



FROM GARAN LUCOW MILLER'S MUNICIPAL LAW DEPARTMENT

GOV LAW

Monthly Publication for Michigan Cities, Townships, Villages and Schools

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From the Editor
by John J. Gillooly

Patronage Dismissals:
When Are They Constitutional?
by Jami E. Leach



Complimentary Seminars

For more than 60 years, Garan Lucow Miller has been providing its clients with what we call "continuing client education". By teaming up with you and

keeping track of current legal issues, many legal expenses are often reduced.

Members of Garan Lucow Miller are on the road nearly every month educating leaders in government, business and the insurance industry about current trends in the law. Our complimentary seminars are widely known as an important tool in recognizing legal trends. Here are a few of our upcoming seminars:

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- Freedom of Information Act Seminar, February 16, 2005; Lansing, MI.
- Public Act 425 - Economic Development Projects Seminar, March 7, 2006; Lake Odessa, MI
- Auto Negligence and Worker's Compensation Seminar, March 30, 2006; St. Louis, MO
- Auto Negligence and Worker's Compensation Seminar, March 31, 2006; Kansas City, MO

We can also tailor a seminar to meet your specific needs. Please feel free to call me for further details at 313.446.5501. All our best.

After each election, employment decisions are made. Whether to fire, refuse to rehire, or to hire must be carefully thought out. Ending someone's employment because of political affiliation is referred to as a patronage dismissal.

In general, patronage dismissals are unconstitutional. However, party affiliation may be an acceptable requirement for some types of government employment. *Branti v. Finkel*, 445 U.S. 507 (1980). In order to succeed in such a claim, a plaintiff must prove that he or she was discharged because of his or her political affiliation. The burden then shifts to the defendant to prove that the plaintiff's job is of the type that would qualify for an exception to the general rule. The Court in *Branti* described the types of positions that would qualify for the exception as policymaking positions. The Sixth Circuit Court of Appeals interpreted *Branti* by outlining four categories that qualified for the exception:

- **Category One:** positions specifically named in relevant federal, state, county, or municipal law to which discretionary authority with respect to the enforcement of that law or the carrying out of some other policy of political concern is granted;
- **Category Two:** positions to which a significant portion of the total discretionary authority available to category one position-holders has been delegated; or positions not named in law, possessing by virtue of the jurisdiction's pattern or

practice the same quantum or type of discretionary authority commonly held by category one positions in other jurisdictions;

- **Category Three:** confidential advisors who spend a significant portion of their time on the job advising Category One or Category Two position-holders on how to exercise their statutory or delegated policymaking authority, or other confidential employees who control the lines of communications to Category One positions, Category Two positions or confidential advisors;
- **Category Four:** positions that are a part of a group of positions filled by balancing out political party representation, or that are filled by balancing out selections made by different governmental agents or bodies.

After an election, be very careful about changing a person's employment status. When in doubt, consult with your municipal attorney before any action is taken. Planning ahead and getting much needed legal advice before taking action will save everyone a lot of time and money in the long run.

Michigan Supreme Court Decides Issue of Non-Employers' Liability for Sexual Harassment by Thomas Paxton



In a case decided on July 26, 2005, the Michigan Supreme Court, in a 4 to 3 decision, held that a common law claim for negligent retention could not be premised upon workplace sexual harassment, and a cashier could not bring claim for sexual harassment against company under the Act. *McClements v. Ford Motor Company*, 473 Mich 373 (2005).

The plaintiff was a cashier with AVI Food Systems which operated three cafeterias at the Ford Wixom Plant. Plaintiff sued Ford Motor Company as a result of alleged sexual harassment by one of Ford's employees. The plaintiff claimed that a supervisor at the plant sexually harassed her. The plaintiff also alleged that Ford should have known of his propensities given his convictions for

sexually related crimes. The plaintiff brought an action based upon two theories: 1) that Ford Motor Company was negligent in retaining the supervisor as an employer given its knowledge of his sexual propensities and 2) that Ford Motor Company was liable to pay damages under the Michigan Elliot Larsen Civil Rights Act for the sexual harassment of the plaintiff. Ford alleged that it could not be held liable for a "common law" tort of negligence which was based predominantly on an action created by a statute, the Michigan Elliot Larsen Civil Rights Act. The court also held that while the Elliot Larsen Civil Rights Act allows the plaintiff to bring an action against a non-employer defendant, it can only do so if the plaintiff can establish that the non-employer defendant "affected or controlled a term, condition, or privilege of the worker's employment."

In the *McClements* case, the court found that the plaintiff had not demonstrated that Ford controlled the terms, conditions or privileges of her employment. They found that clearly the only entity that had such control was AVI Food Systems.

In a footnote, the Court made an important distinction which could affect many employers. Analogizing the instant case with a situation where a secretary works for a temporary employment agency, the court said "there is little question that the employer at the office would dictate the terms, conditions, or privileges of her employment with the temporary employment agency, at least during the dependency of her temporary employment." Therefore, the Court is making a distinction and it seems to be allowing claims by what otherwise may have been termed "leased" employees and those working for temporary and contract employment situations. It appears that the Court has not attacked the validity of the "joint employer" theory which allows liability against two separate entities as a joint employer. Rather, the Court seems to indicate that they will focus on the issue of control over a term or condition of the plaintiff's employment as a definite test for liability.

Employers with non-employee situations should re-examine their handbooks and employment policies to determine the actual amount of control and power to affect a term and condition of employment.