

2013

Legal Questions from Georgia Librarians

Ten Case Studies

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Introduction

Public librarians and administrators in Georgia face legal dilemmas on a daily basis through service to the public, as employers, and because of a library's governmental status. The precise legal analysis applicable to a given issue is dependent on the facts. However, by reviewing the scenarios described in this document, librarians can learn the skill of "issue-spotting," the ability to recognize and anticipate situations that raise legal red flags. Many difficult legal entanglements may be avoided through planning and implementation of strategies to keep a library within the bounds of the law. Of course, there is never a guarantee that a library will not get drawn into litigation. But awareness of common legal quandaries and a plan to address them will put a library in the strongest possible position to face any legal challenge.

The questions below originated from public librarians in Georgia. In some instances, the facts have been embellished or modified in order to better illustrate legal principles.

Q: In the context of discipline and safety issues, when, if ever, can a library staff member touch a child who is not being supervised by a parent?

This question is best addressed from two different perspectives: (1) what is the obligation of a library staff member to aid or protect a child through physical intervention, and (2) what is the potential for liability if a library staff member physically touches a child to either shield the child or another from harm, discipline a child, or comfort a child.

In a strictly legal sense, there is no duty on a library employee to protect or aid a child through physical intervention. However, the “obligation to protect children from harm” has been recognized as one of the fundamental tenets of library policy (Rubin 186). According to Rubin, this policy stems from the broader obligation of society as a whole to protect those who are defenseless or vulnerable. Decisions about what steps to take to protect a child or any person from harm are best left to individuals on an incident-by-incident basis. The totality of the circumstances is crucial to how one will react, particularly the level of personal risk involved. However, library administrators should recognize and address the issue with employees, informing them that there is no duty imposed by law to come to the aid of children but reminding them of the library’s dedication to the well-being and safety of all library patrons.

On the opposite end of the spectrum, library employees must understand the potential for liability if they do lay hands on a child (or any person) to aid, assist,

comfort, or discipline. According to the policy of the American Library Association, librarians, unlike teachers, do not act *in loco parentis* (as one charged with a parent's rights, duties, and responsibilities). Usually this is discussed in terms of what responsibilities librarians have for monitoring a child's access to materials. However, by affirmatively rejecting this responsibility, librarians likewise give up rights they may otherwise have to discipline or supervise children. Therefore, there is no protection from liability that arises from the relationship between librarian and child as there is in the relationship of teacher and child.

The best way to assess potential for liability is to consider what legal causes of action (bases for suit) may arise when a library employee physically touches a child. Of course, in most instances the choice to physically intervene is made in the best interest of the child, and the outcome is a grateful parent; however, the American society is a litigious one, and it is wise to consider worst-case-scenarios in order to fully appreciate the risk of liability.

Assault and battery are the relevant tort actions that may arise in the event of an unauthorized touching. An assault occurs where all the apparent circumstances, reasonably viewed, are such as to lead a person reasonably to apprehend a violent injury from the unlawful act of another. It is the apprehension that gives rise to the cause of action of assault. An actual touching is thus not a necessary element of the tort of assault, it being necessary only to show an intention to commit an injury, coupled with the apparent ability to do so. The act of intentionally causing physical harm to another is civilly actionable as a battery.

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Because of the importance of one's right of the inviolability of his or her person, any unlawful touching, or unauthorized offensive contact, no matter how minimal, is actionable as a physical injury to a person.

Title With respect to liability of the employees themselves, they have a strong defense of immunity. Because library employees are public agents, they are immune from liability for their discretionary acts unless they are done with malice or intent to injure. The doctrine of official immunity "protects individual public agents from personal liability for discretionary actions taken within the scope of their official authority, and done without willfulness, malice, or corruption." Under Georgia law, a public officer or employee may be personally liable only for ministerial acts negligently performed or acts performed with malice or an intent to injure. *Cameron v. Lang*, 274 Ga. 122, 123(1), 549 S.E.2d 341 (2001).

Turning to the liability of the library itself, i.e., through a suit against the library board, another form of immunity, sovereign immunity, may provide protection. The Georgia Constitution of 1983 provides that the defense of sovereign immunity extends to the State and all of its departments and agencies. This provision has been construed as extending the defense to counties, *Gilbert v. Richardson*, 264 Ga. 744, 747(2), 452 S.E.2d 476 (1994), the Board of Regents, *Wilson v. Board of Regents of University System of Georgia*, 262 Ga. 413, 419 S.E.2d 916 (1992), school districts, *Crisp County School Dist. v. Pheil*, 231 Ga. App. 139, 498 S.E.2d 134 (1998); *Hunt v. City of Atlanta*, 245 Ga. App. 229, 537 S.E.2d 110 (2000), and community service boards, *Satilla Community Service Bd. v.*

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Satilla Health Services, Inc., 251 Ga. App. 881, 555 S.E.2d 188 (2001), judgment rev'd on other grounds, 275 Ga. 805, 573 S.E.2d 31 (2002) and opinion vacated in part, 259 Ga. App. 93, 575 S.E.2d 927 (2003), but not to municipalities, *City of Thomaston v. Bridges*, 264 Ga. 4, 439 S.E.2d 906 (1994), and county hospital authorities. *Thomas v. Hospital Authority of Clarke County*, 264 Ga. 40, 440 S.E.2d 195 (1994). *See also Randolph County Hosp. Authority v. Johnson*, 215 Ga. App. 283, 450 S.E.2d 318 (1994).

Thus, the library board, as an entity of either a county or the State, in the absence of any applicable exception or statutory waiver, will be shielded by sovereign immunity for a tort committed by an employee. *Davis v. Dublin City Bd. of Ed.*, 219 Ga.App. 121, 122, 464 S.E.2d 251 (1995). *See Coffee County School Dist. v. Snipes*, 216 Ga.App. 293, 294, 454 S.E.2d 149 (1995); *accord Woodard v. Laurens County*, 265 Ga. 404, 405(1), 456 S.E.2d 581 (1995)

In conclusion, the question of when a library staff member may lay hands on child is not easy to answer. First, there is no legal duty of a library employee to take action to protect or assist a child. Second, liability for touching a child could arise in the context of the torts of assault and battery. However, the likelihood is that the employee would be protected by official immunity and library itself would be protected by sovereign immunity.

Rubin, Richard E. (2004). *Foundations of Library and Information Science* 2d ed. Neal-Schuman Publishers: New York.

American Library Association. 2004. Interpretation of the Library Bill of Rights. Accessed August 31, 2013 at

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<http://www.ala.org/Template.cfm?Section=interpretations&Template=/ContentManagement/ContentDisplay.cfm&ContentID=31870>

Q. How much help can a librarian legally provide to a patron who is filling out an official form or document?

Public librarians and staff are called upon to serve patrons in a myriad of ways, many which go beyond assistance finding and accessing information. When library staff members are asked to help with the completion of official forms or government documents, they may have concern about their own abilities to accurately guide the patron or liability in the event they make mistakes.

Under Georgia law, there are a number of professions that have licensing requirements making the unauthorized practice of activities within the governed profession a violation of law. In the context of the public library where a patron seeks help completing official documents or forms, the statute most likely at issue is one which regulates the practice of law. O.C.G.A. § 15-19-51.

The statute defining the practice of law is broad; it includes the preparation of legal instruments of all kinds whereby a legal right is secured and any action taken for others in any matter connected with the law. O.C.G.A. § 15-19-50(3),(6). An individual who undertakes conduct that falls into these (among other) categories would be conducting the unauthorized practice of law. O.C.G.A. § 15-19-51.

It is easy to imagine a scenario at a public library where the assistance sought could result in conduct that is encompassed by these definitions, particularly in the instance of helping with governmental or official forms. Therefore, librarians and staff who assist the public should be aware of the statute and recognize that there are boundaries to the level of guidance and aid that can lawfully be given.

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As to the issue of liability for mistakes made when assisting a patron, professional library literature indicates it is practically non-existent. Researchers have found no case in which a librarian has been sued for breaching a duty to a patron and causing injury. (Healy 515; Cannan 8).

Therefore, focus solely on the legal ramifications of providing assistance to patrons may be too narrow. Diamond and Dragich argue, "Legally acceptable boundaries of behavior should not solely define library practices. Rather than setting a liability-avoiding threshold, librarians should articulate principles and practices ensuring that members of the profession function at the highest level" (396). Nevertheless, awareness of legal boundaries is critical and an excellent starting place for administrators seeking to train staff to handle requests for assistance in more than locating information.

Cannan, John. "Are Public Law Librarians Immune from Suit: Muddying the Already Murky Waters of Law Librarian Liability." *Law Library Journal* 99 (2007): 7-32.

Diamond, Randy, and Martha J. Dragich, "Professionalism in Librarianship: Shifting the Focus from Malpractice to Good Practice." *Library Trends* 49 (2001): 395-414.

Healy, Paul W., "Chicken Little at the Reference Desk: The Myth of Librarian Liability," *Law Library Journal* 87 (1994): 515-33.

Q: A patron who has ADHD has requested the public library provide a private room in which to read to allow her to concentrate. What is required of the library?

Congress enacted the Americans with Disabilities Act ("ADA") "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Title II of the ADA prohibits a "public entity" from discriminating against "a qualified individual with a disability" on account of the individual's disability, as follows:

[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Title II defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable modifications . . . or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2).

Title II of the ADA also provides that "the Attorney General shall promulgate regulations" that implement Title II, Part A. 42 U.S.C. § 12134(a). The Department of Justice ("DOJ") has promulgated regulations implementing Title II's prohibition against discrimination. The DOJ's regulations provide, "[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public

entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.” 28 C.F.R. § 35.130(b)(7).

The ADA's “reasonable modification” principle, however, does not require a public entity to employ any and all means to make services accessible to persons with disabilities but only to make “reasonable modifications” that would not fundamentally alter the nature of the service or activity of the public entity or impose an undue burden. *See Tennessee v. Lane*, 541 U.S. 509, 531-32, 124 S.Ct. 1978, 1993-94, 158 L.Ed.2d 820 (2004) (“Title II does not require States to employ any and all means to make judicial services accessible to persons with disabilities.... It requires only ‘reasonable modifications’ that would not fundamentally alter the nature of the service provided . . . [or] impose an undue financial or administrative burden.”).

Assuming a patron with ADHD is a “qualified individual” for purposes of the ADA, a public library has a legal obligation to make services available to that person through a reasonable accommodation. The request to provide a private reading room is not reasonable. First, it would likely impose an undue burden on a public library to provide it (allocation of scarce resources). Second, private, quiet space for reading is not guaranteed to any library patron, whether disabled or not. The existence of a disability does not entitle the patron to more or better services than provided to the general public.

An example of a reasonable accommodation requested by a qualified individual would be a visually impaired person asking that his service animal be

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allowed to accompany him in the library. It would be clearly unreasonable for the visually impaired patron to request the library provide him with an assistant while in the library.

Often factual scenarios are not as black and white as these examples. For instance, a patron who claims to have an anxiety disorder could request that his dog accompany him in the library. Here, the legal analysis would focus on whether the patron is a “qualified individual” and whether the dog is a “service animal.”

For guidance what is required of the public library by the ADA, *see*

<http://www.ada.gov/taman2.html>.

Q: Whom may the library properly classify as independent contractors?

Courts are seeing an increase in litigation centered around the proper classification of workers as employees or independent contractors. According to a recent story in Wolters Kluwer Employment Law Daily (Milam-Perez 1), the trend began through challenges by federal and state government agencies and has been picked up by the private bar in claims from the workers themselves.

The line between an employee and an independent contractor can be very thin, and great care must be taken in attempting to walk that line when hiring an individual who could arguably be on either side of the contractor line. Unfortunately, many employers view the two types of employment relationships as synonymous and want to label workers as independent contractors but treat them like employees. Utilizing independent contractors may be economically advantageous because generally contractors do not qualify for benefits and do not expose the employer to liability for negligent acts. However, misclassification of employees as independent contractors in order to save money is not a prudent employment practice because if a decision is challenged and the challenge is upheld, the employer could be on the hook for damages far in excess of the original cost savings. There are tax regulations as well as wage and hour laws that pertain to employment relationships; employers should review and adhere to these rules.

What matters to courts and the federal government is the reality of the relationship between the worker and the employer, not the label given to the worker. The following factors are weighed in ascertaining the status of a worker:

- (1) the extent of the employer's control and supervision over the worker, including directions on scheduling and performance of work;
- (2) the kind of occupation and nature of skill required, including whether skills are obtained in the workplace;
- (3) responsibility for the costs of operation, such as equipment, supplies, fees, licenses, workplace, and maintenance of operations;
- (4) method and form of payment and benefits; and
- (5) length of job commitment and/or expectations.

Most significant among the factors examined in determining whether an individual is an employee or an independent contractor is the right to control the way in which the work involved is done. It is solely when an employer has the right to control only the results or the end sought to be accomplished, and the contracting party independently determines the details and means of accomplishing that result, that an independent contractor relationship exists.

It is advisable that library administrators periodically review and apply these factors to individuals classified as independent contractors to ensure that their classifications are correct. Proper classification of workers is a preventative measure worth taking.

Internal Revenue Service, "Government Workers: Employees or Independent Contractors. Access September 8, 2013 at <http://www.irs.gov/Government-Entities/Federal,-State-&-Local-Governments/Government-Workers:-Employees-or-Independent-Contractors%3F>.

Milam-Perez, Lisa. "Industry Perspective—Court Dockets See Swelling Numbers of Independent Contractor Misclassification Suits." *Wolters Kluwer Employment Law Daily*. 18 July 2013, 2013 WL 3754314.

United States Department of Labor, "Employee Misclassification as Independent Contractors." Accessed September 8, 2013 at <http://www.dol.gov/whd/workers/misclassification/>.

Q: What are the FLSA implications of a non-exempt library staff member volunteering to work with or become a paying member of the Friends of the Library?

The Fair Labor Standards Act ("FLSA") requires payment of overtime wages at the rate of at least 1.5 times the regular hourly rate for every hour over 40 worked during one workweek. Employees of public agencies (public library employees) may be rewarded for overtime through compensatory time off (at a rate of 1.5 hours/1 hour overtime) in lieu of monetary payment. 29 U.S.C. § 207(o). If an employer wishes to avoid the requirement to compensate employees for overtime, the employer is responsible for preventing employees from working beyond 40 hours in a workweek.

A question may arise when an employee who has worked 40 hours in a given workweek seeks to volunteer his or her services without payment. For example, a library employee who has worked 40 hours Monday through Friday may wish to volunteer to work at a Friends group book sale for five hours on Saturday. If the volunteered hours count toward the workweek total, the library would be required to provide this employee with 7.5 hours of comp time.

Under the regulations promulgated pursuant to the FLSA, "An individual shall not be considered a volunteer if the individual is otherwise employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer." 29 CFR § 553.101(d). The United States Supreme Court has recognized that individuals may not choose to decline or waive

their statutory entitlements under the FLSA by characterizing the activities they perform for a covered employer as "volunteer." See *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 299 (1984). The Supreme Court stated that the purposes of the FLSA "require that it be applied even to those who would decline its protections. If an exception to the Act were carved out for employees willing to testify that they performed work 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act."

Therefore, an employee, even one willing to testify that he or she was acting voluntarily, would not be considered a volunteer if he or she comes to the library and performs his or her regular duties. However, in a situation analogous to the library worker wishing to volunteer at the Friends' fundraiser, the Department of Labor (2006) has opined that when an employee of an organization freely provides services that are not the same type of service the employee is employed to perform at times outside of the employee's normal working hours, the volunteer activity does not count as hours worked for purpose of the FLSA.

Moreover, the FLSA recognizes the generosity and public benefits of volunteering and allows individuals to freely volunteer time to religious, charitable, civic, humanitarian, or similar non-profit organizations as a public service. 29 C.F.R. § 553.101. Therefore, it is likely that virtually any service a library employee wished to volunteer to the non-profit organization that supports the library would

be approved. To obtain a written opinion from the Department of Labor, contact your local Wage and Hour Division, <http://www.dol.gov/whd/america2.htm#Georgia>.

The above scenario stems from a request from the employee to his or her employer. The analysis is quite different if the "voluntary" time is compelled by the employer. The United States Supreme Court has said, "Time spent in physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business" must be paid in accordance with the minimum wage and overtime requirements of the FLSA. *Tennessee Coal, Iron R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944). Time spent in work for public or charitable purposes at the employer's request, or under his direction or control, or while the employee is required to be on the premises, is working time.

There is no issue with an employee voluntarily paying to join the Friends of the Library. The only problem that would arise would be if a contribution to the Friends was made mandatory or if the payment was somehow tied to a favorable employment action.

United States Department of Labor. (2006) Opinion Letter FLSA2006-18. Accessed on August 25, 2013 at http://www.dol.gov/whd/opinion/FLSA/2006/2006_06_01_18_FLSA.pdf.

Q: May the library deduct fines and lost material fees from an employee's paycheck?

Some states have laws prohibiting an employer from deducting money owed from an employee's paycheck. Georgia does not. However, federal law provides that employers are prohibited from paying below the statutory "minimum wage." The FLSA is a remedial statute designed to "eliminate . . . substandard labor conditions" in the United States. *Powell v. United States Cartridge Co.*, 339 U.S. 497, 510, 70 S.Ct. 755, 94 L.Ed. 1017 (1950). It was enacted to protect workers who lack sufficient bargaining power to secure a subsistence wage. *See Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739-40, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981); *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 708, 65 S.Ct. 895, 89 L.Ed. 1296 (1945). The FLSA requires that employers pay employees no less than the hourly minimum wage, which is currently \$7.25 per hour. The minimum wage must be received "free and clear" of improper deductions. 29 C.F.R. § 531; *see also Arriaga v. Florida Pacific Farms, L.L.C.*, 305 F.3d 1228, 1241 (11th Cir. 2002) ("The FLSA prevents improper deductions from reducing the wages of a worker below the minimum wage. . . .").

An exception that has been judicially recognized is repayment to the employer of amounts misappropriated by the employee may be made by means of paycheck deductions, even where they reduce the net pay to the employee below minimum wage. *See Mayhue's Super Liquor Stores, Inc. v. Hodgson*, 5th Cir. 1972,

464 F.2d 1196. In such cases the employee has actually taken the money free and clear and had the use of it. "In such a case there would be no violation of the 'Act' because the employee has taken more than the amount of his wage and the return could in no way reduce his wage below the minimum." *Id.* at 1198. The Act was not intended to protect employees against return of amounts wrongfully taken.

Likewise, courts have approved payroll deductions for salary advances given to employees even if the deduction brings the amount paid below minimum wage. However, there is no authority for a making a deduction to collect a debt if the deduction brings the employee's wage below the statutory minimum.

Consider an employee who earns \$8.00 per hour and owes fines to the library in the amount of \$100.00. An 80 hour pay period would result in a gross amount of \$640.00. If the library deducts the full \$100 owed from this paycheck, the gross amount is reduced to \$540.00, which equates to an hourly rate of \$6.75 per hour, below the statutory minimum. However, the library could deduct \$60 from the paycheck and not violate the minimum wage law. It could then deduct \$40 from the following paycheck and remain within the statutorily mandated minimum wage. If the library is considering taking this action, it would be a good idea to draft a policy to include in the employee handbook. Also, it is important to enforce the policy in a uniform manner as to all employees.

Q: How does an employer administer FMLA leave when an employee has accrued leave and is receiving short term disability?

The Family and Medical Leave Act ("FMLA") 29 U.S.C. § 2601 *et seq.*, provides that covered employers must provide eligible employees with up to 12 weeks of unpaid leave during any 12-month period for the birth, adoption, or foster care placement of a child; to care for a parent, son or daughter, or spouse with a serious health condition; and for the employee's own serious health condition. In addition to employers from the private sector with 50 or more employees, the FMLA applies to public agencies regardless of the number of employees. To be eligible to take FMLA leave, an employee must have worked for a covered employer: (1) for at least 12 months, (2) for at least 1,250 hours during the 12-month period immediately preceding the date leave is taken, and (3) at a worksite where the employer employs at least 50 employees within 75 miles.

FMLA leave is generally unpaid. However, an employee with accrued paid leave may elect to substitute the paid leave for any portion of the 12-week FMLA leave. Also, the employer may require the employee to substitute accrued paid leave for what otherwise be FMLA leave. Accrued compensatory time off in lieu of overtime is not a form of accrued personal leave. Therefore, public employers may not require employees to substitute comp time for unpaid FMLA leave. An employee may elect to use her comp time, but any absence utilizing comp time does not count toward the employee's FMLA entitlement.

An employee in need of FMLA leave for her own serious health condition may be eligible for paid benefits under a workers' compensation or temporary disability plan. If the employee is receiving such payments, the employer may not require, and the employee may not elect, substitution of accrued paid leave.

An employer is required to maintain group health insurance coverage for an eligible employee on FMLA leave on the same terms and conditions as if the employee had continued to work. An employee may opt not to retain health benefits during FMLA leave, but an employer may recover any premium payments missed by an employee on unpaid leave who maintains health coverage.

For more information go to

<http://www.dol.gov/compliance/guide/fmla.htm>

Sample policy:

FMLA does not provide paid leave. Employees eligible for FMLA leave will use applicable library paid leave benefits concurrently with FMLA leave. Leave benefits may be sick leave or annual leave dependent on the FMLA reason. If sick leave and vacation leave are exhausted, leave will be unpaid (leave without pay). In the event an employee is receiving short-term disability benefits or worker's compensation benefits while on FMLA leave, the employee may not also receive

annual or sick leave benefits. Sick and annual leave will not accrue while an employee is on unpaid FMLA leave.

Consider this policy in the context of the following scenario:

An eligible employee goes on leave for the birth of a child. Because of complications with the pregnancy, her time away from work begins 6 weeks prior to the birth of the child. At the time she goes on leave she has accrued 40 hours of sick leave and 40 hours of annual leave. FMLA leave begins on the first day she is away from work; she receives pay for the first 2 weeks (from sick/annual leave). The next 4 weeks are unpaid. On the date the baby is born (or whatever the short-term disability policy provides) the employee begins receiving short term disability benefits. FMLA leave is exhausted 6 weeks after the birth of the baby.

Changing the facts slightly alters the analysis. If the employee works until the day the baby is born, FMLA leave will begin that day. However, if the short term disability benefits begin on the date the baby is born, the annual leave and sick leave benefits are not utilized until the disability benefits are ceased. Under this scenario, if we assume the disability payments continue for the full 12 weeks of FMLA leave, the employee would then be entitled to utilize her two weeks of sick and annual leave (subject to the library's general leave use policy).

Q: Does a power of attorney give the holder access to a library users circulation records?

A power of attorney is a written instrument containing an authorization for one to act as the agent of the principal. Under Georgia law, whatever one may do himself may be done by an agent. O.C.G.A. § 10-6-5. Additionally, there is a Georgia statute that makes a power of attorney durable unless it expressly provides otherwise. O.C.G.A. § 10-6-36. This means that the power of attorney is not terminated by incompetency or incapacity of the principal. A power of attorney may be revoked by the principal at any time.

To be valid, a power of attorney must be in writing, signed by the grantor, and signed by two adult witnesses. One of the witnesses should be a notary.

A power of attorney may be general or specific. In other words, a general power of attorney conveys to the agent the ability to do any act the principal may do; a specific power of attorney grants the ability to perform a specific act or actions within an express scope. For example, a person may execute a power of attorney to allow his agent to sell a specific piece of property.

If a library staff member is presented with what appears to a valid power of attorney that is general in nature and a request by the agent to review the principal's circulation records, the library should treat this request as if it comes from the principal himself. Therefore, if it is the library's policy to allow a patron to review his own circulation records, that same policy should apply to the agent.

A situation could arise in which the library staff member is uncertain as to the validity of the presented power of attorney. If so, it may be wise to request to make a copy of the document and have it reviewed by the county attorney or the library's retained counsel.

It should be noted that Georgia's statute regarding the confidentiality of library circulation records provides that disclosure of these records is allowed upon "written consent of the user of the library materials or the user's parents or guardian if the user is a minor or ward." O.C.G.A. § 24-12-30. Therefore, prior to disclosure of the records upon request of the agent, the library should obtain the agent's written consent as well as a copy of the power of attorney. Maintaining these documents will allow the library to avoid liability in the event the disclosure of the records is challenged by the borrower (principal).

Q: What are the considerations for a public library in establishing or removing an area for free informational materials?

Placement of “free to the public” materials in an area of the library creates a public forum. (Helms 12). This includes a general information table with flyers and posters from the community for upcoming events and a community bulletin board with advertisements for yard sales, tutoring services, items for sale, etc.

Over a decade ago, a lawsuit against a Georgia public library addressed a controversy over materials placed on a table occasionally utilized for materials free to the public. *Gay Guardian Newspaper v. Ochopee Regional Library System*, 235 F.Supp. 2d 1362 (S.D. Ga. 2002). The plaintiff claimed his First Amendment rights had been violated when the library closed the free literature table to all but library and government items. The court disagreed, holding that the First Amendment does not require the library to maintain the public forum it created; rather, the library is free to opt for a low-cost, conflict-avoiding maneuver such as removal of the forum altogether. *Id.* at 1376.

The holding of the *Gay Guardian* case remains good law. However, a new theory of liability has evolved that library administrators should know about. It is called “retaliatory forum closure,” a proposed cause of action explored in the Summer 2012 edition of *The Arizona Law Review* (Elzinga 502). The article argues that closure of a public forum in response to controversial speech, even if applied equally to all speakers, is a method to conceal viewpoint discrimination and thus a violation of the First Amendment.

The elements of retaliatory forum closure are:

- (1) the plaintiff exercised or intended to exercise First Amendment speech rights in a forum;
 - (2) the government adversely affected the plaintiff's speech by closing the forum; and
 - (3) the plaintiff's speech or viewpoint was a substantial motivating factor for the government's decision to close the forum;
- the burden would then shift to the government to prove that (4) it would have closed the forum even absent the protected speech. (Elzinga 521). Elzinga applies these elements to the *Gay Guardian* case and contends that the library could not have prevailed under this theory (524-25).

While retaliatory forum closure as a cause of action has not been formally recognized by courts, the groundwork has been established providing a new tool for entities who seek out litigation opportunities to affect governmental policy.

Therefore, when considering whether to establish an area in the library for "free to the public" materials, administrators must consider that, should controversy arise, dissolution of the public forum may not end the threat of litigation.

Elzinga, Stephen R. "Retaliatory Forum Closure." *Arizona Law Review* 54 (2012): 497-539.

Helms, Cathy Harris. "Lessons Learned from *The Gay Guardian Newspaper* vs. Ochopee Regional Library System – Or, What You Need to Know about Your 'Free to the Public' Area." *Georgia Library Quarterly* 41.2 (2004): 12-16.

Q: Is it discriminatory to be closed on holidays associated with Christianity while open on holidays associated with other religions?

This question raises two distinct issues: (1) whether the public library, a governmental entity, violates the Establishment Clause of the First Amendment by incorporating holidays such as Christmas and Easter into its schedule, and (2) whether it is discriminatory to require library employees who practice other religions to work on holidays recognized by their respective religions.

Establishment Clause

The purpose of the Establishment and Free Exercise Clauses of the First Amendment is “to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other.” *Lynch v. Donnelly*, 465 U.S. 668, 672 (1984) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971)). At the same time, however, the Supreme Court has recognized that “total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable.” *Id.*

As to a governmental entity’s observance of a religious holiday such as Christmas, the jurisprudence is clear: “the government may acknowledge Christmas as a cultural phenomenon” without triggering First Amendment Establishment Clause concerns. *Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 601 (1989). In fact, federal government has long recognized holidays with religious significance. *Lynch*, 465 U.S. 668, 676. Congress first

declared December 25 a public holiday in 1870; in 1885 Congress provided for holiday pay for federal employees on December 25.

Based on this well-settled interpretation of the Establishment Clause, the fact that the public library is closed on certain days associated with a particular religion is not unconstitutional. Therefore, closing the library in observance of Christmas, Easter, or Thanksgiving does not raise legal concerns.

Discrimination

Title VII of the Civil Rights Act prohibits adverse employment action motivated by race, gender, religion, or national origin. 42 U.S.C. § 2000e. An employee may succeed on a claim of religious discrimination if an employer fails to reasonably accommodate an employee's religious observance or practice, unless the accommodation would cause an undue hardship on the employer's business. *Beadle v. Hillsborough County Sheriff's Dep't*, 29 F.3d 589, 592 n.5 (11th Cir. 1994),

How an employer must accommodate an employee's religious practice is not specifically delineated. The Department of Labor has suggested: "One means of providing reasonable accommodation for the religious practices of employees or prospective employees which employers and labor organizations should consider is the creation of a flexible work schedule for individuals requesting accommodation." 29 C.F.R. § 1605.2 Notably, the federal government has enacted a statute allowing its employees to elect to engage in overtime work for time lost in observing religious requirements; an employee who so elects such overtime work shall be granted equal compensatory time off. 5 U.S.C. § 5550a. (NOTE: If the overtime work results in an

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employee working in excess of 40 hours in a single workweek, compensatory time off must be at a rate of time and a half. 29 U.S.C. § 207(o).)

Often, the accommodation offered by employers to allow employees to participate in religious observances is the use of vacation or personal leave. However, courts have held that requiring an employee to use annual leave for religious holidays, discriminates against the employee by negatively affecting a benefit of employment enjoyed by other employees who did not share the same religious beliefs, i.e., vacation time. *Krop v. Nicholson*, 506 F. Supp. 2d 1170, 1177 (M.D. Fla. 2007) (holding that requiring an employee to use vacation rather than leave without pay in order to observe religious holidays was discriminatory.) *See also Cooper v. Oak Rubber Company*, 15 F.3d 1375, 1379 (6th Cir. 1994)(holding that an employer who permits an employee to avoid mandatory Sabbath work only by using accrued vacation did not reasonably accommodate the employee because the employee stood to lose a benefit enjoyed by other employees who did not observe the same Sabbath).

On the other hand, some courts have recognized that use of vacation time legitimately may be required to allow an employee to avoid work on religious holidays or, in combination with other methods, to allow an employee to regularly avoid working on the Sabbath. *See Getz v. Pennsylvania*, 802 F.2d 72 (3d Cir.1986); *United States v. Albuquerque*, 545 F.2d 110, 113-14 (10th Cir.1976),

Courts in Georgia have not addressed whether requiring an employee to utilize accrued vacation (as opposed to leave without pay) is discriminatory.

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Moreover, courts avoid bright-line rules in this area of the law. Instead, they consider each factual situation as a whole to determine whether the employer has offered a "reasonable" accommodation. Therefore, in facing this issue as an employer, the public library should evaluate what accommodation is being requested and what repercussions the organization will face as a result.

From an administrative perspective, an employer may legitimately require advance notice of which employees will need accommodation for religious observance. For example, to avoid scheduling issues, an employee needing time off for religious purposes could be required to submit his or her request 30 days in advance. This will allow administrators to arrange for substitute coverage.

Finally, an employer's obligation to accommodate an employee's request for time off for religious purposes is excused if the employer can demonstrate "undue hardship." The Supreme Court has defined "undue hardship" as any act that would require an employer to bear greater than a "*de minimis* cost" in accommodating an employee's religious beliefs. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 75, (1977). Therefore, if accommodating an employee's request to be absent from work would result in the library being severely understaffed, the requirement to do so is waived. However, courts will scrutinize what efforts were made by the employer to make the accommodation. It is likely that a denial without sincere attempts to coordinate the library's staffing to accommodate the employee's request would result in an outcome unfavorable to the library should the employee proceed to litigation.

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