

## Recent Trends in Human Resource Management

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## Employment Laws and the Public Sector Employer: Lessons to Be Learned from a Review of Lawsuits Filed against Local Governments

*Numerous aspects of the day-to-day operations of local governments are subject to legal scrutiny; public managers and officials must be keenly aware of the legal rights and protections that extend to both citizens and employees of local governments. This research evaluates several areas of concern in the human resource administration of municipal governments with respect to the management of public employees within the protections set forth by the legislative and judicial branches of the federal government. Sample cases filed from 2000 to 2007 against local governments in Tennessee involving Title VII violations, retaliation, hostile work environment, Family and Medical Leave Act violations, and other employee grievances are detailed. The intent of this analysis is to highlight many of the laws and legal principles that relate to municipal human resources management and to provide scholars and practitioners with a brief overview of the liabilities that may arise from the employment relationship between local governments and their employees.*

Many of the laws established in this country, especially those defined by the U.S. Constitution, have been used to protect the rights of our citizenry from infringement by the government; however, there are times when the actions of federal, state, and local governments and their employees violate these protections in the provision of services, the enforcement of the laws, and the management of government employees. Yet the legal accountability of the government unit and its staff may depend on the branch, circumstances, and outcome of the violation. The federal government has always possessed sovereign immunity and cannot be sued unless it has waived this immunity or has consented to the suit; the Eleventh Amendment to the Constitution grants similar sovereign immunity to the states.<sup>1</sup> Local governments, however, lack protection from most court proceedings because of the U.S. Supreme Court's interpretation that only states and arms of the state possess immunity from suits

authorized by federal law (Durchslag 2002). This Court's long-standing precedent has established that political subdivisions of the states (counties, municipalities, school districts, and other local entities) are not entitled to Eleventh Amendment immunity.<sup>2</sup>

In 1946, Congress passed the Tort Claims Act, which allowed citizens to sue their government for injuries caused by the negligent action of federal employees. Most state governments followed with similar statutes. Historically, public employees have been protected as individuals from constitutional torts by the doctrine of absolute immunity established under American common law (Rosenbloom and Kravchuk 2005). This doctrine was reexamined by the courts in the 1970s as a result of the expansion of both individual constitutional rights and civil liability in the American legal system (Ricucci 2006). While the Civil Rights Act of 1871 (amended and codified in 42 U.S. Code, section 1983) was enacted after the Civil War to protect African Americans in the South from abuses by the Ku Klux Klan, litigation under this statute was fairly uncommon until 1961. In *Monroe v. Pape* (365 U.S. 167 [1961]), the Supreme Court held that local governments were wholly immune from suit under 42 U.S.C. § 1983, which imposes civil liability on every "person" who deprives another of his or her federally protected rights. The Court reasoned that Congress had not intended the word "person" in this section to apply to municipalities. This case was later overturned in *Monell v. Department of Social Services of the State of New York* (436 U.S. 658 [1978]), in which the Court determined that local governments, municipal corporations, and school boards were "persons" subject to liability under § 1983 and were not wholly immune

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from § 1983 suits. This decision also stated that local government officials could be sued in their official capacity as "persons" under § 1983 in those cases in which a local government would be subject to suit in its own name. This section also allows

individuals to sue state officials in state or federal court for civil rights violations. The doctrine of absolute immunity has been replaced by qualified immunity for many employees of the public sector and still protects government officials performing discretionary functions as long as their actions do not violate clearly established law. Qualified immunity protects public officials in all levels of government from civil suits only if they have acted reasonably and in good faith (Ricucci 2006). However, if a state or local government official violates a federally protected right of an individual, such as those defined in the First Amendment, the Fourteenth Amendment, and the equal protection clause of the Constitution, civil action for the deprivation of rights can be initiated and redress sought through the court system.

Numerous aspects of the day-to-day operations of municipalities have attracted legal scrutiny; lawsuits and judgments against municipalities, municipal employees, and elected officials have increased dramatically over the last several years in many functional areas as a result of the ruling in *Monell* (LaBrec and Foerster 1985). Third-party liabilities arising from intentional or unintentional torts, statutory liabilities, and contractual liabilities present a serious threat. Also, individuals may file a case against the municipality alleging negligence of its officials or employees. In addition, routine human resource functions such as recruitment, selection, promotion, performance appraisals, and merit systems have the potential for legal scrutiny, jury trials, compensatory and punitive damages, and other burdens imposed under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Age Discrimination in Employment Act, the Americans with Disabilities Act (ADA), the Equal Pay Act, the Fair Labor Standards Act, the Family and Medical Leave Act (FMLA), and tort theories such as defamation, misrepresentation, and negligence. While these acts have been implemented to protect employees from discrimination and arbitrary management decisions and focus personnel decisions on job qualifications and job related actions, the resulting increase in civil rights and employment case law has also made it more difficult for employers to take justified action against their employees (Woodard 2005).

This research evaluates several areas of concern in the human resource administration of municipal governments with respect to the management of local government employees within the protections set forth by the legislative and judicial branches of the federal government. It is inevitable that most local governments will experience some form of legal scrutiny

regarding their human resource operations. Decisions in recruitment and selection, promotion, discipline, and dismissal often fuel discrimination and other types of lawsuits by disgruntled applicants, current employees, and former employees. In many cases, the nature of the employment relationship and the nature of the employment decision are factors in determining whether a dispute has actual legal merit. An overview of selected laws and legal principles that pertain to the nature of the employment relationship between municipal governments and their employees is included in this analysis. In addition, select laws and legal principles that describe the potential liability for employment discrimination are discussed. Sample cases filed against local governments in Tennessee involving Title VII violations, retaliation, hostile work environment, Family and Medical Leave Act violations, and other employee grievances are detailed in this study to illustrate the liabilities that may arise for municipalities in the employment law arena.

### Public Sector Employees and Their Employers

The employment relationship between public sector employees and public entities can be very different from the employment relationship between private sector employees and private entities. Most individuals employed in the private sector are subject to an at-will employment relationship with their organization. Employment at will allows either party to terminate the work relationship at any time. This term is derived from the court decision in *Payne v. Western and Atlantic RA Company* (82 Tenn. 597 [1884]), which held that an employer in the private sector does not have to provide cause to an employee who is terminated (Patton et al. 2002). At-will employment often prevents private sector employees from claiming a

property right in their positions within the organization. Yet the private employer's discretion regarding termination is not entirely without limits. Employers may be found liable by the courts in cases in which there may be an implied contract or in which the employer terminates an employee after the individual complains of harassment or accuses the employer of some other form of misconduct involving discrimination or retaliation. However, with at-will employment arrangements, the employee who challenges an arbitrary discharge shoulders the burden of proof in the judicial proceeding; even employees who have legitimate claims may be discouraged from pursuing legal recourse because of the costs, time requirements, and justifications required (Gertz 2006).

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Most public sector employees, however, are privy to a unique set of legal protections guaranteed by several federal and state laws. The Constitution often protects the public sector employee's rights to freedom of speech and association, privacy, equal protection, and due process, just as it protects these same rights of all citizens; the Supreme Court has continued to rule that public employees have substantive constitutional rights and protections against the actions of government employers (Rosenbloom 2007). In addition, a civil service employee is considered to have a bona fide property right to his or her position after he or she has progressed beyond the probationary term of employment (Patton et al. 2002). Termination of a civil employee by a federal, state, or local government requires just cause that in many cases must be viewed as indisputable if the employee files a wrongful discharge claim against the government employer. At the present time, only a handful of states, including Florida, Georgia, and Texas, have instituted substantial reforms to the civil service system, such as at-will employment relationships that aim to increase executive control over public employees (Cogburn 2006).

Over the past two decades, these at-will employment initiatives and a wave of other reforms have taken place, aimed at enhancing the efficiency of the public sector and the control that government has over it. New Public Management and its accompanying changes have attempted to make public entities function similar to the private sector. Debureaucratization, decentralization, and changes in career civil service have been central themes in this reinventing government movement (Cogburn 2000; Hou et al. 2000; Kearney and Hays 1998; Kellough 1999; Kellough and Selden 2003). Deregulation of government personnel administration has been suggested and implemented to alleviate notable concerns in the traditional civil system, such as undeserved tenure, the rewarding of seniority rather than merit, and certain difficulties associated with employee discipline (Cogburn 2000). Proponents suggest that at-will employment enhances governments' efforts to make their employees more accountable for performance and eases legal restraints on the termination of public employees who are poor performers or discipline problems. However, concerns regarding program implementation, job security, work environment, administrative accountability, and performance of civil service reforms are still being debated as to whether these private sector approaches offer significant opportunities for government employers to overcome employee protections under the civil service system and enhance public sector employee responsiveness, productivity, and management (Battaglio and Condrey 2006; Bowman 2002; Bowman et al. 2003; Condrey 2002; Hays and Sowa 2006; Kearney and Hays 1998; Kellough 1999; Nigro and Kellough 2000).

Human resource areas of legal concern in the public sector environment regarding 42 U.S.C. § 1983 are very similar to those found in the private sector and often include hiring and promotion processes, disability accommodations, and hostile work environment or retaliation claims. Hiring decisions may subject the local government employer to allegations of discrimination based on race, sex, or age. Also, claims of disparate treatment or disparate impact may emerge after recruitment and selection takes place. Disparate treatment involves intentional discrimination by the employer that results in improper distinctions among individuals based on a protected status. Disparate (adverse) impact is the unintentional discrimination that arises from employment practices that appear neutral but adversely affect those with protected status. The overall goal of the local government hiring process should be to identify and select the applicant with the most appropriate qualifications for the vacancy within the municipality. However, just consideration must be given to individuals who fall within the protected classes established by Title VII of the Civil Rights Act of 1964 and other acts, including the 1967 Age Discrimination in Employment Act and the Americans with Disabilities Act of 1990 (see table 1). Affirmative action also requires that federal government agencies and contractors not only refrain from discriminating against minority individuals in their employment practices but also take steps to actively recruit minority individuals for employment (Kellough 2006). Both public and private sector employers are also liable if discrimination occurs in their promotion, training, pay, benefits, discipline, and termination processes.

Protection from sexual harassment in the workplace also falls under Title VII. Sexual harassment is defined by the Equal Employment Opportunity Commission as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment" (EEOC 2007).

This statute applies to employers with 15 or more employees, including federal, state, and local governments. Municipalities are expected to encourage and maintain work environments free of sexual harassment by implementing no-tolerance policies that are effectively communicated to employees, providing sexual harassment training for employees, establishing a complaint and grievance process for employees, and making plans for immediate and appropriate action in response to employee complaints (EEOC 2007). Both public and private employers are viewed by the courts as liable for the sexual harassment actions of their

**Table 1** Employment Laws and Statutes

Laws and Principles	Summary
Civil Rights Act of 1964 Executive Order 10925 (1961)	Title VII prohibits discrimination based on race, color, sex, religion, and national origin. Prohibits federal government and its contractors from employment discrimination because of race, creed, color, or national origin and requires that these employers take affirmative action in employment practices.
Executive Order 11246 (1965)	Prohibits the federal government from contracting with any public entity or private entity found to have personnel policies that discriminate based on race, color, religion, or national origin.
Executive Order 11375 (1967) Age Discrimination in Employment Act (1967)	Prohibits sex as a basis of discrimination for the federal government and its contractors. Prohibits employment discrimination of individuals age 40 and over.
Equal Employment Opportunity Act (1972)	Prohibits discrimination and extends affirmative action policies to state and local governments and prohibits discrimination by private sector employers with 15 or more employees.
Americans with Disabilities Act (1990)	Prohibits discrimination in employment based on a known physical or mental impairment against a qualified individual with a disability.
Older Workers Protection Act (1990)	Amendment to Age Discrimination in Employment Act that broadened discrimination to include distinctions that may be made in employee benefits based on age and prohibited such actions.
Civil Rights Act of 1991	Allows jury trials and compensatory and punitive damages in discrimination cases. Also alters the burden of proof and other technical aspects of some cases.
Family and Medical Leave Act (1993)	Individuals who are determined eligible may take up to 12 weeks of unpaid personal leave per year for certain medical reasons. After this absence, the covered employee is entitled to return to the same position or another position that has equal pay, benefits, and working conditions.

employees. In addition to claims of sexual harassment, allegations of a hostile work environment may arise if this conduct interferes with the employee's work and creates an offensive work environment. Retaliation may also be charged if a government employee is treated differently once he or she has reported an alleged misconduct or violation of policy by another

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government employee or official. Local government administrators must be very familiar with these legal rights and protections, or they put themselves at risk for allegations of discrimination and misconduct in their human resource policies and actions. The following section details actual cases that have been filed against local governmental entities in the state of Tennessee by potential, current, and former employees who have alleged violations of several of these laws and legal principles.

### Case Studies

The federal court cases for this research study were found through a search of Public Access to Court Records (PACER, <http://www.pacer.psc.uscourts.gov>), which listed more than 350 court cases that were filed from 2000 to 2007 against public entities in Tennessee within the U.S. district court system and the U.S. court of appeals. The search was limited to cases that alleged employment discrimination in hiring, promotion, and firing; violations of the Fair Labor Standards Act; and violations of the Americans with Disabilities Act.<sup>3</sup> Detailed information for several of these cases was found in a search of Lexis-

Nexis Academic. This information included the prior history of the case, opinion, and disposition of the court. The lawsuits that are included in this discussion distinctly illustrate several of the legal issues that local government entities may encounter in their daily personnel operations. Both court decisions in favor of the

municipality and against the municipality are presented.

### Discrimination in Hiring

Numerous cases found during this time period alleged discrimination in the hiring, promotion, and termination decisions of several municipalities in Tennessee. One individual brought suit against a municipality under the Americans with Disabilities Act and the Vocational Rehabilitation Act of 1973 alleging that the city had refused to hire him as a police officer because he was infected with the human immunodeficiency virus (HIV) (*Holiday v. City of Chattanooga*, U.S. Court of Appeals for the Sixth Circuit, no. 98-5619, 2000). In this case, the city of Chattanooga had extended this applicant an employment offer that was contingent on the passing of a physical examination required by state statute. During the physical examination, the potential employee informed the examining physician that he was HIV positive. As a result of this disclosure, the medical examiner concluded that the individual was not strong enough to withstand the physical requirements of the police officer position; he advised the

municipality that this applicant did not pass the medical examination.

The plaintiff had previously passed a written examination and completed a physical agility test for the city a year prior to being invited to interview for the open position. After receipt of the medical examination report, the administrator of the city's Department of Safety decided to withdraw the offer, and the city's personnel director informed the applicant that the municipality could not hire him because other employees and the public would be put at risk. The potential employee filed suit in the district court alleging that the city had violated the Americans with Disabilities Act and the Rehabilitation Act by basing this hiring decision on his HIV status.

The U.S. district court granted summary judgment to the city, noting that it had withdrawn its conditional offer of employment only because the plaintiff could not pass the physical examination mandated by state law, not because of any disability this individual possessed. The court stated that the city had a right to reasonably rely on the physician's report as substantive evidence that the applicant could not meet the physical requirements of the police officer position.

The U.S. court of appeals, however, reversed this decision. The appellate court ruled that the district court had erred in accepting the physician's report as dispositive evidence of the individual's alleged inability to perform as a police officer. The plaintiff had presented sufficient evidence to the appellate court that this physician had failed to complete the individualized determination required by the ADA and had determined the applicant to be unqualified because of his HIV status. The ADA mandates an individualized inquiry in determining whether an employee's disability or other condition disqualifies him or her from a certain position. This inquiry must evaluate the individual's actual medical condition and the impact, if any, that this condition may have on the individual's ability to perform the requirements of the position. The court of appeals also stated that a rational trier of fact could conclude that the municipal official had withdrawn the employment offer because of the fear that this individual would transmit the human immunodeficiency virus while employed by the city. As a result of the evidence presented in this case, the U.S. court of appeals reversed the district court's grant of summary judgment on behalf of the city.

Another suit involving alleged age and sex discrimination was brought against the city of Cookeville and its police chief when the city failed to hire a former employee who had voluntarily resigned from two positions previously held with the city (*Andrews v. City of Cookeville*, U.S. Court of Appeals for the Sixth Cir-

cuit, no. 01-6413, 2003). This individual had resigned the first time when the municipality requested that the employee move into the city while he was still attending school in an adjacent community. The employee had resigned a second time to accept a position as a criminal investigator in a public defender's office. When the municipality had an opening for a police officer, the plaintiff applied for the position, passed the written and agility examinations, and was interviewed. After these three segments of the application process were completed, the individual was ranked eighth and was not offered employment.

As a result of this hiring decision, the plaintiff brought suit against the city and its police chief alleging age and sex discrimination. The age discrimination claim was filed as a result of a comment made by the police chief during the applicant's agility examination, in which the chief compared this individual to George Foreman because he did not know when to quit. The sex discrimination claim resulted when the position was offered to a female. The police chief had allegedly informed the plaintiff that the female applicant was hired because she was a qualified female who ranked close to the top in the interview process. After this opening was filled, the city also hired three additional officers out of the same applicant pool, one of whom had allegedly scored lower on the oral interview than the plaintiff. The plaintiff claimed to be more qualified because of his education, training, and experience. After hearing the facts of this case, the federal district court granted the city's motion for summary judgment and dismissed the action.

The plaintiff appealed the judgment on rejection of the age discrimination claim to the U.S. court of appeals. In its review of the decision, the appellate court found that the district court appeared to have accepted that the plaintiff had presented enough evidence to satisfy a prima facie burden for an age discrimination claim. The city argued that the plaintiff was not qualified for the police officer position because he had been designated ineligible for rehire after the second resignation of employment from the city. Both the district and appellate courts rejected the city's contention. The court of appeals found fault with the district court because it had only considered the city's hiring of the female applicant in its assessment of the city's nondiscriminatory reason for not hiring the plaintiff for the position. The district court did not consider the applicant who had scored lower on the oral interview than the plaintiff but was still offered a position with the city, nor did the district court offer an explanation as to why consideration of the facts were limited to the female hire. The appellant found fault with this omission and asked the court of appeals to consider the hiring of the applicant with the lower oral interview score, the police chief's reference to George Foreman, and the police chief's

participation in the hiring process as sufficient evidence for a trier of fact to disbelieve the city's nondiscrimination explanation for its actions. The appellate court agreed with the appellant's contentions, reversed the district court's decision, and remanded the case for further proceedings on the age discrimination claim.

The city of Clarksville was named defendant in a case filed by a plaintiff who alleged the city had used discrimination in its employment decision not to rehire him (*Tartt v. City of Clarksville*, U.S. Court of Appeals for the Sixth Circuit no. 04-5925, 2005). The plaintiff had previously been employed by the police department and had resigned when disciplinary action to terminate his employment because of several reprimands and a violation of department rules for neglect of duty was initiated. This individual met with the police chief three months later and requested to be rehired; however, his request was denied.

In a suit filed with the U.S. district court, this individual argued that the police department was guilty of race discrimination in its refusal to rehire and that he had been discriminated against during his tenure with the department. Mr. Tartt noted that eight Caucasian officers had resigned and been rehired by the city within a year. Also, the plaintiff claimed that this discrimination had contributed to a forced resignation from the police force. The district court found that the plaintiff had put forth enough evidence to make out a prima facie case of racial discrimination against the city under *McDonnell Douglas Corp. v. Green* (411 U.S. 792, 36 L.Ed. 2d 668, 93 S.Ct. 1817 [1973]).<sup>4</sup> The city did concede that the plaintiff had established the first three elements required; for the purposes of summary judgment, the court concluded that the plaintiff had demonstrated a genuine dispute of material fact regarding less favorable treatment in the request for rehire. However, the court ruled that the plaintiff had not presented sufficient evidence to rebut the city's claim that rehire was not enacted because of the nondiscriminatory reason of significant disciplinary and personal problems. The eight officers previously rehired were not similarly situated employees with disciplinary problems. As a result, the district court granted summary judgment to the city.

### **Discrimination in Promotion**

Other court cases have arisen as a result of the promotion processes utilized by certain municipalities in Tennessee. The Memphis Police Department was sued over a process that was implemented to promote several patrol officers to the rank of sergeant (*Johnson et al. v. City of Memphis*, U.S. Court of Appeals for the Sixth Circuit no. 01-6111, 2003). This process initially consisted of four components: (1) a written test (20 percent), (2) a practical exercise test (50 percent), (3) performance evaluations for the previous two years (20 percent), and (4) seniority points (10 percent).

The city informed candidates that they would be ranked based on total scores and the promotions would be based on these rankings. Allegations emerged that the city had released study materials to a select group of individuals prior to the administration of one of the tests. At first, the city denied that any part of the promotional process had been compromised. However, when the news media produced a copy of the practical exercise test during its administration, the city acknowledged that the validity of this testing component had been jeopardized. This test was eliminated from the overall assessment, and the weight of both the written test and the performance evaluation were increased to 40 percent each.

Several individuals claimed that the city had intentionally discriminated against African American and Hispanic candidates by increasing the weight of certain components and eliminating other segments in the promotional procedure after the city determined the process had been compromised. Caucasian plaintiffs claimed they had been discriminated against because unauthorized study materials for the practical exercise component of the test had been released to a select group of African American candidates. At least 52 individuals brought suit under Title VII against the municipality over this process.

Two plaintiffs in this case filed suit alleging racial discrimination and violation of the Fourteenth Amendment. These plaintiffs requested that (1) any promotions based on this selection process be permanently suspended, (2) the city be required to create and implement a new promotional process, (3) an individual be appointed to oversee the development and implementation of this process, and (4) all candidates be allowed to review their scores for accuracy before the promotional list was issued. The district court denied these requests, and immediately the city ranked the previous candidates according to the revised process and promoted the top 63 candidates to the rank of sergeant. Two months later, the plaintiffs amended their complaint and added 50 additional individuals who had not been selected for promotion in the previous process. These 52 plaintiffs requested the same relief but also asked that those individuals who had been promoted as a result of the flawed promotional process be required to compete in a new promotional process.

After review, the district court declared the city's promotional process invalid and granted the defendant leave to begin a new promotional process. Subsequently, the 51 sergeants whose promotions were rescinded also filed a complaint against the municipality requesting that the city be prohibited from demoting them or reducing their pay. As a result of the indiscretion that occurred in the original promotion process, the city subjected itself to two major employment

lawsuits—one alleging the intentional discrimination against African American and Hispanic plaintiffs by the elimination and increase in the weights of the written test and performance evaluation components, and the other for intentional discrimination against Caucasian plaintiffs for the advanced release of study materials to a select group of African American candidates in the promotion process. Consequently, the sergeants who had been awarded promotions based on this test were required to compete in a new promotional process, and the individuals who were shown to have received, used, and benefited from the unauthorized study materials were disqualified from this new process.

The city of Memphis was also named defendant in a lawsuit filed regarding its promotional process for sergeants to lieutenants on the police force. Several African American sergeants brought suit against the municipality alleging violation of Title VII of the Civil Rights Act of 1964. In this case, the district court ruled that the cutoff score for the city's written test, which was used as one criteria for promotion to lieutenant, discriminated against African American candidates (*Isabel et al. v. City of Memphis*, U.S. Court of Appeals for the Sixth Circuit no. 03-5912, 2005). In all, 120 sergeants competed for this promotion to lieutenant, including 63 African American and 57 Caucasian candidates. The promotional process consisted of a written test (20 percent), a practical exercise test (50 percent), performance evaluations from the previous two years (20 percent), and seniority points (10 percent).

The cutoff score for the written test was originally established at 70 percent. This requirement was a carryover from a prior agreement the city had with the police department, which was established in a memorandum of understanding and stated that a candidate must obtain a passing score of 70 on a written job knowledge test in order to be eligible for promotion to lieutenant. However, the proportion of minority candidates to nonminority candidates who passed the written test in the promotion process actually violated the EEOC's four-fifths rule. This rule states that "a selection rate for any race, sex, or ethnic group which is less than four-fifths (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact" (EEOC 2007).

The allocation of proof for a prima facie case involving disparate or adverse impact rests first with the plaintiff, who must establish that the employer's selection practice or device had a substantial impact on the protected group. The employer has the opportunity to

demonstrate that this practice or testing mechanism was job related or consistent with business necessity. The burden of proof then shifts back to the plaintiff, who must demonstrate that the employer refused to choose an existing alternative method that did not have a disparate impact on the protected class (EEOC 2007).

When the cutoff score of 70 was used for this test, the passing rate of minorities was less than four-fifths of the passing rate of nonminorities. A total of 19 of the 64 African Americans who took the exam achieved a score of 70 or higher (29.7 percent), while 38 of the 56 nonminority candidates who took the test achieved a passing score (67.9 percent). As a result, the selection rate for this test was calculated at 43.8 percent, which was in violation of the four-fifths rule. An industrial psychologist who had managed the test decided to eliminate nine of the test questions because he felt they were faulty; however, all candidates were given credit for answering the questions correctly so that the test would still be scored on a 100-point scale. Also, the psychologist determined that the cutoff score should be lowered to 66 in order to avoid any adverse impact. With these two modifications in the testing process, 98 candidates passed the test, including 47 African Americans; more importantly, the test did not violate the EEOC's four-fifths rule.

Four individuals who scored below 66 were not allowed to continue in the promotional process. As a result, these four applicants filed discrimination charges against the city. The case was based on other statistical analyses of the written test scores that revealed significant adverse impact on African American candidates, even though the EEOC's four-fifths rule was not violated. The plaintiffs' expert noted that a statistically significant difference in minority and nonminority candidates' scores did exist when the *t*-test and *z*-test were applied.<sup>5</sup> The district court concurred that the written test unlawfully discriminated against the African American sergeants and that the four plaintiffs were also entitled to promotion to lieutenant. This promotion was retroactive to the same date that the first group of candidates was promoted, and the plaintiffs were compensated for back pay and overtime, as well as attorneys' fees. When this case was appealed by the city to the U.S. court of appeals, the district court's judgment was affirmed in all respects.

Another group of individuals filled a lawsuit against this same city alleging they had suffered due process violations and racial discrimination in violation of the Fourteenth Amendment during the promotional process administered to individuals in the city's fire department (*Firefighters United for Fairness et al. v. City of Memphis*, U.S. District Court for the Western District of Tennessee no. 02-2431, 2005). The court

ruled for the city, however, in this case, finding that the plaintiffs' rights had not been violated. Several individuals alleged that they had suffered racial discrimination in their participation in the fire department's lieutenant and battalion chief promotional process. The promotional process for lieutenant consisted of three weighted components, including a written job knowledge test (22.5 percent), a practical video test (70 percent), and a credit for seniority (7.5 percent). The promotional process for battalion chief utilized results from a practical video test (48 percent), an in-basket exam (27 percent), a group interpersonal skills exercise (17.5 percent), and a credit for seniority (7.5 percent). These two processes were developed and administered by an industrial organizational psychology consulting firm contracted by the city. In all, 118 candidates for battalion chief and 541 candidates for lieutenant were involved in the promotional process. All information related to the promotional process, the review process, and other relevant issues were related to the city's fire department by the contracted administrator. The fire department was responsible for providing this information to the candidates. Before the first promotional roster was established, all candidates were allowed to review their transcripts, the answer key, and the videotape of their practical test for accuracy regarding transcription, scoring, and clerical errors. Specific concerns were addressed by the process administrator and changes were made if appropriate.

The plaintiffs in this case alleged racial discrimination against the city's fire department because several Caucasian candidates had been allowed to participate in the promotional process even though they had not been employed long enough at the required grade level at the time of testing. The plaintiffs also claimed that they had been denied procedural due process because the plaintiffs perceived that the city had not responded to or given them sufficient time to review the testing procedure and determine their correct scores. In this case, the U.S. district court determined that the plaintiffs had not sufficiently established a prima facie case of racial discrimination and that these plaintiffs had been afforded sufficient due process for obtaining a fair and accurate score.

### **Sexual Harassment and Hostile Work Environment**

Sexual harassment and hostile work environment claims have also been filed in the federal court system against numerous local governments. A sheriff's department in western Tennessee was named defendant in a case alleging sexual harassment, gender discrimination, and hostile work environment related to a female's employment by that department (*Rudd v. Shelby County*, U.S. Court of Appeals for the Sixth Circuit no. 04-5939, 2006). This individual claimed that she had been sexually harassed by a male coworker when he handcuffed her to a file cabinet,

rubbed against her, draped a belly chain around her neck, and asked her over the intercom if it was "too hot in the kitchen" for her. The female employee reported this harassment to a superior officer who referred her to the Internal Affairs Division, which began an investigation within five days of the incident. The plaintiff was allowed to work in another facility so that she would not come in contact with the coworker. As a result of the investigation, the male coworker was demoted in rank, suspended for 30 days without pay, and placed on probation for six months. This male individual appealed the department's actions and retired with full rank and pay during this appeals process. The female plaintiff resigned her position within two weeks of the harassment incident and filed suit alleging sexual harassment, gender discrimination, and a hostile work environment in violation of both Title VII of the Civil Rights Act and the Tennessee Human Rights Act.

The female plaintiff was awarded almost \$1 million in compensatory damages, back pay, and lost future wages by the jury that heard the initial case in district court. This decision was reversed, however, by the U.S. Court of Appeals for the Sixth Circuit. The appellate court examined the five elements set forth in *Blankenship v. Parke Care Centers, Inc.* (1213 F.3d 868, 872 [1997]), which stated that in order for an individual to prevail in a sexual harassment case involving a coworker, (1) the employee must be a member of a protected class, (2) the employee must have been subject to unwanted sexual harassment, (3) the harassment must have been based on the employee's sex, (4) the harassment must have unreasonably interfered with the employee's work environment and created a hostile work environment, and (5) the employer must have known or should have known of the charged sexual harassment and failed to implement prompt and corrective action. The appellate court concluded that even though the plaintiff satisfied the first four elements of this test, she did not satisfy the fifth. She had failed to prove that the department did not take prompt and effective corrective action. The court determined that the local government administration had demonstrated a good faith effort to safeguard the plaintiff when she was referred to the Internal Affairs Division and allowed to work in a separate facility. The appellate court concluded that the trial jury had erred in its decision and remanded the case for judgment in favor of the local government.

The city of Memphis also prevailed in a case involving alleged same-sex sexual discrimination. A plaintiff brought suit against the city's Housing Authority alleging discrimination on the basis of sex and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et. seq. and 42 U.S.C. § 1983 (*Terry v. Memphis Housing Authority*, U.S.

District Court for the Western District of Tennessee no. 05-2283, 2006). The male plaintiff had been employed by the housing authority as a field commander when he was allegedly harassed by a male supervisor. After the plaintiff rejected the unwelcome sexual advance, he contended that he was treated differently and subjected to several forms of retaliation including failure of the housing authority to pay his overtime wages, a threat of loss of his employment position, a written reprimand for inappropriate and unprofessional behavior, and failure to promote him to an open director's position. This individual filed a suit alleging violations of Title VII based on retaliation, failure to promote, and a hostile work environment.

The U.S. district court concluded that the plaintiff failed to state a valid retaliation claim because almost one year had passed between the single incidence of sexual harassment and the earliest alleged act of retaliation.<sup>6</sup> Also, evidence of a causal connection between the incidence of harassment and the adverse employment action was not established. Because the position in question pertaining to the failure to promote claim had not been filled, the plaintiff could not claim relief under Title VII. With regard to the hostile work environment claim, the court ruled that the plaintiff had not satisfied requirements for the Title VII discrimination claim of a hostile work environment. The plaintiff contended that the acts occurred because of his rejection of the supervisor's sexual advances rather than because of his gender. The court ruled that the acts that the plaintiff complained of did not include a sexual advance, nor was there any indication that the actions were related to rejection of the sexual advance that took place approximately 18 months before. As a result of these findings, the court ruled for dismissal of the case.

In another case involving sexual harassment and hostile work environment claims by a former female employee of a sheriff's department, Crockett County's motion for summary judgment was denied by the U.S. district court (*Harbison v. Crockett County*, U.S. District Court for the Western District of Tennessee no. 01-1373, 2003). This individual claimed that she was sexually harassed during her employment and then retaliated against after complaining of the alleged sexual harassment. The female plaintiff also stated she was constructively discharged from employment with the sheriff's department as a result of these allegations. The alleged sexual harassment occurred when the plaintiff was employed as a reserve deputy and part-time deputy for the department. A male employee allegedly began touching her and making sexually offensive remarks to her. The female employee reported these incidents to her supervisors, including the sheriff; however, no actions were taken against the male employee. The plaintiff also reported the

incidents to the county executive, and she was suspended from her duties pending further investigation. Less than one week later, the female employee resigned from the sheriff's department. The defendants in this case asked for summary judgment on the hostile work environment claim and contended that the alleged sexual harassment was not sufficiently pervasive to alter the conditions of her working environment or to create an abusive and hostile environment. Conduct of this type is not actionable under Title VII. The defendants also contended that the plaintiff was not subjected to any retaliation, even though the male employee was a supervisor to the plaintiff and he had threatened to make things difficult for the plaintiff if she did not engage in a sexual relationship with him. Additionally, the sheriff had allegedly threatened to fire the plaintiff depending on the results of the investigation. The court denied both of the defendants' motions because they could not offer a legitimate nondiscriminatory reason for their actions. The court also rejected the defendants' motion for summary judgment on the constructive discharge claim, concluding that a jury could find that a reasonable person would feel the need to resign from his or her position after allegedly being subjected to the actions that the plaintiff had endured. In this case, an order denying the defendants' motion for summary judgment was issued, and the case proceeded through U.S. district court.

#### **Family and Medical Leave Act**

Local government entities in Tennessee have also had employees or former employees file cases against them alleging violations of the Family and Medical Leave Act. A police officer filed a complaint against his former employer for alleged violations of his rights under the FMLA when the employer denied his intermittent leave to care for his infant daughter (*Maynard v. Town of Monterey*, U.S. Court of Appeals for the Sixth Circuit no. 03-5202, 2003). This employee had been absent from work for a period greater than three days and had refused to report back to work after being given two opportunities to do so. This individual also alleged sexual discrimination under Title VII, claiming he was fired because he was a male. The district court granted summary judgment to the defendants, and the plaintiff appealed this decision to the U.S. Court of Appeals for the Sixth Circuit. The appellate court determined that the plaintiff did not fulfill the requisites for filing a Title VII claim because this individual had failed to exhaust his administrative remedies with respect to the Title VII claim. Also, the plaintiff did not possess a right-to-sue letter from the EEOC, which was necessary to pursue a Title VII claim in district court.

The appellate court also found that the plaintiff had not reached an agreement with the employer regarding intermittent leave; therefore, he was not entitled

to take it in this manner. In addition, the plaintiff's claim that his termination was a violation of his FMLA rights was rejected because the plaintiff had been absent for a period of three consecutive work days, and this absence was unauthorized. The plaintiff had remained out of work additional days consecutive to this period while the employer advised him repeatedly to report to work. As a result of the plaintiff's actions, the employer considered that he had terminated his position voluntarily. The court of appeals agreed that the plaintiff's action constituted a voluntary resignation and that the former employee was not eligible to recover under the FMLA for an allegedly adverse employment action.

A former employee of another sheriff's department filed suit against this department for firing him because of excessive absenteeism, which was allegedly in violation of the FMLA, ADA, and Tennessee Human Rights Act (*Lackey v. Jackson County*, U.S. Court of Appeals for the Sixth Circuit no. 03-5193, 2004). The plaintiff was employed by the department as a corrections officer and had missed work on several occasions during 2000. The sheriff had informed the plaintiff in January of 2000 after his first absence of three days that he would need to furnish a doctor's statement any time he missed work because of an illness. The plaintiff furnished a doctor's excuse for two other incidences; however, several other absences were not documented in this manner. The sheriff terminated the plaintiff's employment in early August 2000 when the employee did not report to work on an assigned Saturday. The plaintiff contended that he had complied with the employer's notification process by notifying the sheriff's department prior to the start of his shift that he would not be in to work and the reason for his absence. This information was given to whichever individual had answered the phone.

After the plaintiff was terminated for excessive absenteeism, he filed a claim for unemployment compensation. In his response to questions regarding this separation, the plaintiff stated that he was fired because of absenteeism and tardiness and that the absences were attributable to the plaintiff's attendance at a meeting. In his charge of discrimination filed with the Tennessee Human Rights Commission and the EEOC, however, the plaintiff claimed that he had taken periodic medical leave from work because of several health problems, including chronic back pain, migraines, diabetes, and hypertension. In examining the facts of the case, the district court determined that

the plaintiff was an eligible employee entitled to FMLA protection; however, the plaintiff had failed to establish that he had a serious health condition under the FMLA. The plaintiff did not submit any evidence to the court that he had any of the illnesses he claimed. As a result, the district court granted the defendant's motion for summary judgment, and this decision was reaffirmed by the U.S. court of appeals.

## Conclusion

These sample cases present a brief glimpse of the legal proceedings that municipal governments, managers, and other public officials are often subject to regarding the day-to-day human resource functions that pertain to their employees. While the decisions cited in this study involve only local governments in Tennessee, the federal laws and their interpretations are applicable to local government units in all 50 states. The outcome of each case offers valuable insight into how the actions of municipal employees, supervisors, administrators, and elected officials across the United States can influence municipal liability in legal proceedings regarding Title VII of the Civil Rights Act, the Family Medical Leave Act, the Americans with Disabilities Act, and the Age Discrimination in Employment Act. A recent estimate states that almost 70 percent of Americans qualify under one or more protected classes defined by these antidiscrimination laws (Malos 2006). Local government administrators must be keenly aware of their current, former, and future employees' rights and protections in order to safeguard their departments and governments from the liabilities that can arise in the employment law area. This understanding often comes from both theory and practice; however, the field is characterized by constant changes in technology, employment laws and policies, workforce composition, and administrative ethics.

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New Public Management with its emphases on debureaucratization, decentralization, and civil service reform has attempted to make public sector entities function similar to those of the private sector; however, the implications for human resource management at all levels of government are yet to be fully determined.

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New Public Management, with its emphases on debureaucratization, decentralization, and civil service reform, has attempted to make public sector entities function similar to those in the private sector; however, the implications for human resource management at all levels of government are yet to be fully determined. The debate regarding civil service systems and at-will employment of public employees will continue as more state and local governments choose to declassify many of the traditional job positions of civil servants. At-will employment offers little or no job protection and eliminates the right that civil service employees have to terminate for just cause. The employment laws that

have been discussed in this analysis were enacted to protect all classes of employees from discrimination and arbitrary management decisions. Future research is required to objectively evaluate whether New Public Management and its accompanying changes have enhanced public sector employee responsiveness, productivity, and management without precariously altering public sector employer liabilities and public employee protections in the human resource policies and actions of state and local governments.

## Notes

1. In *Seminole Tribe of Florida v. Florida* (517 U.S. 44 [1996]), the Supreme Court held that Congress lacks the power under Article I of the U.S. Constitution to abrogate the states' sovereign immunity in federal court established under the Eleventh Amendment. The question as to whether Congress could use its Article I powers to abrogate a state's sovereign immunity from suits in its own courts was resolved in the Court's ruling in *Alden v. Maine* (527 U.S. 706 [1999]), which determined that Congress has no such authority under these circumstances also. This ruling maintained sovereign immunity for the states and limited congressional authority to pass legislation that uses state courts as a means of redress. The Supreme Court also held in *Kimel et al. v. Florida Board of Regents et al.* (528 U.S. 62 [2000]) that the Age Discrimination in Employment Act's abrogation of the states' Eleventh Amendment immunity exceeded Congress's authority under § 5 of the Fourteenth Amendment and that suits in federal court by state employees to recover monetary damages under Title I of the ADA were barred by the Eleventh Amendment (*Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 [2001]).
2. In *Board of Trustees of University of Alabama v. Garrett* (531 U.S. 356 [2001]), the Supreme Court also noted that Eleventh Amendment immunity does not extend to local government units such as cities and counties. In delivering the opinion of the Court, Chief Justice William H. Rehnquist noted that local government units do not possess immunity under the Eleventh Amendment and therefore are subject to private claims for violations of the ADA without the reliance of Congress on § 5 of the Fourteenth Amendment to assert this liability. The case cited as precedent was *Lincoln County v. Luning* (133 U.S. 529 [1890]), in which the Court reasoned that although a county is territorially part of a state, the county is a corporation created by that state and both private and municipal corporations may sue and be sued in all courts just as individuals. Over time, political subdivisions of the states have assumed many of the governing responsibilities exercised previously by the states;

however, the Supreme Court continues to maintain a distinction between the state and its local political subdivisions in its interpretation of the scope of the Eleventh Amendment. See also *Moor v. County of Alameda* (411 U.S. 693, 717–21 [1973]), *Mt. Healthy City School District Board of Education v. Doyle* (429 U.S. 274, 280 [1977]), and *Pennhurst State School and Hospital v. Halderman* (465 U.S. 89, 123 n. 34 [1984]).

3. The 350 cases identified through PACER are not considered by the author to be an all-inclusive list of cases filed against public entities in Tennessee during this time period. Of these 350 cases, 277 involved a city, town, or county government. The intent of this research was to illustrate through case study several of the legal issues that these local governments encountered. Statistical analysis of a more comprehensive data set is an excellent recommendation for future study.
4. In order to establish a prima facie case of racial discrimination under Title VII, a plaintiff or complainant must demonstrate (1) that he or she belongs to a racial minority, (2) that he or she applied and was qualified for a job or promotion for which the employer was seeking applicants, (3) that he or she was considered for and denied the position despite his or her qualifications, and (4) that the position remained open and individuals of similar qualifications were considered. Under *McDonnell Douglas*, the plaintiff has the initial burden of proving a prima facie case by preponderance of the evidence. If the plaintiff does establish a prima facie case, the burden shifts to the employer to articulate some legitimate nondiscriminatory reason for its action. The plaintiff must then demonstrate that the proffered reason was not the true reason for the employment decision (see *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 [1981]).
5. The *t*-test evaluated the difference in the mean scores of the minority (69.17) and nonminority candidates (75.59) and was determined to be significant by the plaintiffs' expert. The *z*-test measured statistical success for each group and demonstrated that Caucasian candidates had a passing rate of 90 percent as compared to the passing rate of 74.6 percent by minority candidates. The expert for the plaintiffs also testified that this difference was statistically significant.
6. 42 U.S.C. § 2000e-5(e)(1) requires that an aggrieved individual who seeks to file a Title VII claim in federal court first present a charge with the EEOC within 180 days after the allegedly unlawful employment practice occurred. If a discrimination charge is also filed with a state or local agency that has authority to grant relief regarding the employment practice, this time period is extended to 300 days.

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