municipality based on an act (or a failure to act) to prevent or diminish the harmful consequences of a condition or situation not originally caused by the municipality or its employees. Although the plaintiff argued that the affirmative acts of two physical education teachers in selecting the bowling game as part of the second grade physical education curriculum constituted the original cause of plaintiff's injuries, the Appeals Court was unconvinced, relying instead on the Town's

arguments in support of the application of Section 10(j). This ruling illustrates the utility of Section 10(j) as a viable defense for public schools faced not only with lawsuits involving injuries inflicted by the tortious conduct of third parties, but also involving students injured by their own actions.

New Heightened Pleading Standard of Iannachhino Reinforced: Tauro v. Tewksbury, Middlesex Super. Ct., C.A. No. 08-02601 (November 24, 2008)

A resident filed suit against the Town of Tewksbury for the negligence of its independent contractors in installing new sewer mains. Specifically, the resident claimed that one independent contractor struck a water line while digging for the sewer main, which caused flooding to the resident's basement. The resident also claimed that another independent contractor negligently supervised such work on behalf of the Town.

PD&P filed a Motion to Dismiss for the Town, arguing that independent contractors do not qualify as "public employees" for which a municipality can be held vicariously liable under the plain language of G.L. c. 258, § 1. Further, the Town asserted it was immune from suit and liability under Section 10(j) because independent contractors – not the Town – caused the plaintiff's alleged harm. While conceding its potential liability for negligently supervising contractors over which it exercises control, the Town pointed out that the plaintiff failed to plead such control or supervision in his Complaint. In fact, plaintiff specifically pled that the work was supervised by another independent contractor. The Middlesex Superior Court (Walker, J.) agreed that G.L. c. 258, § 1 does not authorize suits against a public employer for the conduct of independent contractors unless it can be shown that the Town exercised supervisory control. The Court considered plaintiff's allegations, that another independent contractor supervised the work, as binding judicial admissions which precluded his claims against the Town and, therefore, allowed the Town's Motion to Dismiss.

Of particular interest is Judge Walker's careful application of the heightened pleading standard recently handed down by the Massachusetts Supreme Judicial Court ("SJC") in Iannacchino v. Ford Motor Co., 451 Mass. 623 (2008). As described in the Fall 2008 issue of PD&P's municipal newsletter, in Iannacchino the SJC adopted a heightened standard of review for complaints challenged under Mass. R. Civ. P. 12(b)(6). Under the prior rule, a claim "should not be dismissed . . . unless it appears beyond doubt that a plaintiff can prove no set of facts in support of his claim." The SJC observed that, under the prior rule – which had "earned its retirement" – it was possible for wholly conclusory and speculative language to pass muster under Rule 12(b)(6). To avoid this result, the SJC followed the lead of the Supreme Court in Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007), holding that a future plaintiff, to withstand a Rule 12(b)(6) motion, must plead "more than mere labels or conclusions," and must plead sufficient facts to "bring the claims out of the realm of speculation."

The Superior Court in this matter held the plaintiff to the Iannacchino standard, rejecting his "labels and conclusions" and dismissing his case as against the Town. This decision signals the willingness of Massachusetts' trial courts to readily adopt and apply the Iannacchino pleading standard, which will benefit defendants and defense attorneys across the Commonwealth.

Police Chief Sued In Official Capacity Only Held Immune Under MCRA: Stetson v. Ashland, Worcester Super. Ct., C.A. No. 03-02348-C (September 5, 2008)

G.L. c. 12, § 11I, the Massachusetts Civil Rights Act ("MCRA"), does not extend to claims against a municipality, since a municipality does not qualify as a "person" within the meaning of G.L. c. 12, § 11H. Howcroft v. City of Peabody, 51 Mass. App. Ct. 573, 591-592 (2001). A suit brought against a public official in his "official capacity" is, in effect, a suit against his employer. O'Malley v. Sheriff of Worcester County, 415 Mass. 132, 141 n.13 (1993). It therefore follows that a MCRA claim brought against a municipal official in his official capacity is barred.

PD&P recently obtained summary judgment on all 11 counts brought against the former Ashland Police Chief by the plaintiff, a former volunteer auxiliary police officer. The Town terminated plaintiff when it became aware that he had lied to the State Police, exaggerating his employment experience with the Town on an application for a private detective's license. The plaintiff's subsequent Complaint against the Town and others included claims for wrongful termination, due process violations, intentional interference with advantageous relations, defamation, fraud, conversion and a violation of the MCRA. The Worcester Superior Court (Lemire, J.) initially granted summary judgment to the defendants – the Police Chief, as well as the Town of Ashland, the Ashland Police Department, and the Town Manager – on all but one count: plaintiff's MCRA claim against the Police Chief.

PD&P subsequently filed a Motion for Reconsideration, contending that summary judgment was also proper on the remaining MCRA count because plaintiff's suit against the Police Chief was in his official capacity only. The Complaint did not include language suggesting plaintiff sought to recover from the Chief in his individual capacity. In evaluating whether a defendant is sued in his individual or official capacity, courts will often look to the course of proceedings. Here, Judge Lemire highlighted several relevant factors in support of his determination that the Police Chief was not sued individually. First, the Complaint and its caption only referred to the Chief in his official capacity, as "Chief of Police for the Town of Ashland." Second, the allegations against the Chief only involved actions taken during the performance of his official duties. Third, the Complaint did not include a request for punitive damages, which are only available against individually sued officials. Finally, the plaintiff never made a single reference during the course of proceedings disclosing an intent to sue the Chief individually, until he filed an opposition to the defendants' Motion for Summary Judgment. In his opposition, the plaintiff attempted to change the case caption of his filings to include claims asserted against the Chief as an individual. PD&P immediately filed a Motion to Strike plaintiff's references to the Chief as an individual. Plaintiff's

counsel ultimately assented to the Motion, claiming his inclusion of the word "individually" was merely a mistake. Judge Lemire pointed to the motion practice and events that transpired concerning the case caption as being highly persuasive in reaching his decision in favor of the Chief.

Attorneys representing public officials and employees must not only play close attention as to how their clients are named in a complaint – either in an individual or official capacity, or both – but tthey must also monitor and guard against attempts by plaintiffs to change their theories of liability during the course of litigation. As the Stetson case demonstrates, such vigilance can pay off.