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Civil Litigation Impacting Governments

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September 29, 2022

Qualified Immunity

***City of Tahlequah, OK v. Bond*, 595 U.S. __ (2021)**

***Rivas-Villegas v. Cortesluna*, 595 U.S. __ (2021)**

City of Tahlequah, OK v. Bond

- **Facts:**
  - **Dominic Rollice's ex-wife called 911 to report that Rollice was in her garage, was intoxicated, and would not leave.**
  - **Three officers responded to the call.**
  - **They encountered Rollice at the side entrance to the garage and engaged him in conversation.**
  - **When Officer Girdner gestured with his hands and took a step forward, Rollice took a step back and then turned around and walked toward the tools at the back of the garage.**
  - **Disobeying an order to stop, Rollice kept walking and grabbed a hammer.**
  - **He held it with both hands and pulled it up to shoulder level.**
  - **Disobeying orders to drop the hammer, Rollice moved to where he had a clear view of Officer Girdner, "then raised the hammer higher back behind his head and took a stance as if he was about to throw the hammer or charge at the officers."**
  - **The officers fired their weapons, killing Rollice.**

City of Tahlequah, OK v. Bond

- **Procedural History:**
  - **Rollice's estate filed a §1983 suit against the officers, alleging they violated his Fourth Amendment right to be free from excessive force.**
  - **The district court granted the officers' motion for summary judgment, but the Tenth Circuit reversed.**
  - **It explained that its precedent "allows an officer to be held liable for a shooting that is itself objectively reasonable if the officer's reckless or deliberate conduct created a situation requiring deadly force."**
  - **And it concluded "that a jury could find that Officer Girdner's initial step toward Rollice and the officers' subsequent 'cornering' of him in the back of the garage recklessly created the situation that led to the fatal shooting."**
  - **The Tenth Circuit found that several cases, particularly *Allen v. Muskogee*, 119 F.3d 837 (10th Cir. 1997), clearly established that the officers' conduct was unlawful.**

City of Tahlequah, OK v. Bond

- **Holding:**
  - **Through a *per curiam* opinion, the Court reversed.**
  - **The Court concluded that none of the cases upon which the Tenth Circuit relied "clearly established" that the officers' "conduct was reckless or that their ultimate use of force was unlawful."**
  - **The Court found that "the facts of *Allen* are dramatically different from the facts here."**
  - **In *Allen*, the officers "responded to a potential suicide call by sprinting toward a parked car, screaming at the suspect, and attempting to physically wrest a gun from his hands."**
  - **Here, by contrast, the officers "engaged in a conversation with Rollice, followed him into a garage at a distance of 6 to 10 feet, and did not yell until after he picked up a hammer."**
  - **The Court found that the "other decisions relied upon by the Court of Appeals are even less relevant."**
  - **Because "[n]either the panel majority nor the respondent have identified a single precedent finding a Fourth Amendment violation under similar circumstances[,] [t]he officers were [] entitled to qualified immunity."**

Rivas-Villegas v. Cortesluna

- **Facts:**
  - **A crying 12-year-old called 911 reporting that she, her sister, and her mother were hiding in their home from her mother's boyfriend, respondent Ramon Cortesluna, who was trying to hurt them and had a chainsaw.**
  - **Officer Daniel Rivas-Villegas responded along with four other officers.**
  - **After learning from dispatch that the girl and her family could not get out, Officer Rivas-Villegas knocked on the front door, announced his presence, and ordered Cortesluna to come to the front door.**
  - **Cortesluna approached the front door and, upon the police's order, dropped the chainsaw.**
  - **On the police's orders, Cortesluna walked out of the house and toward the officers.**
  - **Police ordered him to stop 10 to 11 feet from them. He did so, at which point an officer saw a knife sticking out of the front left pocket of Cortesluna's pants.**

Rivas-Villegas v. Cortesluna

- **Facts:**
  - **When he disobeyed police's orders to keep his hands up, police shot him with a bean-bag round.**
  - **Cortesluna then raised his hands over his head and got down on the ground.**
  - **Officer Rivas-Villegas then straddled Cortesluna, placing his left knee on the left side of Cortesluna's back, near the knife.**
  - **He raised both of Cortesluna's arms up behind his back.**
  - **Rivas-Villegas was in this position for no more than eight seconds.**
  - **At that point, another officer removed the knife, tossed it away, and handcuffed Cortesluna.**

Rivas-Villegas v. Cortesluna

- **Procedural History:**
  - **Cortesluna filed suit under 42 U.S.C. §1983, claiming (among other things) that Officer Rivas-Villegas used excessive force in violation of the Fourth Amendment.**
  - **The district court granted summary judgment to Officer Rivas-Villegas, but the Ninth Circuit reversed.**
  - **The Ninth Circuit found that its decision in *LaLonde v. County of Riverside*, 204 F.3d 947 (2000), clearly put Officer Rivas-Villegas "on notice that his conduct constituted excessive force."**

Rivas-Villegas v. Cortesluna

- **Holding:**
  - **Through a *per curiam* opinion, the Court reversed, holding that Officer Rivas-Villegas is entitled to qualified immunity.**
  - **The Court explained that "'[q]ualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" And "[a]lthough 'this Court's case law does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate.'"**
  - **The Court continued that "[i]n an obvious case," the excessive force standards set out in *Graham v. Connor*, 490 U.S. 386 (1989), and *Tennessee v. Garner*, 471 U.S. 1 (1985), "can 'clearly establish' the answer, even without a body of relevant case law." (Quotation marks omitted.) "But this is not an obvious case. Thus, to show a violation of clearly established law, Cortesluna must identify a case that put Rivas-Villegas on notice that his specific conduct was unlawful."**

Rivas-Villegas v. Cortesluna

- **Holding:**
  - **The Court found that neither Cortesluna nor the Ninth Circuit passed that test.**
  - **The Ninth Circuit relied solely on *LaLonde*. But "[e]ven assuming that Circuit precedent can clearly establish law for purposes of §1983, *LaLonde* is materially distinguishable and thus does not govern the facts of this case."**
  - **The Court explained that in *LaLonde*, the "officers were responding to a mere noise complaint"; "LaLonde was unarmed"; and the officer in *LaLonde* "deliberately dug his knee into [LaLonde's] back when he had no weapon and had made no threat when approached by police."**

Changes and Emerging Trends in Employment Law

Do You Need to Provide Reasonable Accommodations to Employees Infected With COVID as Part of an ADA Accommodation?

- **On December 14, 2021, the EEOC updated its guidance to clarify when COVID-19 may be an ADA-protected disability.**

Is COVID an ADA-Qualifying Disability?

You'll find this new information in section "N" of the EEOC's COVID guidance.

The EEOC starts with this premise:

An employee who suffers only mild COVID symptoms, or who is asymptomatic, does not have a disability under the ADA and is, therefore, not entitled to an ADA accommodation.

Is Covid and ADA-Qualifying Disability?

- **However, the EEOC clarified that employees with the following COVID experiences may have an ADA-covered disability that entitles them to a reasonable accommodation.**
  - **Individuals who experience ongoing but intermittent multiple-day headaches, dizziness, brain, fog, and difficulty remembering or concentrating.**
  - **Individuals who receive supplemental oxygen for breathing difficulties and have shortness of breath, associated fatigue, and other virus related effects that last, or are expected to last, for several months.**
  - **Individuals who experience heart palpitations, chest pain, shortness of breath, and related effects due to the virus the last, or are expected to last, for several months.**
  - **Individuals with "Long-Covid" who experience COVID-19 related symptoms "for many months, even if intermittently."**

EEOC Updates to COVID-19 Testing Guidelines for Employers

- On July 12, 2022, the EEOC updated its guidelines regarding COVD-19 testing for employers
- At the beginning of the pandemic, the EEOC determined that the ADA standard for medical examinations was always met for employers to conduct on-site COVID-19 viral screening tests.
- With the July 12, 2022 update, the EEOC has made clear that moving forward, employers will need to assess whether current pandemic circumstances and individual workplace circumstances justify the testing to prevent workplace transmission of COVID-19.

COVID-19 Testing and ADA Standard for Medical Examinations

- **Whether a medical examination, like a COVID-19 screening, is permissible under the ADA if it is job-related and consistent with business necessity.**
- **The EEOC has provided some factors that employers should consider when determining whether to test employees:**
  - **The current level of community transmission;**
  - **The vaccination status of employees;**
  - **The accuracy and speed of tests;**
  - **The degree to which breakthrough infections are possible for employees who are "up to date" on vaccinations;**
  - **The ease of transmissibility of the current variant(s);**
  - **The possible severity of illness from the current variant(s);**

COVID-19 Testing and ADA Standard for Medical Examinations

- **The EEOC has provided some factors that employers should consider when determining whether to test employees:**
  - **What types of contacts employees may have with others in the workplace or elsewhere that are required for work; and**
  - **The potential impact on operations if an employee enters the workplace with COVID-19.**
- **The EEOC has reiterated that COVID antibody tests (as opposed to viral tests) do not meet the "business necessity" standard for employee testing and are prohibited under the ADA.**

Remote Work

- **First, step is to determine why an employee has requested to work in a remote capacity. If an employee simply prefers remote work, you may compel them to return onsite. However, if an employee cannot work onsite for health reasons—physical (e.g., immunocompromised conditions) or mental (e.g., anxiety or depression)—the employee may be eligible for leave under the Family & Medical Leave Act (FMLA) or an accommodation under the Americans with Disabilities Act (ADA) and related state law.**

When employees list a health reason for wanting to work remotely

- **Municipal employers should initiate the FMLA process by providing eligible employees with the FMLA's Notice of Eligibility and Rights and Responsibilities form.**
- **Employers also should initiate the ADA's interactive process to determine if the employee's condition qualifies as a disability under the ADA and if the employer can provide an accommodation without undue hardship, e.g., remote work.**

If you provided remote work only in response to the pandemic, will that be some evidence that onsite work really isn't essential?

- **From Q&A D.16 of the EEOC's COVID guidance:**
- **"…the temporary telework experience could be relevant to considering [a] renewed request [for telework post-pandemic]. In this situation, for example, the period of providing telework because of the COVID-19 pandemic could serve as a trial period that showed whether or not this employee with a disability could satisfactorily perform all essential functions while working remotely, and the employer should consider any new requests in light of this information."**

Establishing that onsite work is essential?

If you believe onsite work is essential, here are some strategies to avoid telework as an accommodation post-pandemic:
Document how telework was a challenge.
Review your job descriptions—is there something there about onsite work? If not, add it.
Consider a statement like this when you communicate with employees about returning onsite:

"We are excited to return you to onsite work so that you can resume all the essential functions of your job."

Remote Workforce Moonlighting

How Common Is Remote Work Moonlighting?

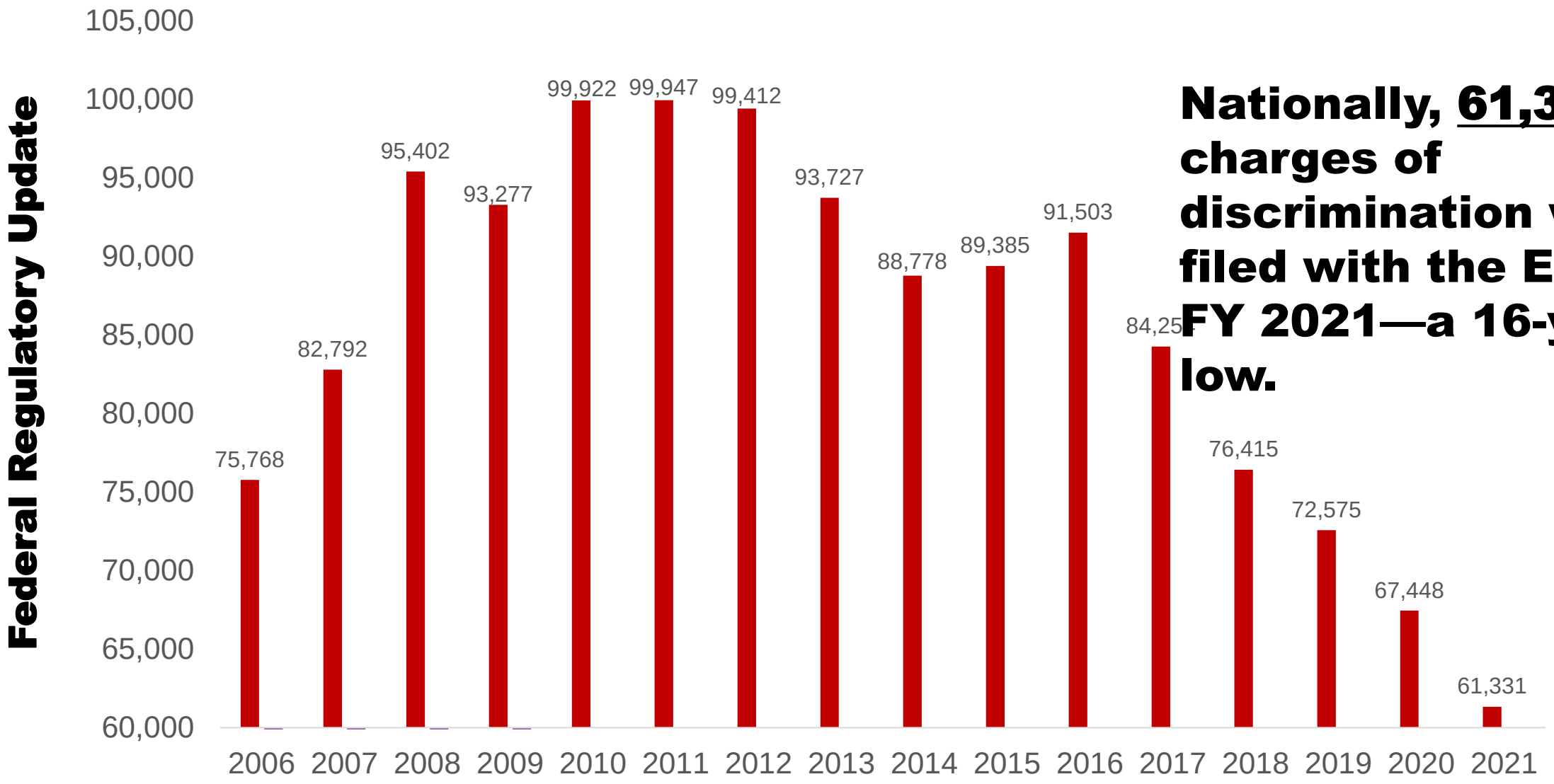
- **A recent survey by Resume Builder revealed 69% of remote workers had a second job.**
  - **37% of those have a full-time second job.**
  - **Almost 40% of those with two remote jobs say they do not work more than forty hours total for both jobs.**
- **Forbes reported on a survey that revealed approximately 50% of respondents had worked for another employer while on the clock**

Remote Workforce Moonlighting

- **Decide what limitations the City will set on outside employment and communicate those limitations to your employees and applicants. Possible limitations on outside employment include:**
  - **Does not interfere with job performance or availability during expected work hours.**
  - **Does not create a conflict of interest such as work involving a vendor of the City.**
  - **Does not involve the use or disclosure of confidential or other non-public information.**
  - **Does not use City-provided equipment or resources.**

Enforce relevant company policies, and train managers to effectively address performance issues.

EEOC Charge Statistical Report



Nationally, <u>61,331</u> charges of discrimination were filed with the EEOC in FY 2021—a 16-year low.

EEOC/UALD Charge Statistics

In 2021, the top 5 charges of discrimination nationally were:

Retaliation (56%)

Disability (37%)

Race (34%)

Sex (30%)

Age (21%)

In 2021, the top 5 charges of discrimination in Utah were:

Retaliation (62%)

Disability (50%)

Sex (28%)

Age (20%)

Race (18%)

Recent Employment Law Cases

***Kennedy v. Bremerton School District*, 21-418 (06/27/2022)**

***Dennis v. Fitzsimons*, No. 19-1377 (10th Cir. 2021)**

Kennedy v. Bremerton School District

- **Facts:**
  - **Joseph Kennedy, a high school football coach, engaged in prayer with a number of students during and after school games.**
  - **His employer, the Bremerton School District, asked that he discontinue the practice in order to protect the school from a lawsuit based on violation of the Establishment Clause.**
  - **Kennedy refused and instead rallied local and national television, print media, and social media to support him.**
- **Procedural History:**
  - **Kennedy sued the school district for violating his rights under the First Amendment and Title VII of the Civil Rights Act of 1964.**
  - **The district court held that because the school district suspended him solely because of the risk of constitutional liability associated with his religious conduct, its actions were justified.**
  - **Kennedy appealed, and the U.S. Court of Appeals for the Ninth Circuit affirmed**

Kennedy v. Bremerton School District

- **Issue:**
  - **Is a public school employee's prayer during school sports activities protected speech, and if so, can the public school employer prohibit it to avoid violating the Establishment Clause?**
- **Holding:**
  - **The Free Exercise and Free Speech Clauses of the First Amendment protect an individual engaging in a personal religious observance from government reprisal; the Constitution neither mandates nor permits the government to suppress such religious expression.**
  - **The District disciplined Coach Kennedy after three games in October 2015, in which he "pray[ed] quietly without his students." In forbidding Mr. Kennedy's prayers, the District sought to restrict his actions because of their religious character, thereby burdening his right to free exercise.**

Kennedy v. Bremerton School District

- **Holding:**
  - **As to his free speech claim, the timing and circumstances of Kennedy's prayers—during the postgame period when coaches were free to attend briefly to personal matters and students were engaged in other activities—confirm that Kennedy did not offer his prayers while acting within the scope of his duties as a coach. The District cannot show that its prohibition of Kennedy's prayer serves a compelling purpose and is narrowly tailored to achieving that purpose.**
  - **The Court's Lemon test, and the related endorsement test, are "abandoned," replaced by a consideration of "historical practices and understandings." Applying that test, there is no conflict between the constitutional commands of the First Amendment in this case.**

Dennis v. Fitzsimons

- **Facts:**
  - **In early 2016, Officer Dennis was promoted to Detective Sergeant.**
  - **But on July 27, 2016, Dennis's wife pursued criminal charges against him for domestic violence.**
  - **Sheriff Fitzsimons immediately placed Dennis on paid leave, but directed him to be available (on duty) the next day from 9:00-5:00pm and to contact the office at the start and end of the "shift."**
  - **The next day, Dennis went to the jail for arraignment on the domestic violence charge. When he arrived, he blew a .107. Dennis failed three more tests that day and was unable to be arraigned. He remained in custody and failed to call in as directed.**
  - **A corporal at the jail, called the sheriff and let him know what happened.**

Dennis v. Fitzsimons

- **Facts:**
  - **Sheriff Fitzsimons met with his staff and decided to terminate Dennis.**
  - **Multiple policies were violated:**
    - **Deputies will behave in a manner that does not discredit the SCSO or themselves.**
    - **An employee shall not consume alcohol to a degree that impairs his performance on duty.**
    - **An employee shall not consume alcohol eight hours before going on duty.**

Dennis v. Fitzsimons

- **Procedural History:**
  - **Dennis sued under ADA claiming he was discriminated against for having the disability of alcoholism.**
  - **To win on a disability case, a plaintiff must identify some affirmative evidence that his disability was a "determining factor" in his termination.**

Dennis v. Fitzsimons

- **Procedural History:**
  - **Evidence of comments about his disability or a close temporal proximity to the employer learning about the disability may give rise to an inference of discrimination.**
  - **District court sided with the Sheriff saying that the plaintiff couldn't prove that the termination was based on the officer's alcoholism but rather on his conduct.**
  - **According to the court, Dennis offered no affirmative evidence. Instead, the record showed:**
    - **Sheriff promoted him to detective after learning of negative incidents associated with drinking.**
    - **Sheriff knew of his alcoholism for over a year before taking action in response to Dennis's conduct.**

Dennis v. Fitzsimons

- **Holding:**
  - **Alcoholism as a disability is a protected class, but misconduct is not protected.**
  - **The ADA does not protect misconduct "merely because the actor has been diagnosed as an alcoholic and claims that such action was caused by his disability."**
  - **Under the ADA, an employer can still prohibit an employee from being under the influence of alcohol at the workplace and hold an alcoholic employee "to the same qualification standards for employment" as other employees.**
- **Takeaways:**
  - **Alcoholism as a disability is a protected class, but misconduct is not protected.**

Dennis v. Fitzsimons

- **Takeaways:**
  - **The ADA does not protect misconduct "merely because the actor has been diagnosed as an alcoholic and claims that such action was caused by his disability."**
  - **Under the ADA, an employer can still prohibit an employee from being under the influence of alcohol at the workplace and hold an alcoholic employee "to the same qualification standards for employment" as other employees.**

Utah Legislative Update

Government Record Amendments

HB 399 – Government Record Amendments

Prior to the passage of HB399, there were 83 categories of protected records in Utah code. HB399 brings that total to 84. The records protected are statements made by an employee of a governmental entity in relation to an investigation related to potential misconduct by the employee.

Protects Garrity statements from records access.

Utah Code §§ 63G-2-305 (85).

HB399 Background

- **What are Garrity Rights?**
  - **Garrity v. New Jersey (Supreme Court) Governments can compel police officers to make statements or lose their jobs. Prosecutors cannot use these statements against the officers in a criminal case.**
  - **Garrity Rights protect public employees from being compelled to make statements that might incriminate themselves during investigatory interviews by their employers.**
  - **Fifth Amendment doesn't require someone to speak, but under Garrity an employee can be compelled to.**
  - **These statements are coerced statements that are protected and cannot be used in a subsequent criminal prosecution.**

HB399 Background

- **Salt Lake Tribune GRAMA requests to each law enforcement agency in Utah for records related to officer involved shootings.**
  - **West Jordan PD – State Records Committee found *Garrity* statements of officers made during investigations of officer involved shootings are public records.**
    - **"Simply because officers are required to participate in Garrity interviews, their privacy interests do not rise to the level of a 'clearly unwarranted invasion; of personal privacy because they are public officials with public responsibilities subject to public oversight."**
    - **Weighing various interests and public policies regarding classification of the records, "the public's right to know 'substantially exceeds' individual interests of public officials or police officers."**
- **HB399 has now made these records protected.**

Takeaways

- **Law Enforcement Agencies receive a disproportionate number of records requests**
  - **Duchesne County received 828 GRAMA requests between Jan. 1 2017 and Jan. 31, 2018**
  - **Of those, 775 were directed at the Sheriff's Office**
- **Pursuant to Utah Code § 63G-2-801(1)(a), it is a class B misdemeanor for a public employee to intentionally disclose a private, controlled, or protected record knowing that the disclosure is prohibited under GRAMA.**
- **Just because an officer has a different perspective it doesn't mean they have violated Garrity.**

Malicious Prosecution Claims

Thompson v. Clark, 595 U.S. __ (2022)

Thompson v. Clark

- **Facts:**
  - **Camille Watson was staying with her sister and her sister's husband, Larry Thompson, when she dialed 911 after seeing a diaper rash on the couple's infant daughter and mistaking the rash for signs of abuse.**
  - **In response, two Emergency Medical Technicians (EMTs) arrived at Thompson's apartment building to investigate.**
  - **The EMTs saw nothing amiss, and, unaware of Camille's 911 call, Thompson told the EMTs that no one in his home had called 911.**
  - **He asked the EMTs to leave, and they did.**
  - **Four police officers followed up to investigate the alleged child abuse and insisted on seeing Thompson's daughter.**
  - **Thompson asked to speak to the officers' sergeant, and after being denied that request, asked whether the officers had a warrant (which they did not). Nevertheless, they physically tried to enter Thompson's home, and when Thompson attempted to block the doorway, the officers tackled and handcuffed him.**

Thompson v. Clark

- **Facts:**
  - **He was arrested and taken to jail, where he spent two days.**
  - **He was charged with resisting arrest and obstructing governmental administration, and about three months later, the prosecution dropped the charges against him, stating that "People are dismissing the case in the interest of justice."**
- **Procedural History:**
  - **Thompson filed a Section 1983 malicious prosecution claim against the police officers involved.**
  - **A federal district court granted judgment as a matter of law in favor of the defendants on Thompson's malicious prosecution claim due to his failure to establish favorable termination of his criminal case, which is required under binding Second Circuit precedent.**
  - **The appellate court affirmed.**

Thompson v. Clark

- **Issue:**
  - **What does a favorable termination mean?**
- **Holding:**
  - **Larry Thompson's showing that his criminal prosecution ended without a conviction satisfies the requirement to demonstrate a favorable termination of a criminal prosecution in a Fourth Amendment claim under Section 1983 for malicious prosecution; an affirmative indication of innocence is not needed.**

Other Claim Issues

Responding to Persons Experiencing a Mental Health Crisis Mental

- CIT Utah:
  - *"The CIT Utah program develops and sustains partnerships between criminal justice services, behavioral healthcare services, and community members. These partnerships provide three basic services: the training of law enforcement officers and other first responders in proper methods of crisis response and resolution; developing effective crisis response systems; and advocating for accessible behavioral health services and programing."* https://cit-utah.com/

Dealing with Sovereign Citizens

According to the FBI, Sovereign Citizens are "anti-government extremists who believe that even though they physically reside in this country, they are separate or 'sovereign' from the United States. . . . [T]hey believe they don't have to answer to any government authority, including courts, taxing entities, motor vehicle departments, or law enforcement."

- The FBI has labeled the movement as an "extremist movement" because Sovereign Citizen groups, cells, and individuals have committed various crimes, including:
  - Committing physical assault and even murder;
  - Threatening judges, government personnel, and law enforcement professionals
  - Impersonating diplomats and police officers
  - Using fake documentation (passports, license plates, driver's licenses)
  - Using fake currency
  - Various white-collar crimes (mortgage fraud

Other High Risk Areas

-Vehicle pursuits
-Opioid epidemic
-Evidence Rooms
-Solitary Confinement
-Medical Marijuana

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Questions

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