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Local Emergency Preparedness: What to do If Disaster Strikes Your Community

by Linda S. Kingsley

INTRODUCTION

It is safe to say that on September 11, 2001, there were many municipal attorneys throughout the State of New York who spent a great deal of time thinking about what they would need to do had the disasters of that day struck their community. Unfortunately, while there has been a significant amount of training in the few larger cities of New York State, including training by federal and state agencies, most municipalities have not yet had the ability to fully address this issue. While, obviously, we all now think about the risk of terrorist attack, the policies and practices discussed are equally applicable to a train derailment, chemical spill, ice storm or other "run of the mill" but equally paralyzing emergency situation.

STATUTORY AUTHORITY

The main statutory authority and regulation for municipal officials dealing with disasters can be found in Article 2-B of the Executive Law. The following is a summary of the significant portions of this article, however, it is highly recommended that municipal attorneys familiarize themselves with the entire article.

Section 23 - Local Disaster Preparedness Plans

- authorizes counties, cities, towns and villages to prepare disaster preparedness plans;
- requires that city, town and village plans be coordinated with the county plan;
- requires that disaster preparedness plans address disaster prevention, disaster response and recovery.

Section 24 - Local State of Emergency

- authorizes the chief executive of a city, county, town or village during a disaster or if there is reasonable apprehension of immediate danger to declare a local state of emergency within all or part of their municipality;
- authorizes the promulgation of emergency orders during that state of emergency.
- such orders may include:
- establishment of a curfew and prohibition of pedestrian and/or vehicular traffic;
- designation of areas where occupancy and use of buildings and ingress and egress of vehicles and persons may be prohibited;
- regulating and closing places of amusement and assembly;
- suspension or limitation of the sale, etc. of alcohol, firearms, explosives and flammable materials;
- prohibition and control of persons on public streets;
- establishment of emergency shelters;
- suspension of local laws, ordinances and regulations;
- sets a five day limit for such emergency orders, authorizing additional extensions not to exceed five days at a time;
- establishes the effective time of the emergency order as the time specified in the order and requires publication in a newspaper of

general circulation as soon as practicable and transmission to radio and television media;

- details where emergency orders must be filed;
- authorizes the county executive (or in New York City the mayor) after declaration of a state of emergency to request that the governor provide assistance.

Section 25 - Use of Local Government Resources in a Disaster

- details the ability to request assistance from the county and the ability of one municipality to request assistance from another.

Section 26 - Coordination of Local Disaster Preparedness Forces

- provides that the chief executive and elected/appointed government officials shall not be responsible for acts or omissions of municipal employees when performing disaster assistance pursuant to a declared disaster emergency.

CASE LAW/OPINIONS

Given the fact that little litigation arises questioning the conduct of government officials in a true emergency, there is not significant precedent in this area. However, the following offers some guidance:

ATTORNEY GENERAL OPINIONS

1979 AG 21 provides that a chief executive of a county may unilaterally declare a local state of emergency in any city, town or village within the county without the approval of the chief executive of that municipality. Despite this fact, that local chief executive may also declare a local state of emergency in their municipality.

1980 AG 21 confirms that under Article 2-B, local chief executives and officers are immune from liability based upon the acts or omissions of disaster preparedness forces or civil defense forces and local chief executives, officers and employees are immune from liability when performing disaster assistance pursuant to a civil defense plan, drill or test. In cases where this does not apply, the defense of governmental immunity may be raised and employees may be entitled to indemnification under the General Municipal Law.

Opinion No. I 90-58 specifies that each county and each city is authorized to prepare a disaster preparedness plan. It indicates that there is no authority for a county to *require* a municipality to prepare a disaster preparedness plan. (See Opinion No. I 93-46 which indicates the authority of each municipality to develop a disaster preparedness plan).

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OPINIONS OF THE STATE COMPTROLLER

Opinion No. 82-203 clarifies the parties responsible for costs of a disaster as follows:

The municipality declaring the disaster is responsible for its own costs incurred within its own jurisdiction;

Other municipalities who give assistance may enter into whatever financial relationship is agreed upon between the requesting and providing municipalities (may be gift, loan or lease);

Where aid is provided by the state, it is at state expense. (Note: Obviously, where a state declaration of disaster is made, there is often reimbursement through both state and federal disaster relief programs).

CASE LAW

Prospect v. Cohalan, 109 A.D.2d 210 (2nd Dept. 1985) distinctly separates the authority of the county executive and the county legislature relative to disaster preparedness planning versus an actual disaster. The case clarifies that the unilateral authority of the county executive is in the situation of a disaster, not disaster planning.

Litchhult v. Reiss, 183 A.D.2d 1067 (3rd Dept. 1992), *lve to appeal dismissed*, 81 N.Y.2d 737 (1992) was an action arising out of the death and injury to numerous students after a tornado struck a school building. Prior to the tornado, the county had received a tornado watch and, while the county's emergency manager had provided the county public information officer with a copy of the report to issue to the emergency broadcast system, the information officer failed to disseminate the information prior to the tragedy. An action was commenced against the county, school district and others based upon the fact that the county emergency plan provided that schools would be directly notified in an emergency and, therefore, the county had breached its duty by failing to directly notify the school of the impending tornado. The Appellate Division held that the plaintiffs failed to state a cause of action against the county. The decision reaffirms the principle that a municipality is generally immune from liability for acts involving the exercise of discretion which

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Cultural Diversity: Paradigm 2002

by Deb Volberg Pagnotta

Focus on Diversity

Cultural identity has taken on heightened significance, at home, at work, and in places of public accommodation. For political, legal, economic and sociological reasons, government organizations, as employers and service providers, carefully must begin to understand and address issues of cultural diversity.

Demographic Changes. Dramatic population changes are taking place in the United States. The number of Americans of Hispanic origin jumped by 58 percent over the past decade, to 12.5 percent of the total population.¹ African-Americans climbed to 12.9 percent of the total, an increase of about 16 percent. Asian-Americans have almost doubled their presence since 1990, to 4.2 percent of the total population. In 1970, one in twenty U.S. residents were either foreign-born or first-generation immigrants. Now the ratio is one in five.

New York State is a hub for many of these significant shifts in population. Statewide demographic changes include an increase in the number of Americans over 65, youths under 18, and single parent and same sex households. Census 2000 reports that much of the State's diversity is centered in New York City: for the entire state, 75.3 percent of Hispanics and 75.3 percent of Asians who reported only one race lived in the five boroughs of the City. The growing Hispanic and Asian populations in the City have become ever more diverse. The community of those of Mexican heritage has tripled in size since 1990, and Asian Indians have almost doubled.² The so-called "minority" populations themselves are extraordinarily diverse: a self-identified Hispanic or Latino may hail from Mexico, Puerto Rico, Cuba, Chile, Columbia, perhaps Peru; a Black may identify as African-American, Caribbean or African; Asians may be from China, Korea, Japan, India, Pakistan and so on. Each has distinct and unique national cultures.

These and many other social developments increasingly are reflected at the workplace. Jobs which once were traditionally homogenous – all white, or all female, or all young – are now kaleidoscopic. At the hospital, the woman wearing the green scrubs may be the surgeon; the man in identical scrubs may be the nurse. Cultural assumptions also have evolved. The teenager in baggy jeans and knapsack may be the newly wealthy CEO of a dot.com. The young male customer wearing a diamond earring may not be gay but simply fashionable. Casual dress Friday has become casual dress week. Email has become the communication device of choice, nudging out the telephone. Maternity leave is now frequently called parental leave, as more men take the opportunity to spend time with their family, often under the federal Family and Medical Leave Act, enacted in 1993.

Current Events. The events of 9/11 underscore the need to address increasing cultural diversity at the workplace. Prior to the terrorist

attack on New York City, probably the most publicly discussed current concern in race relations was racial profiling of African-Americans by law enforcement agencies. Today, federal, state and local government agencies are struggling to define how best to structure security measures against potential attacks by fundamentalist Muslim groups and other organizations seeking literally to destroy our country. As service providers and employers, these agencies must walk a delicate balance between determining appropriate measures and ensuring individual and community rights.

Government entities also must address the marked increase of discriminatory and hostile actions toward Muslim, Arab, Middle Eastern and Southeast Asian employees, clients and customers, or even those merely perceived to be a member of one of those groups. The federal Equal Employment Opportunity Commission ("EEOC") has reported that since September 11, 2001, discrimination complaints by Muslims have nearly tripled (to 427 from 171 in the same period the year before).³ Discriminatory actions against Asians and Middle-Easterners have included racial slurs, threatening phone calls and even homicide.⁴ Reportedly, after 9/11, a quarter of these discrimination complaints involved ethnic and religious profiling at airports and workplaces, and nearly 20 percent involved government agencies including local law enforcement authorities.⁵ (In response to the increase, the EEOC issued a document on October 1, 2001, "Employment Discrimination Based on Religion, Ethnicity or Country of Origin." See, www.eeoc.gov/facts/fs-relig_ethnic.html.)

What is Cultural Diversity?

Diversity is more than the "protected classes." We often think of cultural diversity as simply comprising the categories protected by our federal, state and local anti-discrimination laws: e.g., race, religion, national origin, gender, marital status, sexual orientation, age, disability. As a nation we believe that these listed characteristics should not determine how a person is treated at work or at a public accommodation. However, the nature of culture itself runs much deeper than those limited categories.

"Culture includes learned patterns of behavior, socially acquired traditions, repetitive ways of thinking and acting, attitudes, values and morals. Cultural programming specifies rules for acquiring and transferring information. It standardizes perceptions. It also defines attitudes for intragroup relationships and for dealing with nonmembers. And it sets the institutional parameters that condition human behavior and stabilize social systems.

Culture standardizes relationships, so that people need not be constantly mindful of the implications of their behavior. They can make

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reasonably confident assumptions about the reactions of those with whom they interact. From the economist's perspective, culture reduces transaction costs. The codes for interpreting external information, classifying forms of potential behavior as acceptable or not and perceiving social rank are all passed from one generation to the next through a system of reward and punishment. Successful cultural programming leads to ethnocentrism, a belief that one's own culture is normal and, perhaps, superior. Frequently, other cultures are perceived as inferior.⁶

Individually, differences may include age, gender, race, physical traits, parental status, sexual orientation, ethnic and religious backgrounds, socioeconomic status, birthplace and hometown, and social, even political affiliations. At the workplace, additional differences which inform our attitudes and perceptions may include seniority, experience, position, education, training, salary, belonging to a union, full or part time, permanent or temporary. All affect our interactions.

Often, cultural traits are embedded and unperceived by the individual with that set of beliefs. Cultural differences may include language and communication, appearance and dress, food and eating habits, time and time-consciousness, rewards and recognition, roles and responsibilities, values and norms, sense of self and of space, mental processes and learning styles, and beliefs, values and attitudes. Each of these traits informs our workplace interactions, at best enhancing the work and at worst leading to misunderstanding, miscommunication and failure to perform effectively.

Literature is replete with documentation of the ways in which our culture impacts our interactions. A recent striking study affirms that, at the workplace, race-related values influence how employees perceive and react to others, resulting in interracial conflict.⁷ In short, says the researcher, the African-American community highly values emotional expression, whereas those of Northern-European heritage tend to favor moderation of expressive behavior and discourage strong expression of emotion in a conflict situation. In a conflict situation between two individuals of a different race, where for example one worker feels slighted by another, these expectations and preferences may exacerbate the conflict. The study also found that individuals are less confrontational with offenders of their same racial group.

"Discriminatory" Behavior

Notwithstanding the prohibitions against illegal discrimination, we all use "discriminatory" behaviors. The ability to distinguish friend from foe is crucial to our existence. Humans are wonderfully equipped to categorize others based on visual, verbal, physical and social cues. Yet, we often lack "cultural competence," that is, the understanding of cultural characteristics of communities other than those in which we have grown up. Key differences between cultures are generally not the obvious ones, but rather invisible differences in expectations, values, goals and communication styles, such as the example in the previous paragraph. It is clashes of these

differences that most often cause misinterpretation and miscommunication. So it has become ever more critical to develop a greater cultural competence, as individuals, as employers and as service organizations.

Issues arising in multicultural workforces and communities include incorrect assumptions about diverse cultures, expectations that others will conform to a "norm," language problems leading to miscommunication and misinterpretation, biases against the unfamiliar, and finally, "traditional" American values coming in conflict with values of other cultures.

The possibilities are endless. An employee whose cultural background includes a high "casual touch rate" may inadvertently distress a client of the opposite sex who is a traditional Orthodox and Hasidic Jew and uncomfortable with such contact. The police in the Jon-Benet Ramsey case apparently failed to secure the crime scene swiftly because of their assumption, based on the wealthy neighborhood, that the child's absence must be a kidnapping. A thin female supervisor off-handedly dismissed an employee's claim of sexual harassment, saying that because the employee was "overweight," the alleged harasser would have had no sexual interest. An African-American customer may be offended and feel disrespected by a Korean employee who avoids direct eye contact. English-speaking employees may resent bilingual coworkers speaking to each other in Spanish or other languages: while the communication may be utterly innocuous, it can feel exclusionary to the English speaker.

We may even offend with the best of intentions. John Molloy's self-help book, "New Dress for Success," reprinted in 1988, provides a chapter "Some Advice for Minorities," which advises, amongst other things, "When selling to middle-class blacks, you cannot dress like a ghetto black"; "Do not wear jewelry and never wear Afro hairstyles or any clothing that is African in association." Shawn Brooks, an account executive for the Eagles Radio Network in Philadelphia, and an African American was stunned in 2001 when his supervisor gave him Molloy's book and he read that chapter.⁸ He later filed a successful discrimination charge with the Pennsylvania human rights commission.

Governments and Diversity

As government workforces themselves become more diverse, they also must reconfigure their functions to meet the needs of the changing communities. Government entities are, by definition, service organizations. Much of their work involves interfacing with community groups, individuals, businesses, officials from other federal, state and local governments, not-for-profit organizations, and other myriad "clients" or "customers." Diversity issues arise not just between employees, but between employees and the communities they are "servicing." A systemic approach to diversity issues should be integrated into both a municipality's internal operations and its interactions with the public. Absent such effort, the entity may face poor workplace morale, diminished productivity, failure to effectively perform essential functions, and, at worst, discrimination litigation. All of these results render it more difficult to ensure the cohesive, high functioning workforce

necessary to best serve the public.

By squarely addressing diversity issues and developing more culturally competent workforces, employers will reap myriad benefits. Morale will improve, as employees feel included and empowered. Constituents and customers will benefit from the municipality's better understanding of community needs. Your organization will profit from increased productivity and from the increased vision of seeing situations through different perspectives. Following are some proven suggestions.

Practical Solutions

Recruit wisely, consistently and broadly. Cast a wider net. Reach out to a broad spectrum of communities early on in multiple ways. Recruit from middle schools, local youth groups, religious institutions, the military, local colleges and universities, including predominantly minority institutions. Learn from other governmental or service organizations. The New York Times reported on April 3, 2002, that the New York Fire Department, traditionally white and male "would embark on a new recruiting campaign aimed at addressing a historical problem: its failure to hire enough blacks, Hispanics and women as firefighters....[T]he department [will] spend several million dollars, in government and private funds, on a program to attract candidates from minority groups through billboard advertising, television commercials and meetings with church leaders.") Generally, of course, the recruiting does not have to cost millions!

Enact anti-discrimination policies and procedures. While managing diversity is far more complex than simply prohibiting discrimination at the workplace, nonetheless promulgate such policies and procedures for your department. These set the tone for the department, inform your workforce what is expected of them, standardize in-house responses, and may limit potential liability against discrimination claims. If your organization has an employee handbook, confirm your commitment to diversity in that manual.

Train and educate your workforce. Provide on-going training to management, supervisors and staff on the principles of non-discrimination and cultural competence. Not only will training enhance employees' communication skills, but possibly may provide some insulation against potential liability. In 2001, the Seventh Circuit Court of Appeals, ruling against an employer on an age-discrimination claim, noted that although the employer had an anti-discrimination policy, *its failure to train its hiring managers evidenced its "[indifference] to whether its managers followed [the] law."* The training should address internal issues within the entity as well as diversity awareness when dealing with the public. Such trainings may range from EEO (Equal Employment Opportunity) laws and cultural sensitivity workshops to skills-based workshops which enable employees and managers to become culturally competent and effective communicators.

Mentoring and Coaching. Establish programs to mentor and coach new or non-traditional employees. Such programs, which may

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are acts which "involve the exercise of reasoned judgment which could typically produce different acceptable results" as opposed to ministerial acts which envision "direct adherence to a governing rule or standard with a compulsory result". The Court found that the county's plan absolutely qualifies as a discretionary act. The Court further found that the mention of schools in the county's emergency preparedness plan did not create a special relationship, thereby creating a special duty. Finally, the Court found that the county's failed attempt to notify the emergency broadcast system does not equate to negligence for which it can be liable because the decision to notify the public was an immune exercise of discretion.

Finally, *DeBari v. Town of Middleton*, 9 F.Supp.2d 156 (N.D.N.Y. 1998), involved an attempt to bring an action pursuant to 42 U.S.C. Section 1983 for the emergency demolition of property damaged by a disaster after the declaration of a state of emergency pursuant to Article 2-B of the Executive Law. The Court held that immunity available under Article 2-B would not protect an officer from a 1983 action, as that immunity protects when there is discretionary action and "fidelity to the constitution is not discretionary; it is mandatory." On a motion for summary judgment, the plaintiff's substantive due process claim was found to be without merit, the procedural due process claim withstood the motion, a takings claim was deemed to be not ripe and the Fourth Amendment claim also survived summary judgment.

CONCLUSION

While you can never fully be ready for every disaster that might strike your community, sound preparation can make addressing the problem significantly easier. As part of being prepared, I recommend that every attorney develop two copies of an emergency handbook. One copy should be left in their office and one in the trunk of their vehicle, (should they be called out to an emergency from home or should their office be destroyed or inaccessible). It is recommended that the handbook contain at a minimum the following: (1) List of all phone (home and office), cell and pager numbers for every municipal staff member and official that you might need in an emergency; (2) Maps of all areas of the municipality; (3) Multiple copies of declaration of state of emergency forms; (4) A copy of Article 2-B; (5) Basic operating guidelines (I carry a copy of NYCOM's "The Authority of a Municipal Chief Executive During an Emergency" and "Emergencies - A Field Guide for Local Officials"). These tools should provide you with the basics for beginning the process of advising and assisting your municipality.

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cover a variety of cultures such as age, race, and gender, provide numerous benefits. These include: increasing employee understanding of the organizational culture and its informal rules; increasing employees' connections throughout the workplace and their ability to get things done; increasing employee loyalty and commitment; boosting productivity with transfer of learning; cultivating leadership and raising the quality of job performance; heightening the organization's reputation as a good workplace and assisting recruitment; and accelerating inclusion of new or non-traditional members of the workforce.¹⁰ Also, the mentor provides professional and organizational assistance, often regarding the unwritten rules of the corporate culture, while the mentee provides a senior person with the opportunity to gain insight into other cultures in the organization.

Create a diversity panel. Designate a diverse group of employees, managers and staff, to address organizational diversity issues. As every workplace is unique, the solutions should reflect your organization's distinctive needs and concerns. A panel or task force should accomplish several things: evidencing the commitment of senior level management; ensuring that employees are part of the solution; and addressing the specific needs of your organization rather than applying a cookie-cutter approach. Solicit the panel's input in decision-making; this will assist in broadening the "we've-always-done-it-this-way-and-therefore-can't-change" approaches.

Practice what you preach. Model behavior for employees. Management behavior continually reinforces what is appropriate and what is not. Reward employees and managers who display high levels of cross-cultural skills and competencies. Other employees will model themselves after coworkers or supervisors who are held in high esteem by management.

Update your website. A well-designed website which addresses diversity will enhance recruitment efforts, and send a strong message of inclusion to your present and future employees as well as to your community. Check the websites of major private businesses – many provide excellent examples of such design. Do not rely on standard EEO/affirmative action language; use language which addresses the broader spectrum of diversity.

Deborah Volberg Pagnotta, Esq., is President of Interfacet, Inc., White Plains, New York, which trains employers and employees on sexual harassment, cultural diversity and other employment issues; conducts neutral fact-findings; and mediates disputes.

1. Note that Hispanics can be of any race. The term "Latino" refers specifically to individuals whose ethnic heritage is South America.
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