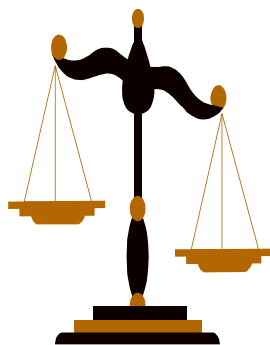


# The Municipal Liability Update

A Publication of Siana, Bellwoar & McAndrew, LLP



## Siana, Bellwoar & McAndrew Successfully Defends Borough in Retaliation Lawsuit

On March 19, 2009, the United States District Court for the Eastern District of Pennsylvania in Jonathan Knight v. Borough of Chalfont, et al., 2009 WL 704140 (E.D.Pa.), granted a motion for summary judgment filed by Christopher P. Gerber, Esquire, a partner with the law firm of Siana, Bellwoar & McAndrew, LLP, in favor of the Borough of Chalfont and several named Borough officials who were sued by a former Borough police officer who claimed retaliatory discharge. The Court ruled that the police officer's complaints to his superiors regarding a fellow officer's alleged misconduct does not constitute "citizen speech" that would warrant protection against retaliatory dismissal under the First Amendment.

In this matter, the Borough terminated patrol officer Knight after he intentionally leaked confidential information about an undercover narcotics investigation to a drug dealer who was under surveillance by a local drug task force. Pursuant to the police association's collective bargaining agreement, Knight appealed the termination. The arbitrator upheld the decision finding that Knight had violated department policy by disclosing confidential information to the drug dealer. Knight did not appeal of the arbitrator's decision. Instead, he filed a federal civil rights lawsuit claiming that the Council's true motive to fire him was in retaliation for his alleged prior complaints about fellow officers.

The Court's analysis of Knight's First Amendment retaliation claim was governed by the U.S. Supreme Court's decision in Garcetti v. Ceballos and related Third Circuit decisions. The Garcetti court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." Following Garcetti, the Third Circuit has held that "[a] public employee's statement is protected activity when (1) in making it, the employee spoke as a citizen, (2) the statement involved a matter of public concern, and (3) the government employer did not have 'an adequate justification for treating the employee differently from any other member of the general public' as a result of the statement he made ...." Reilly v. City of Atlantic City, 532 F.3d 216, 228 (3d Cir. 2008).

The Knight Court first addressed the threshold question of whether the reports of alleged misconduct by a fellow police were made as a private citizen or pursuant to his official duties as a police officer. Since the Court held that Knight's complaints through the chain of command fell within the scope of his duties, no further inquiry was warranted under the First Amendment.

The Knight decision should provide municipalities with an effective shield against retaliation lawsuits filed by police officers who claim that they were unfairly discharged in violation of the First Amendment. However, as a caveat, the Pennsylvania Whistleblower Law provides broader protections to police officers and other government employees who claim they suffered unlawful termination on the basis of their complaints about government "waste and wrongdoing."

Since disciplinary action against police officers and other government employees in Pennsylvania can result in costly and disruptive litigation, it is recommended that legal advice from experienced labor counsel be sought *before* the action is taken. In the event your municipality faces the need to take such action, the experienced attorneys at the law firm of Siana, Bellwoar & McAndrew, LLP are well equipped to provide counsel.

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## Operation of an Emergency Vehicle

In its decision of Lahr v. City of York, the Commonwealth Court examined the emergency vehicle doctrine of the Motor Vehicle Code (MVC), which provides that the driver of an emergency vehicle may exercise special privileges. Specifically, the Court addressed Section 3105(c), which states that the privileges granted shall only apply when the vehicle is making use of an audible signal and visual signals meeting the requirements set forth in the regulations adopted by the Pennsylvania Department of Transportation (PennDOT).

In Lahr, a police officer was operating his police vehicle in excess of the posted speed limit in the wrong direction on a one-way road, in pursuit of a suspected gunman. The police vehicle's emergency lights were activated but the siren was only being used intermittently at intersections. The officer collided with a vehicle operated by Susan Lahr, who was looking only to her left (the direction from which traffic was permitted to travel on the one-way street). While she may have seen the police cruiser with the lights activated, she did not hear any siren.

The Commonwealth Court held that the driver of an emergency vehicle is not relieved from the duty to drive with due regard for the safety of all persons. To invoke the protection of the special privileges statute, the operator must prove compliance with all standards required to be followed. The requirements at issue covered both audible and visual signals. The PennDOT requirements for visual signals have specific chromaticity (color quality of light) coordinates set forth in regulations adopted by PennDOT. However, at trial, the officer only testified as to the police department regulations, rather than compliance with PennDOT Regulations.



Despite testimony from the officer that he reviewed regulations at police headquarters regarding the size, shape, and dimensions of the lights, and the manner of use of lights and sirens, the Court found the officer's testimony and trial evidence fell short of establishing compliance with PennDOT's chromaticity requirements. Without proof of compliance with PennDOT's regulations governing visual signals and use of the audio signals, the driver of the emergency vehicle was not entitled to special privileges to exceed speed and directional mandates. Therefore, the operation of the police vehicle in violation of the MVC was found to be negligence *per se*, imposing liability on the City.

## The Home Improvement Consumer Protection Act

With spring cleaning projects in full swing, municipalities should take note of the provisions of the Home Improvement Consumer Protection Act (HICPA) that will take effect on July 1, 2009. Although municipalities are exempt from the requirements of the Act, HICPA will significantly change the requirements for home improvement contractors operating within your municipality.

Generally, HICPA will provide increased regulations of home improvement contractors in an effort to provide uniform state-wide registration of contractors and to protect your residents from scrupulous business practices. Notably, HICPA requires that all home improvement contractors register with the Commonwealth; requires that all home improvement contracts be in writing, noting the contractor's registration number, with signatures of the contractor and the homeowner; and requires that such contracts contain a three day rescission period. This list is not exhaustive and there are a number of other requirements imposed upon contractors under the Act.

Contractor registration under HICPA can be done online for a \$50.00 fee at [www.attorneygeneral.gov](http://www.attorneygeneral.gov). It is noteworthy that HICPA does NOT contain a grandfathering clause for existing businesses, and all home improvement contracts must register. Failure to comply with the Act could result in severe penalties imposed by the Attorney General, ranging from criminal sanctions to the revocation of a contractor's license.

From the municipal perspective, unfortunately HICPA preempts municipalities from requiring home improvement contractors to pay a registration or licensing fee to do work within the municipality. This provision comes with several caveats. HICPA does NOT restrict a municipality from requiring a building permit and does NOT preempt local enforcement of the building code or the Pennsylvania Construction Code Act. The HICPA preemption provision also does not affect existing licensing standards in effect as of July 1, 2009, with respect to electricians, plumbers and other trades, and does not affect local regulations that require contractors to carry insurance (but only as long as those regulations were in effect prior to January 1, 2006).

With these regulations taking effect soon, municipalities should act fast to educate staff, contractors and the public. Doing so will provide a smoother transition and will ensure that the residents enjoy the full benefit of the Act's protections.



## Trees, Streets, and Right-of-Way Liability

The Commonwealth Court recently issued two decisions addressing liability for trees located within and outside of the street's right-of-way. These decisions should apply equally to municipalities.

In Clark v. PennDOT, the Court reaffirmed PennDOT's immunity from suit for injuries caused by trees and tree limbs falling onto state highways when the tree is located outside of PennDOT's right-of-way. In Clark, the plaintiff was paralyzed after the trunk of a tree, the limbs of which extended to the centerline of a state highway, broke away and fell across the roof of a car in which the plaintiff was a passenger. At trial, the lower court granted PennDOT's motion for a compulsory nonsuit, finding the plaintiff had not shown a right to relief under the real estate exception to PennDOT's sovereign immunity because the tree trunk was located outside of PennDOT's right-of-way.

In affirming that decision, the Commonwealth Court held that, for the real estate exception to apply, a claimant must first demonstrate that the alleged dangerous condition that caused the injury or originates from Commonwealth realty itself before making any showing of the dangerousness of the condition. Because the right-of-way for the relevant state highway was sixteen-and-a-half feet from the centerline and the trunk of the fallen tree was located thirty-five feet from the centerline, the Court held the fallen tree was not located on Commonwealth realty. The Court also found that plaintiff failed to prove the overhanging tree limb was itself a dangerous condition because the entire tree fell, not just the tree limb that extended over the state highway.

In the case of Pritts v. PennDOT, the Court affirmed the trial court's finding of summary judgment in favor of PennDOT for injuries sustained by a young driver when her vehicle left the highway and it hit a tree situated within PennDOT's right-of-way. Plaintiff brought a suit against PennDOT for failure to maintain its highway properly. The Commonwealth Court upheld the finding of summary judgment holding that PennDOT owed a duty of care to maintain the highway, which is from curb to curb, for the intended enforceable use of vehicular travel. However, the Court held that this duty did not extend to hazards not located on the highway.



## Sidewalk Liability Revisited

In recent decisions, the Pennsylvania Commonwealth Court's attempt to expand the scope of liability faced by municipalities under the Tort Claims Act when individuals sustain injuries on sidewalks that abut municipal-owned property has been rebuffed by the Pennsylvania Supreme Court. The Commonwealth Court found there to be a "gap in coverage" under the Tort Claims Act where an individual sustains an injury on a sidewalk abutting property owned by a municipality adjacent to a state-designated highway. The Court reasoned that, since the sidewalk exception to municipal tort immunity mandates that the municipality is only secondarily liable for injuries occurring on a sidewalk (with the actual abutting property owner being primarily liable for injuries occurring on an abutting sidewalk) the municipality must be primarily responsible for injuries occurring on a sidewalk under the real property exception, when the municipality is the actual abutting property owner. In other words, when the municipality owns the property abutting a sidewalk and an injury occurs on that sidewalk, the liability of the municipality for that injury is analyzed under the real property exception to tort immunity rather than the sidewalk exception.

These Commonwealth Court decisions removed a key defense municipalities had to sidewalk claims. Under the sidewalk exception, not only would a plaintiff need to demonstrate that the sidewalk was dangerous, but also that the municipality had or reasonably could have had notice of the dangerous condition. This notice requirement is not a factor when liability is being assessed under the real property exception. This reasoning also ignored the plain terms of the Tort Claims Act that excludes sidewalks under the real property exception.

In the matter of Reid v. City of Philadelphia, 957 A.2d 232 (PA 2008), the Pennsylvania Supreme Court rejected the Commonwealth Court's expansive interpretation of the real property exception. In reaching its decision, the Supreme Court looked to the express words of the Tort Claims Act and found that the statute clearly and unequivocally excluded sidewalks from the real property exception to tort immunity. The Supreme Court reasoned that, if the Pennsylvania Legislature created a "gap in coverage" when enacting the Tort Claims Act, then the Legislature must remedy the gap by enacting new legislation. When a statute contains clear and unambiguous language, it is a court's role to give full effect to those words, and then, leave it to the Legislature to resolve the problem by enacting proper amendments to the statute.

## Expanding “Occupying” When Interpreting an Insurance Policy

The United States District Court for the Eastern District of Pennsylvania adopted a broad definition of vehicle occupant that could have wide-reaching consequences for municipal insurance coverage matters.

In St. Paul Fire & Marine Insurance Co. v. Rhein, Falls Township Police Officer James Rhein injured his hand during a traffic stop while outside of his vehicle. The injury occurred when the vehicle he had stopped rolled backwards into his patrol car. Rhein sought recovery for his injury under the Township automobile policy with St. Paul. St. Paul filed a Declaratory Judgment asking the court to declare that Rhein was not “vehicle oriented” at the time of the accident and was therefore outside of the scope of coverage.

In considering the issue, the Court looked to the Pennsylvania Supreme Court decision of Utica Mutual Insurance Co., v. Contrisciane. The Utica court applied the so-called “second approach” to such questions which permitted a finding that a person who is not physically inside or in contact with a vehicle may be considered an occupant of the vehicle when (1) there is a causal relation or connection between the injury and the use of the insured vehicle; (2) the person asserting coverage must be in a reasonably close geographic proximity to the insured vehicle; (3) the person must be vehicle oriented; and (4) the person must be engaged in a transaction essential to the use of the vehicle.

The Rhein Court found all of these factors were met. It noted that since a police officer routinely relies upon the use of the cruiser to monitor speeding violations and effect vehicle stops the first and fourth prong were satisfied. Additionally, since the defendant was “within a few feet of the covered vehicle,” the second prong was satisfied. Further, the Court found that a part of a police officer’s routine duties requires him to exit the vehicle, and since Officer Rhein was clearly intending to return to his patrol car, he remained “vehicle oriented.” Accordingly, coverage was required to be provided.



## New Open Records Office Issues Advisory Opinion

On February 18, 2009, the Office of Open Records issued an advisory opinion for the Borough of Franklin Park. The advisory opinion held that audiotape recordings made by a municipal secretary to assist in the preparation of meeting minutes constitutes a public record subject to disclosure under the new Right to Know law. The advisory opinion goes on to state, however, that *notes* taken by a municipal secretary during the meeting do *not* constitute public records subject to disclosure.

On the separate issue of whether, and to what extent, the audiotape recordings must be retained, the advisory opinion states that the tapes should be retained pursuant to a municipality’s document retention and disposition schedule. If the retention and disposition schedule does not identify when the audiotape recordings must be destroyed, municipalities are advised that the tapes should be retained indefinitely and made available to the public upon request. Thus, it is important that a municipal record retention policy specifically address whether, and when, tape recordings made by the municipal secretary may be destroyed.

It is recommended that municipalities consult their solicitor to insure that their retention and disposition schedules provide for the retention and discarding of audiotape recordings of meetings.

## Going Green

As part of our GOING GREEN Initiative, Siana, Bellwoar & McAndrew, LLP, is now posting “The Municipal Liability Update” on our webpage, [www.sianalaw.com](http://www.sianalaw.com). To better and more efficiently serve our clients, after this issue we will only email The Update to our clients. Please forward your email address to [info@sianalaw.com](mailto:info@sianalaw.com) so as not to miss future Updates and other important announcements from Siana, Bellwoar & McAndrew, LLP. Thank you.



## Use of Certified CCO for UCC Compliance

The recent Pennsylvania Supreme Court decision of Allegheny Inspection Service, Inc. v. North Union Township et al held a township's exclusive contract with a third-party inspector to conduct electrical inspections did not violate the Pennsylvania Construction Code Act (PCCA) or the Uniform Construction Code (UCC).

The PCCA was adopted in 1999 with the purpose of insuring uniformity in construction standards and regulations throughout Pennsylvania. However, it did not become effective until April, 2004, after the Department of Labor and Industry promulgated regulations adopting the UCC.

The Commonwealth Court's decision in Allegheny analyzed the municipal designation of an exclusive "construction code official" ("CCO") as defined by the PCCA. The PCCA defines a CCO as an individual certified by the Department of Labor and Industry in an appropriate category to review construction documents, inspect construction or administer and enforce codes. Relying on this definition, the Commonwealth Court determined that nothing in the PCCA allows a municipality to prohibit the use of a CCO who meets the requirements and remains in good standing from performing inspections in the municipality.

The Supreme Court reversed. In interpreting the intent of the Legislature, the Court reasoned that the Legislature could have provided language requiring third-party agencies tasked with administering and enforcing the PCCA on behalf of municipalities to accept inspections by a CCO for code compliance purposes, but did not do so. The Court concluded that the plain language of the PCCA permits municipalities to employ a third-party agency to conduct all PCCA compliance inspections to the exclusion of other construction code officials. However, the Supreme Court also ruled that other construction code officials are not prevented from conducting inspections for purposes other than PCCA compliance.

Allowing a CCO to inspect for purposes other than statutory compliance represents somewhat of a middle ground between municipalities who previously required the use of a third-party agency contracted by the municipality for all construction code purposes and the builders and/or homeowners who wish to use their own inspector. The ruling permits document review and inspections by a CCO chosen by builders or homeowners, but requires the actual determination of PCCA compliance to be issued by the municipality's contracted third-party agency. While this ruling supports a municipality's right to regulate, it also creates an environment for potential legal action against the municipality involving dueling inspectors.

## Police Barred from Warrantless Search of Vehicle if Arrestee Poses No Danger

In a decision that will have a major impact on traffic stops across the nation, the United States Supreme Court in Arizona vs. Gant, decided April 21, 2009, limited the use of prior precedent that allowed officers to contemporaneously search the passenger compartment of a vehicle of any person taken into custody during a traffic stop without a warrant. Under the new limitation, officers may only search the vehicle without a warrant if there is reason to believe the person arrested could still gain access to the vehicle to obtain a weapon or that the vehicle contains evidence of the crime that led to the arrest in the first place.

In Gant, the defendant was arrested for driving with a suspended license. At the time of the search, the defendant was handcuffed and seated in the back seat of a patrol car. Two other individuals who were with the defendant were secured in separate patrol cars. The officers found cocaine in the pocket of a jacket left inside the vehicle.

The Court found no justification for a warrantless search since the safety of police officers and the need to preserve evidence were absent. The Court distinguished New York v. Belton, the Court's 1981 decision that approved contemporaneous warrantless vehicle searches, where one officer alone searched a vehicle while also attempting to secure four suspects noting that in the instant case, five officers had already secured the defendants prior to conducting the search.

The decision largely prohibits warrantless vehicle searches when the driver is arrested for a traffic offense but will have little impact when police already possess evidence the driver has committed a crime such as a drug offense.



## **New Provisions of ADA and FMLA are in Effect**

Has your municipality revised its policies and procedures since the amendments to the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA) Final Regulations? Effective January 1, 2009, the ADA changed in a number of significant respects. On January 16, 2009, the Department of Labor's revisions to the FMLA Regulations took effect, significantly altering the landscape for FMLA leave requests.

### **ADA Amendments**

The ADA Amendments Act of 2008 ("ADAAA") expands the coverage of the Americans with Disabilities Act, which reverses a trend by U.S. Courts whose decisions have narrowed the application of the Act dating back to 1999.

Under the new ADAAA, the term "disability" has a much broader definition based upon the following provisions:

- the term must be construed in favor of *broad coverage* of individuals;
- an impairment that substantially limits one major life activity need not limit *other* major life activities to be a disability;
- the law protects individuals suffering from episodic impairments or impairments that are in remission, so long as the impairment would substantially limit a major life activity when active; and
- consideration of the *ameliorative effects* of medication or treatment may no longer be considered when determining whether an impairment substantially limits a major life activity.

The ADAAA also provides an extensive list of the tasks that constitute "major life activities," including physical tasks such as walking, standing, and lifting; mental tasks such as learning, reading, and thinking; and even the operation of major bodily functions, such as immune system functions, cell growth, and reproductive functions.

Finally, the ADAAA defines the requirements of being "regarded as having an impairment," specifying that individuals who are subjected to discrimination prohibited by the ADA, whether or not an actual or perceived impairment does limit the individual's major life activities, will still be regarded as having an impairment. New regulations issued by the Department of Labor have resulted in sweeping changes to the Family and Medical Leave Act ("FMLA") that will have a substantial effect on employers and their compliance with the changed FMLA. If your municipality employs 50 employees or more, your handbooks must be changed, new forms must be used, and new posters must be displayed. Below is a brief summary of some of the changes.

### **New Qualifying Events for Military**

The amended Act changes the qualifications for FMLA leave. For instance, if the employee's spouse, child, or parent is in the National Guard, is a reservist, or is retired from the military and is called to active duty, the time spent in several specified activities, called "qualifying exigencies," may be considered FMLA time. Moreover, an employee may be eligible for up to 26 weeks of "military caregiver leave" if his or her spouse, child, parent, or next of kin is a member of the armed forces and is injured in the line of duty.

### **New Notice Requirements**

For the employer, a new FMLA poster must be posted and available in other languages if employees are not fluent in English.

For employees, the new regulations require them, absent unusual circumstances, to follow the employer's usual and customary call-in procedures for reporting an FMLA leave absence. The current regulation has been construed to allow employees to provide their employer with notice of the need for FMLA leave up to two full days after an absence, even if they could have provided notice sooner. Other notice provisions have been either added or clarified by the new regulations. *Continued on Page 7*

## New FMLA Regulations (continued)

### Changes to Certification Requirements

The new regulations significantly change the medical certification process. Recognizing employees' privacy concerns and the enactment of the Health Insurance Portability and Accountability Act in 1996, the Department of Labor revised the regulations as follows:

- Employers' representatives contacting the employee's health care provider must be a health care provider, HR professional, leave administrator or management official, but they *cannot* be the employee's immediate supervisor.
- Employers may ask health care providers only for information required by the certification form.
- The DOL created separate optional medical forms for the employee and cover family members.

### Light Duty

The new regulations provide that time spent performing "light duty" work does not count against an employee's FMLA leave entitlement, and the employee's right to restoration is held in abeyance while s/he performs light duty.

### Individual Liability

The courts have recently held that supervisors may be sued in their individual capacity in cases where employees allege violations of the rights under the FMLA. See, e.g., Hayduk v. City of Johnstown, 580 F.Supp.2d 429 (W.D. Pa. 2008)(city manager could be sued, in his individual capacity, for alleged violations of city employee's rights under Family and Medical Leave Act (FMLA), given that city manager, who had sole power to hire and fire, was employed by city to act in its interest, that city manager acted directly on employee when he fired him, and that reasons given by city manager for employee's termination demonstrated that city manager at least purported to have been acting in city's interest when he fired employee).

The above changes are not exhaustive. It is recommended that your employment policies be reviewed to ensure compliance with these laws, especially in a time when the rights of government employees are being broadened by Congress and the courts. The attorneys at Siana, Bellwoar & McAndrew would look forward to advising your municipality regarding these important employment laws.

## Firm News

**John J. Mahoney, Esquire** joined Siana, Bellwoar & McAndrew, LLP as a partner in January 2009. Mr. Mahoney has extensive experience in municipal land use law, especially zoning, subdivision and land development applications and approvals and related litigation. John is admitted to practice in the Commonwealth of Pennsylvania, the U.S. District Courts for the Eastern and Middle Districts of Pennsylvania, the U.S. Court of Appeals for the Third Circuit, and the United States Supreme Court.

**Christopher P. Gerber, Esquire** presented a municipal employment law seminar on behalf of the Chester County Association of Township Officials at the Association's annual convention at the Mendenhall Inn on November 6, 2008. The program offered practical guidance to municipal officials on how to improve the management of their labor force and to raise awareness of the exposure to costly and disruptive litigation that should be avoided with the observance of proper protocol. Mr. Gerber addressed such topics as "hostile work environment" and retaliation claims, how to investigate claims of discrimination, and how to shield municipalities with effective personnel policies.

**Michael G. Crotty, Esquire** has been appointed to the Planning Commission of Upper Providence Township, where he has resided for the past six years.



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**The  
Municipal  
Liability  
Update**

This newsletter is a publication of SIANA, BELLWOAR & MCANDREW, LLP intended to alert the recipients to new developments in municipal law. It does not constitute legal advice or a legal opinion on any specific facts or circumstances. The contents are intended as general information only. You are urged to consult a lawyer concerning your situation and specific legal questions you may have.

SIANA, BELLWOAR & MCANDREW, LLP is a full-service law firm located in Chester Springs, Pennsylvania. The firm's areas of practice include municipal liability, employment practices, corporate and partnership law, commercial and general litigation, professional malpractice, real estate, land development, zoning, workers' compensation and estate planning. In addition, our practice extends to representation of clients in disputes including complex commercial litigation as well as arbitration and other forms of alternative dispute resolution. The firm is committed to providing quality service in the representation of municipalities, police departments, fire departments, public officials and other insureds and in matters involving risk management and loss control. The firm emphasizes proactive involvement by municipalities and other insureds in risk management and loss control to avoid unnecessary expenses and costs associated with claims.

Members of the firm are available for seminars and consultation.  
For further information about these, contact Stephen V. Siana, Esquire at (610) 321-5500 or [ssiana@sianalaw.com](mailto:ssiana@sianalaw.com).

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