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Major Case on Fair Play in Local Zoning Divides the Wisconsin Supreme Court

A property in La Crosse County was zoned Exclusive Agricultural. The owner wanted to establish a game bird farm, to be called the Willow Creek Ranch (called "Ranch" in this article.) The Town Chair gave informal advice to the Ranch that the use was agricultural. The Ranch secured a DNR license, built and opened.

Two years later, the County announced that the use was not proper in the Exclusive Agricultural district. Neighbors became unhappy with the commercialized hunting and the Town Board passed a resolution of intent to veto any curative rezoning. The County Board passed a rezoning, which the Town Board vetoed.

The Ranch sued seeking injunctive relief and damages. The circuit court ruled against the Ranch on summary judgment.

Three issues were presented on appeal:

1. Does licensing by the DNR of game bird farms preempt control of such farms under local zoning?
2. Were the zoning actions of the County and Town arbitrary or discriminatory?
3. Were the County and Town immune from liability for the zoning actions they took?

The Court of Appeals decided all three questions in favor of the local governments.

The Ranch then appealed to the Wisconsin Supreme Court.

The Wisconsin Supreme Court had little difficulty finding that local zoning was not preempted by state licensing. Zoning deals with the appropriateness of the use in particular locations. State regulation deals with the operations. The topics are different, therefore, state regulation does not preempt local regulation.

The issue of immunity turned on whether the decisions made by the County and Town were "ministerial" or "discretionary" under Wis. Stats. sec. 893.80(4). The Court held that zoning classification decisions are inherently discretionary. Lawsuits to challenge such classifications are a form of tort claim and tort claims cannot be brought against discretionary decisions.

According to the Court, the only form of challenge to a discretionary decision of a local government not covered by statutory immunity is a declaratory judgment action, citing *Schmeling v. Phelps*, 212 Wis. 2d 898, 915 N.W. 2d 784 (Ct. App. 1997).

Next, the Court turned to the declaratory judgment portion of the case, where the Ranch asked the Court for a ruling that the zoning decisions were illegal and unconstitutional. Noting that courts are deferential toward local zoning decisions of a legislative nature, the Court concluded that the County was within its rights in deciding that a commercial game bird farm/hunting preserve was not a legitimate use in the Exclusive Agricultural district and that the Town Board and County Board were within their rights in deciding that various

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modifications made by the Ranch were not sufficient to overcome safety issues.

The final issue in the case was equitable estoppel: whether the Ranch should be protected because of the early, erroneous assurances by the Town Chair. The Court said that a single official cannot make a commitment that binds a governmental body, limits enforcement of zoning, or waives immunity .

This was the decision of a four-justice majority on the Court, authored by Justice Bradley.

Justice Prosser authored an 18-page dissenting opinion, joined by Justices Bablitch and Crooks.

The dissenting opinion starts with a ringing declaration that "Wisconsin law has become unintelligible in explaining what rights and remedies are available to persons who have been injured by state or local government... .(This) has led to a serious injustice in the present case."

The dissenting opinion observes that the the position taken in the majority decision with respect to immunity is based upon the 1996 Court of Appeals decision in *Johnson v. Edgerton,* 207 Wis. 2d 343, 558 N.W. 2d 653 (Ct. App. 1996). The dissent says *Johnson* was incorrectly decided.

DNR v. Waukesha, 184 Wis. 2d 178, 515 N.W. 2d 888 (1994) held that the notice requirements under Wis. Stats. sec. 893.80(1) apply to all lawsuits brought against local governments, not just tort claims. *Johnson* expanded on that decision by concluding that all lawsuits brought against local governments are subject to the immunity provided by sec. 893.80(4), as well as the notice requirements of sec. 893.80(1). The dissent agrees with the *Waukesha* decision, but does not agree with the extension made in the *Johnson* case and vehemently disagrees with the Supreme Court's approval of the *Johnson* decision.

The majority took note of this disagreement and said it was limiting itself to the position that cases asking for injunctive relief based in tort, as well as cases asking for money damages based in tort, are covered by statutory immunity.

The dissent argues that the *Johnson* case and the present case put citizens in a worse position than they were in before municipal immunity was abrogated. They have to jump through the hoops of notice requirements, but the most they can achieve when challenging a legislative action is a declaratory judgment.

The dissent elaborates the facts of the Ranch case, implicitly accusing the majority of selective reporting. The additional facts include the following: a County zoning official also told the Ranch that rezoning would be unnecessary; the Ranch spent more than $340,000 in reliance on these assurances; after investments were made, the property was substantially increased in assessed valuation; the Ranch had many communications with the County during construction; 20 months after the Ranch initially contacted the County, the County said a rezoning would be needed; during the subsequent proceedings to seek a rezoning, the Town Chair discouraged participation by the Ranch and its supporters.

The dissent says the totality of this behavior crossed the line: "What local officials may not do is engage in a lengthy course of conduct that induces reasonable reliance and causes great detriment, and then expect to wash their hands and walk away without consequence."

The dissenting opinion believes that both governments injured the Ranch by ministerial actions described as follows:

a. "The County Zoning Office is the most authoritative source of information about zoning in La Crosse County." If the ordinance was clear that a game bird farm was not permitted, the County officials had a ministerial duty to tell the Ranch it was not. If the ordinance was ambiguous, the County zoning officials had a ministerial duty to say so.

Instead, the County officials initially said the use was permitted. "Once they made their decision, however, the officials were not free to reverse their position and attempt to enforce an ordinance they had earlier (said) was not a problem, particularly after waiting so long. The real world cannot function if citizens are not able to rely on the individualized decisions of authoritative government officials. If authoritative government officials are free to make decisions upon which individuals are expected to rely and then are permitted to disregard those individualized decisions, at any time, without consequences to themselves or their governments, there will be no confidence in our governmental institutions and no stability in our economy or the law."

b. The dissenting justices were even more critical of the Town Chair. The County zoning officials told the Ranch to talk to the Town Chair. The Chair told the Ranch there were no zoning problems. He watched the Ranch invest and begin operations. He then launched "a campaign to obstruct the zoning change he once asserted was not necessary." The dissenting justices argue this was also a breach of a ministerial duty.

Any case in which a high-level appellate court is divided four to three on major issues of legal doctrine and application is important. What makes this case most interesting and perplexing is the differing portrayals of the underlying fact situation between the majority and the dissenting opinions. An informal representation by one Town official is not likely to change the legal requirements when the zoning is a County ordinance. Here, however, it is not clear whether there were representations by both Town and County officials. Since the majority opinion never mentions the Ranch's contacts with the County prior to its initial contacts with the Town Chair, we do not know whether estoppel will continue nearly always to be a dead end for plaintiffs.

Willow Creek Ranch, LLC. v Town of Shelby, 2000 WI 56, 611 N.W. 2d 693, June 20, 2000.

— Richard A. Lehmann

Thorps' Lawsuit to Proceed Under Equal Protection Clause

In Thorp v. Town of Lebanon, issued in late June, the Wisconsin Supreme Court ruled that lawsuits filed by landowners to overturn zoning ordinances will not be dismissed if initial allegations say the municipality's actions were discriminatory. The court, in its opinion, ruled towns and counties are open to suit if they "engage in wholesale rezoning efforts, without examining the particular suitability of the land to its zoned usage." In 1994, Town of Lebanon and Dodge County officials rezoned a large portion of the Town of Lebanon from "rural development" to "general agriculture." Two hundred twenty-five acres of the rezoned land were owned by Roy and Helene Thorp. The Thorps' property includes areas that are hilly with rocky soil and wetlands. The Thorps opposed the change limiting their property to farmland. They claim appraised values of their property decreased from $3,000-$4,000 per acre as "rural development" to $850-$1,000 per acre as "general agriculture."

The couple's 1995 petition for a return to rural development status was denied by the Dodge County Board of Supervisors. In late-1995, the Thorps sought a court-ordered injunction forcing Dodge County officials to return their original "rural development" zoning classification.

In the lawsuit, the Thorps claimed their land was not suitable for the agricultural classification. They also questioned county officials' decision to leave several rural development "islands" throughout the town without explaining why some landowners were allowed to keep the more profitable "rural development" classification while others were forced into the "general agriculture" category.

All the claims, except for a deprivation of equal protection, were dismissed by various courts. The Supreme Court ruled that two facts alleged by the Thorps justified the equal protection claim. First was the allegation that hills and wetlands made the area unsuited for agricultural activity. Second, the justices agreed the "islands" of rural development left by county officials could have been an unconstitutional use of police power.

If the property owner can show there was no rhyme or reason or intelligent explanation for how properties were reclassified, that proof would state a case for an equal protection violation.

The Supreme Court warns, however, that the property owner faces a huge burden to prove that a zoning ordinance lacks a rational relationship to a valid governmental objective. The property owner has to prove beyond a reasonable doubt that there was no rational basis. The ordinance comes into court with a presumption of validity, even when challenged on equal protection grounds. This presumption is "frequently insurmountable."

Despite the length of the earlier proceedings, no proof has actually been presented in the Thorp case. The decision of the Supreme Court was based solely on the allegations in the lawsuit complaint filed by the property owner.

The Thorps can claim an initial victory allowing them to continue their lawsuit. Zoning authorities can view *Thorp* as a warning to examine the suitability of land to a particular zone before issuing a rezoning change.

Notice of Suit

In another matter, the *Thorp* decision relaxed rules requiring notice to governmental entities before they may be sued. Section 893.80 states that, before actions can be commenced, the pre-suit claim from the individual to the governmental entity must (1) state the claimants' or their attorney's address, (2) include an itemized statement of relief sought, (3) be presented to the *appropriate clerk* and (4) be disallowed or denied by the governmental entity. Even though the Thorps did not send their complaint to the county clerk, as required by the statute, the court ruled that sending the complaint to the director of the Dodge County Planning Department and to town supervisors satisfied the statute. "While the statute was not followed literally in this case, the claim was presented to several individuals who were all involved in the rezoning effort."

Thorp v. Town of Lebanon, 2000 WL 60, 2000 WL792365, 6/21/2000.

— Laura M. Sutherland

Senate Approves Federal Electric Reliability Bill

On June 21, 2000, the U.S. Senate approved electric reliability legislation (s. 2071). The Senate was unable to agree on more comprehensive electric restructuring proposals.

The reliability bill gives additional authority to the Federal Energy Regulatory Commission (FERC) and the North American Electric Reliability Organization (NAERO). NAERO is the successor to the North American Electric Reliability Council (NAERC).

Under the bill, NAERO is to develop and enforce electric reliability standards on a national basis, subject to oversight by FERC. States retain authority for ensuring the safety, adequacy and reliability of electric service, but cannot take actions contrary to the federally-developed standards. The legislation was supported by the American Public Power Association (APPA).

Whether sufficient time remains in this legislative session to approve the reliability legislation is unclear. Due to a lack of consensus nationally on restructuring legislation, any amendments to the proposal are likely to result in delay, with the potential of killing the reliability legislation for this term. No date has been set for taking up the bill in the House.

— Michael P. May

Zoning Laws vs. Wisconsin Fair Housing Act

The Wisconsin Court of Appeals has recently addressed the direct conflict between two inconsistent laws: Wisconsin's zoning laws and the Wisconsin Fair Housing Act.

In one corner are Wisconsin's zoning laws, which require zoning boards not to grant a variance unless the property owner has shown that there is "no feasible use of the property" without a variance. *State v. Kenosha County Board of Adjustment,* 218 Wis. 2d. 396, 413-14 577 N.W.2d 813, 821-22 (1998). In addition, state zoning laws instruct zoning boards to not consider conditions personal to the owner of the land, but rather to focus exclusively on the physical aspects of the land in question. *Snyder v. Waukesha County Zoning Board of Adjustment,* 74 Wis. 2d. 468, 479, 247 N.W.2d 98, 104 (1976).

In the other corner is the Wisconsin Fair Housing Act, Sec. 106.04(2r)(b) 3 and 4, Wis. Stats., which provides that it is a "prohibited act of discrimination" to refuse to permit reasonable modifications of an existing house that is occupied by a disabled person, if the modifications may be necessary to afford the person "full enjoyment" of the house. The Wisconsin Fair Housing Act also prohibits the refusal to make accommodations in rules, policies, practices or services associated with housing, when such accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy his or her house.

A disabled individual living in a cabin in Sawyer County was unable to fully enjoy the cabin or its view without building an addition onto the cabin, which addition would violate zoning laws. The owner suffers from Marfan's Syndrome, congestive heart failure, pulmonary hypertension, and restrictive lung disease. These conditions necessitate the use of an air concentrator, which involves a 50-foot long hose connecting him to an oxygen supply. He asked for a variance to accommodate the personal circumstances of his disability, not because of unique physical characteristics of the property. Further, the cabin was already built, and accordingly, the cabin owner had already established a "feasible use" of the property without a variance.

In the yet-to-be published case of *County of Sawyer Zoning Board v. State,* ___Wis. 2d___ , ___ N.W.2d ___ Ct. App. 1999), the Third District Court of Appeals held that the zoning laws trump the Wisconsin Fair Housing Act. The Court found that the Sawyer County zoning board did not discriminate when it denied the cabin owner's variance, but correctly applied the general standard of "no feasible use." The Court stated it would not overrule or modify the variance case law as decided by the Wisconsin Supreme Court. The Court found no discrimination in the application of a general standard.

— Christopher J. Dodge

Federal Court Approves FERC Order 888

In a major victory for the Federal Energy Regulatory Commission (FERC), the D.C. Circuit Court of Appeals rebuffed nearly all challenges to the FERC's transmission access regime issued in its Order 888.

The Court of Appeals found that the Commission had authority under the Federal Power Act to "to require open [transmission] access as a generic remedy to prevent undue discrimination." The Federal Court characterized FERC Orders 888 and 889 as requiring utilities to "provide access to their transmission lines to anyone purchasing or selling electricity in the interstate market on the same terms and conditions as they use their own lines." The Court went on to summarize the case:

> All key players in the electricity market have challenged various provisions of Orders 888 and 889. Their claims range from the hyper-technical to arguments that FERC lacks authority to order open access transmission at all. Finding few defects in the orders, we uphold them in nearly all respects.

In one key finding, the Court upheld FERC's assertion of jurisdiction over the terms of the transmission service utilized in retail wheeling programs. Thus, while state commissions will retain jurisdiction so long as retail service is provided on a bundled basis to customers, once a state moves to customer choice in retail service, the FERC may assert jurisdiction over all transmission rates involved in the retail program.

The D.C. Circuit Court of Appeals decision was issued in Case No. 97-1715, *Transmission Access Policy Study Group, et al. v. Federal Energy Regulatory Commission* (June 30, 2000).

— Michael P. May

SPEAKERS FORUM

August 10, 2000
Front Line Supervisor Training Management Responsibility
Dane County Job Center
Madison, WI
Robert E. Gregg

August 17, 2000
Sharing/Outsourcing Services
2000 Management Seminar AWWA - Wisconsin Section
Madison, WI
Lawrie J. Kobza

County Deputies Can Appeal Commission Decisions to Arbitration or Circuit Court

The Wisconsin Supreme Court recently addressed the appeal rights of a unionized county deputy sheriff from decision of a civil service commission ("CSC"), the county equivalent to a municipal police and fire commission ("PFC"). In *Eau Claire County v. Teamsters Local 663,* (Case No. 98-3197, June, 2000), the Supreme Court held that a county law enforcement officer is entitled to seek review of a CSC decision to **either** the circuit court under §59.52(8), Stats., or to an arbitrator under the terms of a collective bargaining agreement.

Eau Claire County's deputy sheriffs belonged to a union organized by the Teamsters. In the collective bargaining agreement, the parties agreed that "just cause" was required for discharge and discipline of its deputies. The agreement contained standard arbitration provisions.

Eau Claire County also had established a civil service commission under the provisions of §59.52(8), Stats. That statute provides that, if a county establishes a CSC, a law enforcement officer may not be suspended or dismissed unless the CSC finds "probable cause" for the discipline. It further provides that a law enforcement officer disciplined under the statute can appeal that decision to a circuit court.

The Eau Claire County CSC determined that a deputy sheriff should be terminated from county employment. Rather than appeal the decision to a circuit court, the union, on behalf of the deputy sheriff, filed for arbitration to contest the decision. Eau Claire County refused to arbitrate the case, contending the sole mechanism for the deputy sheriff to appeal was to a circuit court pursuant to statute.

This position was not only supported by the language of the statute, but also by an earlier Court of Appeals decision which held that under nearly identical statutory provisions relating to municipalities, an employee seeking review of a PFC decision has appeal rights only to a circuit court and not to arbitration. *Janesville v. WERC,* 193 Wis.2d 492 (Ct. App. 1995).

The Supreme Court first dealt with the statutory language. That language provided that a deputy **may** appeal the CSC decision to circuit court. The Court interpreted this language as suggesting that other avenues of appeal were also appropriate. One could argue that the word "may" was meant to suggest that an appeal is not mandatory, but at the discretion of the employee. However, the court felt the absence of specific language establishing §59.52(8), Stats., as the sole appeal mechanism supported its conclusion that the statute permitted other forms of appeals.

With respect to the *City of Janesville* decision, the Court concluded there were significant differences between §59.52(8), Stats. and §62.13(5), Stats., which empowers PFCs to handle municipal disciplinary actions against police officers. In particular, the Court noted that the manner of choosing the CSC and PFC were different and that the CSC did not have to hold a hearing whereas §62.13(5) required the PFC to hold a hearing to support discipline. How these procedural differences give rise to the right of a county deputy sheriff to choose between a circuit court and arbitration for an appeal, when a municipal police officer must appeal to a circuit court, is unclear.

The bottom line holding of the case is that a county deputy sheriff can appeal a CSC decision to either a circuit court or an arbitrator, but not both. *Eau Claire County* creates a distinct difference between county and municipal discipline for its law enforcement officers.

Review by a circuit court of PFC or CSC decisions is preferred over arbitration. The problem in *Eau Claire County* is that the labor agreement provided for the right to arbitrate discipline issues, including that of the suspension or termination of deputy sheriffs, even in light of §59.52(8), Stats. To prevent forum shopping by a terminated deputy, as now permitted by *Eau Claire County,* counties should make clear through future bargaining that the decisions of a CSC are only appealable to the circuit court under §59.52(8), Stats., and not to arbitration under terms of the labor agreement.

— Steven C. Zach

PSC Given Authority To Resolve Disputes Over Sewer Extensions Under Railroad Tracks

Pursuant to a statute passed this legislative session, the PSC has been given the authority to order that a sewer utility be allowed to extend its pipes under a railroad, provided the extension will not materially impair the ability of the railroad.

Such an order may be issued if the parties cannot agree to the sewer extension and the PSC finds that public convenience and necessity or the rendition of reasonably adequate service to the public requires the sewer extension. The PSC already had this authority for "public utilities," which include electric and water utilities, but did not have this authority for sewer utilities.

The PSC is now undertaking to revise its existing rules to make them consistent with the new state law. Chapter PSC 132, Wis. Administrative Code, currently sets forth the compensation to be paid and conditions to be met by a public utility for the construction or maintenance of facilities within a railroad right-of-way in cases where the utility and the railroad cannot agree. The PSC will now change the definition of "public utility" in PSC 132 to include public utilities, cable and sewerage systems. Since the PSC has established the PSC 132 conditions and compensation as reasonable and equitable in cases involving public utilities, the PSC believes it is appropriate to use those same standards when determining equitable and reasonable conditions and compensation in cases involving sewerage systems.

— Lawrie J. Kobza

EMPLOYMENT LAW UPDATE

Supreme Court Confirms That Wrongful Discharge Is Alive And Well

As most employers are well aware, Wisconsin adheres to the doctrine of employment-at- will. This doctrine provides that when the terms of employment are indefinite, an employer may discharge an employee for a good reason, a bad reason, or no reason at all, so long as the reason for discharge is not illegal. Wisconsin recognizes several exceptions to the at-will employment doctrine, including a narrow public policy exception that allows an employee to bring a cause of action for wrongful discharge against an employer when an employee's discharge is contrary to a fundamental and well-defined public policy. The Wisconsin Supreme Court in *Strozinsky v. School District of Brown Deer* (Case No. 98-0454), issued on July 12, 2000, reinforces that the public policy exception to the employment-at-will doctrine is alive and well in Wisconsin.

FACTS OF STROZINSKY

The School District of Brown Deer employed Kathy Strozinsky as a payroll clerk in the district's central office. Strozinsky was responsible for bookkeeping and payroll duties, and determined the federal and state tax withholdings for all payroll checks issued to district employees. One of the employees for whom Strozinsky computed withholding tax was the district superintendent, Kenneth Moe. Under his employment contract, Moe received an annual bonus equal to 10% of his salary. Previously, the district paid the bonus to Moe without withholding any social security or Medicare taxes from the gross amount. Over the course of her employment, however, as Strozinsky became more informed about taxation procedures, she came to believe that tax should be withheld from Moe's bonus check. Accordingly, she made an adjustment to Moe's next regular payroll check to reflect the tax reduction.

When Moe received his reduced paycheck, he confronted Strozinsky about the deductions. Strozinsky responded that she deducted the amounts properly under the tax laws. After this conversation, Strozinsky called the IRS for advice. The IRS representative confirmed that tax should be withheld from the bonus payment and informed Strozinsky that, if she failed to deduct taxes properly, she could be held personally liable for the amount owed as well as a penalty and compounded interest.

Strozinsky conveyed this information to her supervisor, who nevertheless instructed Strozinsky to issue a new payroll check to Moe without deductions. Strozinsky agreed to prepare the unreduced check if her supervisor would sign a written statement releasing her from liability in the event the IRS challenged the failure to report taxes. Strozinsky's supervisor said that he would take full responsibility and signed the statement. When Moe discovered that Strozinsky had asked her supervisor to sign a release, Moe confronted Strozinsky in an angry fashion, told her he was offended by her actions, and warned her that if she engaged in any similar behavior in the future, she would be "out of here."

Strozinsky was upset by the incident and submitted a written complaint to the district's Human Resources Manager, asserting that Moe's treatment was demeaning and amounted to a "form of harassment." Strozinsky's supervisor intercepted the complaint and told Strozinsky he would "pretend he had never seen it." Moe, Strozinsky and her supervisor met the next day. Moe stressed that he was the boss, and that as a payroll clerk, Strozinsky had no authority or power. Strozinsky explained that she had followed the advice she received from the IRS and information she learned from the American Payroll Association.

After that meeting, according to Strozinsky, her supervisor and Moe excluded her from job duties she regularly participated in, stopped communicating with her, reprimanded her without cause and pressured her with rush deadlines. When she confronted her supervisor, he responded, "if this is what you think pressure is, you're working for the wrong guy, and perhaps you shouldn't be working here." Strozinsky submitted a written resignation. Approximately nine months later, she sued the district alleging that it had wrongfully discharged her in violation of public policy. The circuit court entered judgment in favor of the district. However, the Court of Appeals reversed the district court, and the district petitioned for review to the Wisconsin Supreme Court.

WRONGFUL DISCHARGE

The first issue the Supreme Court answered was whether Strozinsky had identified a fundamental and well-defined public policy sufficient to meet the narrow cause of action for wrongful discharge under the public policy exception to the doctrine of employment-at-will. In order to prevail under the public policy exception, an employee must: (1) in his or her complaint, identify a fundamental and well-defined public policy sufficient to trigger the exception to the doctrine of employment-at-will; and (2) demonstrate that his or her discharge violated that fundamental and well-defined public policy. Strozinsky's complaint alleged that Wisconsin Statute § 943.39, which criminalizes fraudulent writings, identified a well-defined public policy against falsifying payroll documentation and defrauding taxing authorities. The Court agreed and further ruled that the tax laws, which require parties to file accurate tax information, also represent a public policy exception to at-will employment. The Court stated, "we cannot presume that the legislature intended to condone the Hobson's choice of choosing between being fired or being exposed to criminal sanctions."

Constructive Discharge

Because Strozinsky voluntarily resigned and was not terminated, the Court further had to answer whether the doctrine of constructive discharge can be invoked in a wrongful termination context. The district argued that Strozinsky could not bring a wrongful termination action because she had not been terminated. The Supreme Court rejected the argument, holding that where the employee establishes that conditions were so intolerable that the employee felt compelled to resign, the employee can bring a wrongful termination case under a constructive discharge theory. In order to show constructive discharge, the employee must show more than stress or an unpleasant, critical or heavy-handed work environment. In addition, inferior work assignments, transfers to less favorable job duties, and substandard performance reviews alone do not generally create "intolerable" conditions. Rather, said the Court, "the situation must be unusually aggravating and surpass 'single, trivial or isolated' incidents of misconduct."

Strozinsky claimed that Moe verbally abused her and was hostile and threatening. She stated that after her meeting with Moe and her supervisor, her work responsibilities diminished and she felt that her job was in jeopardy. The Court remanded the case to the circuit court for a finding of whether Strozinsky's work conditions were so intolerable that a reasonable person confronted with the same circumstances would have been compelled to resign. This is an objective standard that takes into account what would offend a reasonable employee.

Conclusion

The Strozinsky case reminds employers that there are several important exceptions to the employment-at-will doctrine. Employers must take seriously employee concerns and complaints that they are being asked to do things that may be illegal or violate public policy. Moreover, employers must understand that employees may be able to sue for wrongful termination not only when the employee is terminated, but also when the employee is constructively discharged due to intolerable working conditions.

— Jennifer S. Mirus

Power To Condemn Railroad Property Preempted by ICC Termination Act

Effective January 1, 1996, Congress continued the economic deregulation of the railroad industry by passing the Interstate Commerce Commission Termination Act ("ICCTA"). The Federal Transportation Board was granted exclusive jurisdiction over the acquisition, operation and abandonment of rail lines and spur tracks, including wholly intrastate tracks. The Act also included a broad preemption clause limiting state and local regulation of rail transportation.

The City of Marshfield and the Wisconsin Department of Transportation have been working on a project to realign State Highway 13 within the City of Marshfield for many years. The plan calls for the elimination of several at-grade crossings and the elimination of one mile of passing track. The plan would not alter the mainline track that passes through the City.

When the City began condemnation to acquire the necessary interest in the railroad property, the Wisconsin Central Limited, which owns the tracks, brought suit in Federal District Court for the Western District seeking a declaratory judgment that the condemnation was preempted by the ICCTA, that it would violate the commerce clause and, in the alternative, that the City had to obtain a determination from the Surface Transportation Board ("STB") that condemnation of the track would not adversely affect interstate commerce before it could proceed. On February 10, 2000, the District Court entered summary judgment in favor of the railroad, holding that the ICCTA preempted the exercise of the condemnation powers. In doing so, the Court went beyond what even the railroad had argued.

The City filed a motion for reconsideration and clarification. The City argued that the Court's extremely broad interpretation of regulation of rail transportation as including the exercise of condemnation powers where there was no material impact on interstate commerce would render the statute unconstitutional as beyond the powers of Congress under the commerce clause. The City submitted evidence that the relocation of the passing track would have no material adverse impact on the flow of rail traffic over WCL's line on even a temporary basis. WCL essentially conceded this point. The Court denied the motion for reconsideration and the case is now on appeal before the Seventh Circuit Court of Appeals.

This case involved the physical removal of railroad tracks. However, the District Court decision, if applied in other situations, would prohibit every exercise of eminent domain power against railroad property, however minor, such as easements through or over railroad property. The District Court decision goes beyond the ruling of any other published case to date. The Surface Transportation Board has held that state and local regulation, including pre-clearance requirements, such as environmental and zoning regulations, are preempted because they impede a railroad's right to conduct its operations. However, the STB has declared that state and local regulations that do not interfere with railroad operations and certain regulations adopted under state and local police powers are not preempted. *See Union Pacific Railroad Co. - Pet. for Decl. Order - Rehabilitation of Missouri-Kansas-Texas Railroad,* STB Fin. No. 33611 (August 21, 1998). (Decisions of the STB are available on the Internet at *www.stb.dot.gov*.)

— Mark J. Steichen

MUNICIPAL LAW
N E W S L E T T E R

The Municipal Law Newsletter is published monthly by the Municipal Utility and Municipal Special Services Practice Group and the Environmental and Land Use Practice Group of Boardman, Suhr, Curry & Field LLP, Fourth Floor, One South Pinckney Street, Madison, Wisconsin 53701-0927, (608) 257-9521. The Newsletter is distributed to our clients and to municipal members of our clients, the Municipal Electric Utilities of Wisconsin (MEUW) and the Municipal Environmental Group - Municipal Drinking Water Division.

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