

## CONFLICTS REPRESENTING PUBLIC EMPLOYEES

- I. Obvious Conflicts of Interest Requiring Separate Representation
  1. Village Has Already Disciplined Employee for Underlying Incident.
    - Example: Police department conducts internal investigation into incident and subsequently disciplines officer for misconduct.
  2. Village Policymakers and/or Named Employees Have Different and Conflicting Accounts of Underlying Incident.
- II. The Public Official Punitive Damage Crisis
  1. Damages Available in Civil Rights Cases.
    - a. Compensatory damages – make plaintiff whole.
    - b. Punitive damages – punish and deter future misconduct.
  2. Punitive Damages Sought in Most Every Case – Usually Within Jury’s Discretion.
    - Intentional misconduct not necessary for punitive damages – *Smith v. Wade*, 461 U.S. 30 (1983).
    - Did employee act with reckless disregard of subject’s rights.
  3. Large Punitive Awards Occurring with Greater Frequency.
    - a. *Waits v. Chicago* (\$15,000 in compensatory; \$2 million in punitive [to \$45,000 punitive on remittur]).

- b. *Martinez v. Mt. Prospect*, 92 F. Supp. 2d 780 (N.D. Ill. 2000) (\$179,000 compensatory; \$1 million punitive).
- c. *Comanda v. Country Club Hills*, No. 99 C 1708 (N.D. Ill. Jan. 12, 2001) (\$3.5 million compensatory; \$9 million punitive).
- d. *Bull v. City of Wheaton*, No. 98 CV 7583 (N.D. Ill. Jan. 12, 2001) (\$67,420 compensatory; \$400,000 total punitive [to \$134,840 on remittur]).

4. Problem of Punitive Damages Unique to Public Officials.

- a. Private Sector – employment discrimination cases – Title VII of Civil Rights Act of 1964 – 42 U.S.C. § 2e *et seq.*
  - Individuals cannot be sued under Title VII, only the entity. *Williams v. Banning*, 72 F.3d 552 (7th Cir. 1995).
  - Businesses under 15 employees cannot be sued under Title VII. 42 U.S.C. § 2000e(b).
  - Combined compensatory/punitive damage caps on companies of 15 or more employees 42 U.S.C. § 1981a(b).
- b. Public Sector – § 1983 civil rights cases.
  - Municipalities cannot be sued for punitive damages – *City of Newport v. Fact Concerts*, 453 U.S. 247 (1981).
  - Only individuals can be sued for punitive damages in public sector lawsuits.

- No caps on punitive damages available against public officials.
5. If Sued, Understand Employee's Right to Independent Counsel.
    - *Seibert v. Illinois Municipal League Risk Mgt. Assoc.*, 223 Ill. App. 3d 864 (4th Dist. 1992) – Presence of claim for punitive damages entitles officer to separate counsel paid for by the association.
  6. Nature of the Allegations in Complaint May Determine Whether Employee Should Be Entitled to Separate Counsel.
    - a. Waiver issue.
    - b. Continuous obligation to revisit the issue of whether employee should be provided separate counsel.
  7. Understand Your Coverage – Insurance or Risk Pool.
    - a. Traditional insurance exclusions.
    - b. Risk pool – contractual waiver of conflict.
      - *Village of Lombard v. Intergovernmental Risk Management Association (IRMA)*, 288 Ill. App. 3d 1003 (2d Dist. 1997) – IRMA contract properly allows for “no coverage – no defense” of punitive damages claim.
- III. Economic Effect of § 1988 Attorney Fees on Civil Rights Litigation
1. Insurance/Risk Pool Considerations.
  2. Settlement/Judgments.