LAW ENFORCEMENT PERSONNEL ISSUES

(Investigation of the Officer-Involved Shooting)

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Bill leads Chamberlain Hrdlicka's labor, employment and civil rights litigation group but also handles commercial and other large-scale litigation. Prior to joining the firm, he was a name partner in a Houston, Texas law firm.

Bill's labor and employment law practice focuses on the defense of both public and private employers throughout Texas and the United States. He has achieved considerable success in the defense of labor and employment cases of all types, as well as significant success in commercial litigation matters through both trial and arbitration.

He is actively involved in labor, employment and civil rights and governmental liability training as well as training employers and managers, governmental officials and employees. He is frequently interviewed by various media and he speaks frequently on these topics to peer and professional groups such as the Texas State Bar, the Texas Municipal League and the Texas Council Risk Management Fund. In addition, he has served as an adjunct instructor for Sam Houston State University's law enforcement and corrections management professional development programs.

Selected Reported Cases

Mr. Helfand is credited with well over 100 reported cases; among them:

- Wagner v. Bay City, Tex., 227 F.3d 316 (5th Cir. 2000) - Victory where Fifth Circuit reversed lower court to find police officers were entitled to qualified immunity, and that they did not act with deliberate indifference to risk of harm for denial of medical care claim.

Practice Areas

- Labor & Employment Law
- Litigation

Education

- Tulane University, B.A., 1984
- Tulane School of Law, J.D., with Honors 1987
- Attorney Mediators Institute, Graduate, 1995

Honors

- AV Rating, Martindale-Hubbell Law Directory
- The Insurance Bar
- Best's Recommended Insurance Attorneys
- Who's Who Among American Lawyers
- Texas Magazine's Texas Super Lawyer
- Harvard Mediation Project, Participant

Bar Admissions

- Texas
- Illinois

Court Admissions

- U.S. Supreme Court
- U.S. Court of Appeals for the Fourth Federal Circuit

- U.S. Court of Appeals for the Fifth Federal Circuit
- U.S. Court of Appeals for the Sixth Federal Circuit
- U.S. Court of Appeals for the Ninth Federal Circuit
- U.S. Court of Appeals for the Tenth Federal Circuit
- U.S. District Courts for all Four Federal District Courts of Texas

William S. Helfand, Continued

- Belk v. Charlotte-Mecklenburg Bd. Of Ed., 269 F.3d 305 (4th Cir. 2001) - The Fourth Circuit (en banc) affirmed district court finding that CMS had reached unitary status. This was the first case ever in which a school district under desegregation orders was involuntarily forced into unitary status.
- Schaffer v. Benefit Plan of Exxon Corp., 151 F.Supp.2d 799 (S.D. Tex. 2001) - ERISA plan participants challenged Exxon Benefit Plan denial of benefits. District court found that participant's failure to return to work justified termination by plan administrator.
- Sokolow v. City of League City, 37 F.Supp.2d 940 (S.D. Tex.1999) - Former city attorney brought Title VII claim alleging religious discrimination and retaliation. Victory where Court found that attorney failed to prove link between offensive comments and city counsel's decision to terminate attorney.
- Southwest Key v. Gil-Perez, 81 S.W.3d 269 (Tex. 2002) - Obtained Texas Supreme Court decision finding home for boys not negligent where evidence did not support claim that failure to provide protective gear was cause of resident's injury.
- Porter v. Exxon Mobil Corp., 246 F.Supp.2d 615 (S.D. Tex.2003) - Successfully defended Exxon Mobil in age discrimination action. Court found non-age based reason for employee's termination. Employee violated business ethics policy prohibiting expense acceleration practices.
- Giunta v. Mobil Corp. Employee Severance Plan, 205 F.Supp.2d 715 (S.D. Tex.2002) - Obtained favorable opinion against participant in employee severance plan challenging denial of severance benefits. Participant not wanting to relocate was not a good reason for resignation, and thus no entitlement to severance warranted.
- Howard v. East Texas Baptist University, 122 S.W.3d 407 (Tex. App. – Texarkana 2003) - Court found in favor of private university that recreational use statute applied and university was not grossly negligent for injury to patron using diving board at swimming pool.
- Vu v. ExxonMobil Corp., 98 S.W. 3d 318 (Tex. App. – Houston [1st Dist] 2003) - In Exxon Mobil wrongful discharge action, court upheld summary judgment.
- Guadalupe-Blanco River Authority v. Pitonyak, 84 S.W.3d 326 (Tex. App. – Corpus Christie 2002) - Successfully defended river authority in Texas Torts Claim action surrounding condition and maintenance of river saltwater barrier alleged to have caused drowning of boaters.

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An Eagle Scout and shade-tree mechanic, CHRISTOPHER D. LIVINGSTON is a partner with Lyon, Gorsky, Haring & Gilbert, L.L.P., a firm that concentrates on representing law enforcement and public employees. In addition to representing TMPA members statewide for over 17 years, the firm serves as counsel to the Dallas Police Association, the Texas Department of Public Safety Officers' Association, and many other law enforcement associations.

Chris has represented more than 60 peace officers in critical incidents in the past two years.

Chris is a third-generation Jayhawk. He received a Bachelor of Arts degree from the University of Kansas in 1995, where he was an Honors Program Student and earned membership in Pi Sigma Alpha, Omicron Delta Kappa, and several other honor societies. He received his Doctor of Jurisprudence from the University of Texas School of Law in 1998. There, he was a selected to the Board of Advocates and to the 1997 and 1998 Robert F. Wagner National Labor and Employment Moot Court Teams.

Chris was admitted to the Texas Bar in 1998. Additionally, he is licensed and admitted to practice before the Supreme Court of the United States, the U.S. Court of Appeals for the Fifth Circuit; and the U.S. District Courts for the Northern, Eastern and Western Districts of Texas. Before joining Lyon Gorsky, Chris served as a law clerk to U.S. District Judge William M. Acker, Jr. of the Northern District of Alabama, as an Assistant Attorney General for the State of Texas, and worked for a large defense firm.

Chris has lectured before the National Association of Attorneys General, the Texas Department of Insurance, the Texas Municipal Police Association, and continuing education groups on ERISA preemption, Employment Discrimination, Employee Liability Issues, and the Defense of Police Officers Accused of Excessive Force. Additionally, he has been cited as authority on the subject of ERISA preemption in the Boston University Law Review. *See* 81 B.U. L. REV. 867 (2001).

Locally, Chris is an active member of the 5th and 31st Degree Teams of the Dallas Scottish Rite. He also serves on the Board of Directors of Dallas Services, a non-profit organization dedicated to assisting children with disabilities, vision problems, and other special needs.

Chris is married to the former Ashley Elizabeth Bunnell of Midland, Texas. They and their son, Schuyler, live in Dallas, Texas.

TABLE OF CONTENTS

I. HYPOTHETICAL 1

II. CRIMINAL INVESTIGATION 1

III. INTERNAL INVESTIGATION 1

IV. FEDERAL USE-OF-FORCE LAW 3

V. ATTORNEYS FOR OFFICERS? 4

VI. THE COMPLAINT DEBATE 5

VII. POLYGRAPHS 6

VIII. CIVIL SERVICE 7

IX. CONCLUSION 7

ATTACHMENT – Power Point Presentation 9

LAW ENFORCEMENT PERSONNEL ISSUES

Christopher D. Livingston

Obviously, an entire seminar could be devoted to this topic alone. But time is limited. Therefore, I thought a unique hypothetical would best aid in highlighting law enforcement personnel issues for every attorney (whether representing the government entity or the peace officer).

I. HYPOTHETICAL

It is 2:45 a.m. on a warm August evening in Dallas Texas. Daytime highs have been in the triple digits for weeks. Police Officer Livingston ("Officer Livingston") is working an off-duty assignment in full uniform at a bank. Several armed robberies have occurred near the bank this summer and at least two victims have been shot in the last month. Security cameras show (in a grainy black-and-white image) a person loitering around the backside of the bank. The individual appears to stand and then squat near a secured entrance.

Officer Livingston heads to the rear of the bank to investigate. He spots a male wearing a hooded sweatshirt with a pocket in front and long pants. The clothing is suspicious in the heat of the night. As Officer Livingston approaches, the suspicious male turns and walks away. Overhead lights reveal the suspect is attempting to conceal a metallic object in the front pocket of his sweatshirt. Officer Livingston yells for the suspect to stop, but the request is ignored. To assure officer safety, Officer Livingston unholsters his service weapon and loudly orders the suspect to stop and take his hands out of his pockets. Instead, the suspect looks over his shoulder and makes eye contact with Officer Livingston. The suspect begins to turning to his left as if to face Officer Livingston head on. The suspect removes his left hand from the front pocket of his sweatshirt, but is still concealing his right hand in the pocket. Officer Livingston now believes the item in the suspect's pocket is a gun.

As the suspect continues to turn, Officer Livingston again yells, "Let me see your hands!" The suspect steps toward Officer Livingston with his left foot and appears to be getting into a firing position. The suspect, still with his right hand inside his pocket, draws his hand up along his body toward his chest. The lights shine off the edge of the metal object, which is beginning to protrude through the left-hand side of the sweatshirt pocket. Officer Livingston is convinced the suspect is holding a gun and raising it to shoot.

Alone, on the backside of the bank, with a suspect who refuses to comply with his multiple verbal commands, Officer Livingston decides to fire his service weapon. He remembers pulling the trigger once and the suspect dropping to the ground. Officer Livingston can be heard stating in a rapid clip over the radio, "shots fired, shots fired, suspect down, need backup." The suspect dies an instant later.

A later review of the video surveillance reveals the entire encounter lasted just under a minute.

Two possible outcomes occur when the deceased is approached: (1) a gun is found on or near the deceased; or (2) the metallic device turns out to be an MP3 player. Under the latter scenario, the suspect was a jogger who lived in an apartment a few blocks away. For some reason, on this evening, the jogger had turned up the backside of the bank, stopped for a few minutes, leaned against the bank building near the secured entry. Earbuds were still firmly lodged in the jogger's ears with "Eye of the Tiger" blaring on repeat.

The first question is: Does it matter whether the suspect had a gun?

II. CRIMINAL INVESTIGATION

Again, the first question is: Does it matter whether the suspect had a gun? Under Texas law, like everywhere else, the answer is probably an equivocal "MAYBE." We're sorry to disappoint everyone who thought the answer was "heck no."

The standard for the criminal prosecution will be whether **it reasonably appeared to defendant that he or she was in danger of death or serious bodily injury.** Ultimately, a grand jury will determine whether Officer Livingston reasonably feared for his life. If so, Officer Livingston may act on such a fear and is justified in using deadly force. Hence, the first question.

Initially, the shooting would be investigated by local police. In Dallas, a team from the Dallas Police Department's Crimes Against Persons Response Unit ("CAPRs") responds to all officer-involved shootings. In Houston, the Harris County District Attorney's Office investigates officer-involved shootings. Smaller jurisdictions frequently request the Texas Rangers because the Rangers have expertise in these matters and provide an independent investigation to prevent any conflict-of-interest claims.

The investigators request all the video surveillance tapes, take witness statements, and review the Medical Examiner's report. These homicide detectives will present their findings to the district attorney and the grand jury. If necessary, Officer Livingston may be called to testify. But remember, Officer Livingston has a right under the Fifth Amendment of the United States Constitution (yeah, it applies in Texas too) to remain silent. Under the scenario above, Officer Livingston would probably want to prepare a written statement and provide it to the detectives.

III. INTERNAL INVESTIGATION

A use-of-force incident also results in a internal

investigation. Chief Helfand will order the internal investigation of the shooting to assure that Officer Livingston complied with the police department's general orders and policies regarding use of force. Chief Helfand can immediately start the investigation; or, he may decide to wait for the criminal investigation to run its course. Depending on the situation, Officer Livingston may be placed on restricted duty or administrative leave pending the internal investigation. Unlike the criminal case, Officer Livingston can be ordered to submit a written statement and respond to questions during the internal investigation. A police officer who refuses such an order is subject to termination for insubordination. The first step in this internal process should be providing Officer Livingston an administrative or Garrity warning.

In a line of cases decided between 1967 and 1977, the Supreme Court specifically defined the Fifth Amendment rights of public employees in the context of employer investigations. *See Garrity v. New Jersey*, 385 U.S. 493, 500 (1967); *Lefkowitz v. Cunningham*, 431 U.S. 801, 809 (1977); *Lefkowitz v. Turley*, 414 U.S. 70, 84-85 (1973); *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation*, 392 U.S. 280, 284-85 (1968); *Gardner v. Broderick*, 392 U.S. 273, 278-79 (1968). When public employers seek to compel answers from employees by threatening their jobs or asking for waivers of their rights, employees have automatic immunity from the use of those answers in subsequent criminal prosecutions. *Cunningham*, 431 U.S. at 805-06. Coercion is implicit in such cases. *Garrity*, 385 U.S. at 500 (holding that the threat of termination for refusal to answer questions constitutes coercion, resulting in immunity from prosecution for any answer given); *see also Gardner*, 392 U.S. at 278 (holding that an employer cannot fire an employee solely for refusing to waive his Fifth Amendment rights). Employee statements can be compelled only when there is immunity and the questions are narrowly tailored to the employee's duties; immunity can be expressly granted or implied when questioning is coercive. *Gardner*, 392 U.S. at 278 ("If appellant. . .had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity . . .the privilege against self-incrimination would not have been a bar to his dismissal."

The Supreme Court's decision in *Garrity* "prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office." *Garrity v. New Jersey*, 385 U.S. 493, 500, 17 L. Ed. 2d 562, 87 S. Ct. 616 (1967). "More specifically, Garrity protects police officers from having to choose between cooperating with an internal investigation and making potentially incriminating statements. **Immunity under Garrity prevents any statements made in the course of the internal investigation from being used against the officers in subsequent criminal proceedings.**" *United States v. Vangates*, 287 F.3d 1315, 1320 (11th Cir. 2002) (emphasis added). Garrity provides a complete prohibition on the "use in subsequent criminal proceedings of statements obtained under threat of removal from office . . .." *Garrity*, 385 U.S. at 500. This "total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead,' and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures." Id.

Garrity involved police officers who were under investigation for fixing traffic tickets. *Garrity*, 385 U.S. at 494. They were brought in for questioning and informed that, pursuant to New Jersey law, any statement they made could be used against them in a criminal proceeding, and that any refusal to answer questions would subject them to removal. *Id.* at 494 n.1 Because they did not want to be fired, Garrity and the other officers answered their employer's questions. *Id.* at 495. Subsequently, the officers' answers were used against them in their criminal trials. *Id.* They were found guilty and appealed the conviction on the grounds that their statements given in the administrative interview were coerced because they forced the officers to choose between their jobs and self-incrimination. *Id.*

The Court first found that the threat of removal for failure to answer questions was coercive, comparing the choice the officers faced to being "between the rock and the whirlpool." *Id.* at 497-98. As to the admissibility of the statements, the Court held that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office." *Garrity*, 385 U.S. at 500. The result of *Garrity* was the exclusion from any subsequent prosecution of statements given when a public employee is forced to choose between his job and his Fifth Amendment rights. *Garrity*, 385 U.S. at 500.

The year after *Garrity* was decided, the Supreme Court issued another opinion clarifying *Garrity*. In *Gardner v. Broderick*, Robert Gardner, a police officer, was called before a grand jury to answer questions regarding unlawful gambling. *Gardner*, 392 U.S. at 274. Gardner was asked to waive his Fifth Amendment rights before the grand jury, and was told that his failure to do so would lead to his dismissal. Id. Gardner refused to waive his rights and was subsequently fired. Id. at 274-75.

The Court found that Gardner's termination was a violation of his rights under *Garrity*. Id. at 278-79. However, the Court noted in dicta that answers may be compelled if the employee is given immunity. Id. at 276; Specifically, the Court said when an employee is asked questions that are narrowly and specifically tailored to the scope of his employment, the employee can be fired for

failing to answer as long as his employer does not request a waiver of an employee's immunity. *Gardner*, 392 U.S. at 278.

Thus, the government is not allowed to force a person to make a statement, even out of court, that might be used as evidence that he had committed a crime. It is not even allowed to pressure him into cooperating by threatening to fire him (if he's a government employee) for his refusing to provide such evidence. *Gardner v. Broderick*, 392 U.S. 273, 276, 278-79, 20 L. Ed. 2d 1082, 88 S. Ct. 1913 (1968). However, the department has every right to investigate allegations of misconduct, including criminal misconduct by its police officers, and even to force them to answer questions pertinent to the investigation; but if it does so, it must give them immunity from criminal prosecution on the basis of their answers. *Lefkowitz v. Cunningham*, 431 U.S. 801, 806, 53 L. Ed. 2d 1, 97 S. Ct. 2132 (1977); *Gardner v. Broderick*, *supra*, 392 U.S. at 276. The government may not use those compelled answers to assist it in prosecuting the officer. *Murphy v. Waterfront Commission*, 378 U.S. 52, 79-80, 12 L. Ed. 2d 678, 84 S. Ct. 1594 and n. 18 (1964); *United States v. Balsys*, 524 U.S. 666, 683, 141 L. Ed. 2d 575, 118 S. Ct. 2218 (1998).

As the Court noted in *Garrity*, "policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." Garrity v. New Jersey, 385 U.S. 493, 500, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967). The Fourth Amendment's prohibition against "unreasonable searches and seizures" therefore applies to police officers. Moreover, drug or alcohol testing of a governmental employee implicates the Fourth Amendment even though the testing may not be related to enforcement of the criminal law. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989) (applying drug and alcohol testing to railroad employees for safety reasons). Consequently, a *Garrity* warning should also be given before subjecting Officer Livingston to any blood or urine tests if the department commonly conducts such tests after a critical incident.

IV. FEDERAL USE-OF-FORCE LAW

In a subsequent lawsuit, Officer Livingston's conduct could be considered a violation of the Fourth Amendment. The United States Bureau of Justice Statistics has reported that force is used in two percent of arrests. BUREAU OF JUSTICE STATISTICS, *Police Use of Force: Collection of National Data*, United States Dep't of Justice, Washington, D.C. (1997) (NCJ-165040). This force may range from the use of an open hand to deadly force.

The United States Supreme Court, in *Graham v. Connor*, 490 U.S. 386 (1989), established the test for determining whether a police officer's use of force would be judged according to the "objective reasonableness" standard. *Id*. at 393-94. Graham was a diabetic and experienced an insulin reaction. *Id*. at 388. Officer Connor did not believe that Graham was diabetic and thought he was intoxicated. *Id*. at 389. Connor used serious physical force against Graham who suffered a broken foot, an injured shoulder, cut wrists, and a bruised forehead. *Id*. at 390. Graham's friend told Officer Connor that Graham was diabetic and tried to give him orange juice, which Connor refused to allow. *Id*. at 389. The district court granted the officer's motion for directed verdict after evaluating the officer's use of force under an analysis of four factors: (1) whether the force was necessary; (2) the relationship between the need for force and the amount of force used; (3) the extent of the injury; and (4) whether the force was applied in a good-faith effort to restore order or maliciously used with the purpose to cause harm. *Id*. at 390.

The Supreme Court reversed and held that the district and circuit court did not use the appropriate standard in considering the degree of force. *Graham*, 490 U.S. at 390. The Court held that the use of force is viewed in the context of a Fourth Amendment seizure. *Id*. at 388. Therefore, the degree of force must be reasonable under the circumstances that the officer faced at the time. *Id*. at 396.

The Supreme Court, in *Tennessee v. Garner*, 471 U.S. 1 (1985), had previously established the standard for the use of deadly force against a fleeing suspect. *Id*. at 7. The reasonableness standard of the Fourth Amendment applies to the use of deadly force. *Id*. The Court found that the use of deadly force against a fleeing suspect whom the officer did not believe to be armed was unreasonable. *Id*. at 11.

In Texas, the deceased's family is likely to bring a wrongful-death action at the conclusion of the criminal investigation or before. A wrongful-death action must generally be brought within two years of the injured person's death. TEX. CIV. PRAC. & REM. CODE § 16.003. However, the limitations period for wrongful death is tolled during the plaintiff's minority. *Enciso v. Chmielewski*, 16 S.W.3d 858, 861 (Tex. App.--Houston (14th Dist.) 2000, no pet h.). So there is a potential that the suit could be brought more than two years after the incident.

This wrongful-death action could be brought against Officer Livingston and the bank. An employer may be vicariously liable for the tortious acts of its employee under the doctrine of respondeat superior. *Knutson v. Morton Foods*, Inc., 603 S.W.2d 805, 807 (Tex. 1980). Respondeat superior imposes liability on the employer when the negligence of its employee, acting in the scope of his employment, is the proximate cause of another's injury. *DeWitt v. Harris County*, 904 S.W.2d 650, 654 (Tex. 1995); *Marange v. Marshall*, 402 S.W.2d 236, 239

(Tex. 1966).

The action against the bank could be compounded with an action for negligent retention. Negligent retention addresses a different wrong from the wrong addressed by the doctrine of respondeat superior. Specifically, negligent retention focuses on the employer's own negligence, not on the negligence of the employee. Thus, an employer is liable for negligent retention if it retains "in [its] employ an incompetent servant whom the [employer] knows . . . was incompetent or unfit . . . thereby creating an unreasonable risk of harm to others." *Estate of Arrington v. Fields*, 578 S.W.2d 173, 178 (Tex. Civ. App.--Tyler 1979, writ ref'd n.r.e.). To recover for negligent retention, the plaintiff's injury must be the result of the continued employment of an unfit employee. *Dieter v. Baker Serv. Tools*, 739 S.W.2d 405, 408 (Tex. App.--Corpus Christi 1987, writ denied). The question will be whether Officer Livingston had other use-of-force incidents that demonstrated a propensity to make a negligent decision in this incident.

Self-defense or justifiable homicide is a defense in a wrongful death or survival action. In Texas the law of self-defense is the same in both civil and criminal cases, with the exception of the rule of evidence that gives an accused in a criminal case the benefit of a reasonable doubt. *Fambrough v. Wagley*, 140 Tex. 577, 169 S.W.2d 478, 479 (1943); *Bradford v. Fort Worth Transit Co.*, 450 S.W.2d 919, 923 (Tex. Civ. App.--Fort Worth 1970, writ ref'd n.r.e.) (**if it reasonably appears to defendant that he or she is in danger of death or serious bodily injury, defendant may act on such appearances and is justified in killing assailant**); *Rhoden v. Booth*, 344 S.W.2d 481, 485 (Tex. Civ. App.--Dallas 1961, writ ref'd n.r.e.). Self-defense is also available to a person who has been sued by reason of the actions of his or her agent or servant. *McMurrey Corp. v. Yawn*, 143 S.W.2d 664, 666 (Tex. Civ. App.--Texarkana 1940, writ ref'd).

Under Texas law, a party is not liable for the negligent acts of its independent contractor and only is liable for the intentional acts of its independent contractor. *Exxon Corp. v. Quinn*, 726 S.W.2d 17, 19 (Tex. 1987); *Ross v. Texas One Partnership*, 796 S.W.2d 206, 209 (Tex. App.--Dallas 1990, writ denied, per curiam, 806 S.W.2d 222 (1991)). The doctrine of respondeat superior does not apply to an employee of an independent contractor. *Phillips Pipe Line Co. v. McKown*, 580 S.W.2d 435, 438 (Tex. Civ. App.--Tyler 1979, writ ref'd n.r.e.). As explained by the Dallas Court of Appeals in *Ross*, this rule is particularly important when the independent contractor is hired to provide security for a property owner. Owners of premises should be able to hire independent contractors, for purposes of providing armed security and protection of their property, without being exposed to automatic liability for the negligent discharge of firearms by such employees in the course and scope of their employment. *Ross*, 796 S.W.2d at 215. As a matter of law, work undertaken by the security company is not inherently dangerous and can be delegated to an independent contractor. *Ross*, 796 S.W.2d at 215.

V. ATTORNEYS FOR OFFICERS?

Some departments choose to curtail an officer's access to legal counsel during internal investigations. However, the department may want to consider the long-term benefit of having the officer consult with counsel—especially when the incident is likely to lead to a subsequent lawsuit against the department. An off-the-cuff statement from an officer might preclude summary judgment.

For example, in ***Rocha v. Schroeder*, No. 07-50916 (5th Cir. June 27, 2008)**, Daniela and Gerardo Rocha filed a 42 U.S.C. § 1983 action against Officer Julie Schroeder alleging that she used excessive force when she fatally shot their son, Daniel Rocha.

The district court gave short shrift to analysis of the evidence that, viewed in the light most favorable to the plaintiff, demonstrated Rocha attacked two police officers and was on top of one when Officer Schroeder shot him. The court apparently believed that a material fact issue of "excessiveness" could be created solely by alleged inconsistencies in Officer Schroeder's statements about her motivation. Officer Schroeder claimed both that she thought she was un-holstering her TASER and that she shot Rocha because he was trying to obtain her gun. The trial court stated: "A reasonable trier of fact might believe she shot Rocha because he was trying to obtain her gun, or because she thought she had her taser, or disbelieve both accounts." Thus, the court concluded there was a fact issue precluding summary judgment.

But the Fifth Circuit explained that the objective reasonableness of the force used was a separate question from the immunity question: "whether no reasonable officer could have believed that she was not using excessive force." The Fifth Circuit held that the district court may have overlooked the fact that the relevant immunity issue was whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. The district court apparently believed that a material fact issue of excessiveness could be created solely by alleged inconsistencies in the officer's statements about her motivation. The Fifth Circuit noted that it had to review the materiality, though not the genuineness, of fact issues pertinent to immunity cases. Standing alone, the officer's subjective statements, even if conflicting, were not sufficient to create a material issue concerning the objective reasonableness of her conduct for immunity purposes. The issue was not simply what the officer perceived the son to be doing but, critically, **whether a reasonable police officer confronted with**

the same circumstances would have shot him.

While the officer was cleared in the case, it demonstrates the importance of focusing use-of-force statements on the justification for using force as opposed to trying to explain ancillary thoughts. Once Officer Schroeder realized she had her service weapon in hand, there was only one issue: was she justified in using it.

VI. THE COMPLAINT DEBATE

In the event that Chief Helfand determines that Officer Livingston's use-of-force violated department policy, the safest course of action is to present Officer Livingston with a signed, written complaint.

Section 614.023(a) of the Texas Government Code requires that "[a] copy of a signed complaint against a law enforcement officer of this state or a fire fighter, detention officer, county jailer, or peace officer appointed or employed by a political subdivision of this state shall be given to the officer or employee within a reasonable time after the complaint is filed." TEX. GOV'T CODE § 614.023(a) (emphasis added). Section 614.023(b) of the Texas Government Code provides that "disciplinary action may not be taken against the officer . . . unless a copy of the signed complaint is given to the officer or employee." TEX. GOV'T CODE § 614.023(b) (emphasis added). "'May not' imposes a prohibition and is synonymous with 'shall not.'" TEX. GOV'T CODE § 311.016(5).

Currently, there is a debate concerning the term "complaint" in Chapter 614. Counsel for officers assert that the complaint includes internal allegations. Most government agencies disagree. *Compare Fudge v. Haggar*, 621 S.W.2d 196, 198 (Tex.App.—Texarkana 1981, writ ref'd n.r.e.) (a complaint signed by an internal affairs investigator satisfied the requirements of the precursor statute to Chapter 614, subchapter B of the Government Code) *with Guthrey v. Taylor*, 112 S.W.3d 715, 723 (Tex.App.—Houston [14th Dist.] 2003, no pet.) (police chief's notice of charges, without signed written complaint from person making complaint or internal affairs report, did not satisfy requirements of sections 614.022 and 614.023 of the Government Code).

The plain language of the statute makes no distinction between citizen complaints and internal complaints. It is, of course, a well-settled rule of statutory construction that every word excluded from a statute must be presumed to have been excluded for a purpose. *Laidlaw Waste Sys., Inc. v. Wilmer*, 904 S.W.2d 656, 659 (Tex. 1995). This rule complements another general statutory construction principle that courts should not insert words into a statute except to give effect to clear legislative intent. *Id.*

In interpreting sections 614.022 and 614.023, the Texas Attorney General found that the "complaint" could come from a department head. TEX. ATT'Y GEN. OP. GA-251 at 3 (2004) ("The authority of a head of a police department to discipline is not limited to complaints filed by citizens"). In other words, the Texas Attorney General recognizes that the requirements of sections 614.022 and 614.023 apply regardless of the source of the complaint.

Chapter 614 of the Government Code was amended by the 79th Legislature in 2005 by House Bill 639. The analysis of House Bill 639 states its purpose was to amend section 614.023 "to provide that disciplinary action may not be taken against a law enforcement officer of the state, fire fighter or peace officer employed by a political subdivision until the complaint is provided to the employee, the complaint is investigated and sufficient evidence to prove the allegation of misconduct exists." Notably, this amendment came after the decision in *Guthrey v. Taylor*, 112 S.W.3d 715 (Tex.App.—Houston [14th Dist.] 2003, no pet.).

From the stated purpose of the 2005 amendment, it is evident that the Legislature intended to strengthen due process protection in the issuance of complaints that lead to disciplinary action. Prior to the 2005 amendment, the statute did not require that complaints be investigated or that sufficient evidence exist when disciplinary action is taken against an employee. Nothing in the statute forbids a department head from making a complaint regarding inappropriate conduct by a subordinate. But it does require that the employee receive a copy of the complaint prior to disciplinary action being taken.

In Attorney General Opinion GA-251, a school district sought clarification on whether a chief of police for the school district police department maintained authority to issue a complaint against a police officer under Chapter 614 of the Government Code. The school district raised confusion on what happens to complaints in situations where children and/or their parents were unable or unwilling to file a signed, written complaint. In addition, the school district sought resolution of whether Chapter 614 limited the school district's ability to evaluate the conduct of personnel and initiate disciplinary action. The Attorney General agreed that the chief of police may discipline its officers and initiate termination of any employee "as long as the officer/employee receives a copy of the complaint prior to imposition of such disciplinary measures." TEX. ATT'Y GEN. OP. GA-251 at 3 (2004). Further, the Attorney General stated that the written complaint under Chapter 614 did not have to be from a citizen, but may be signed by the school district. Notably, the Attorney General referenced *Guthrey*, but did not rely on *Guthrey* to preclude the police chief from issuing a complaint.

In addition, the Attorney General referenced *Fudge v. Haggar*, 621 S.W.2d 196 (Tex.App.—Texarkana 1981, writ n.r.e.). In *Fudge*, the internal affairs investigator for the Dallas Police Department received a telephone call from a sheriff, who relayed a situation concerning a police officer's improper conduct in obtaining the release of a

prisoner. 621 S.W.2d at 198. The internal investigator wrote an official letter of complaint. That investigator also took two affidavits from pretrial release employees in the Dallas Police Department. The investigator showed the complaint and the two witness statements to the officer. Construing Article 6252-20, V.A.C.S., a precursor statute, the *Fudge* court ruled that showing the officer the "internally generated complaint" along with the two witness statements was satisfied the requirements of the statute.

Similarly, the court in *Guthrey v. Taylor*, 112 S.W.3d 715 (Tex.App.—Houston [14th Dist.] 2003, no pet.), distinguished the *Fudge* case in the following language:

> *Fudge*, however, is distinguishable. In *Fudge*, a member of the Dallas County Sheriff's Department called a Dallas Police Department internal affairs investigator to complain that Fudge, a patrolman with the Dallas Police Department, had engaged in improper conduct in obtaining the release of a prisoner. James, the internal affairs investigator, took affidavits from two pretrial release employees and made a special written report to the chief of police concerning the improper conduct. James also wrote an official letter of complaint, presented it to Fudge, and showed Fudge the affidavits. Fudge then complied with an instruction to prepare a written response to the complaint. Subsequently, the chief of police discharged Fudge for conduct that was the subject of the letter of complaint.

112 S.W.3d at 723–24 (emphasis supplied). By distinguishing the *Fudge* case, the court in *Guthrey* appears to recognize that there are circumstances where a signed written complaint from within the law enforcement agency can substitute for a verbal report that initiated the investigation. However, in both instances a copy of the written complaint must be provided to the officer.

VII. POLYGRAPHS

The pre-hire process for police officers frequently includes a polygraph exam. Thereafter, police departments still look to polygraph examiners in order to address truthfulness issues in internal investigations. Officer Livingston could face a polygraph examination during the internal investigation of the shooting.

In Texas, Officer Livingston may not be suspended, discharged, or discriminated against due to his refusal to submit to a polygraph examination as part of an internal investigation **unless:** the complainant submits to and passes a polygraph examination; or the officer is ordered to take an examination under sections 614.063(d) or (e) of the Texas Government Code. A complainant could include an eye witness who describes the shooting differently than Officer Livingston. If the complaintant takes and passes a polygraph exam, then the Officer can be fired for refusing to submit to a polygraph examination.

Chief Helfand may require Officer Livingston to submit to a polygraph. However, Chief Helfand can give such an order **only if** the subject matter of the complaint is confined to the internal operations of the organization employing the officer, the complainant is an employee of the same law enforcement organization, and the complaint does not appear to be invalid based on the information available when the polygraph is ordered. TEX. GOV'T CODE § 614.063(d). The shooting and use-of-force scenario would appear to meet the first two elements. The question is whether an untruthfulness complaint "does not appear to be invalid." Obviously, the physical evidence at the scene or the statement of an eye witness (who has already passed a polygraph) would satisfy the requirement.

Chief Helfand may require a polygraph if he believes that the integrity of Officer Livingston or the department is in question. In such a case, Chief Helfand must provide Officer Livingston with a written explanation of the nature of the extraordinary circumstances, and how the integrity of a peace officer or the law enforcement organization is in question. TEX. GOV'T CODE § 614.063(e). The polygraph exam, however, is to be used solely for the internal investigation.

A recent, unpublished case from the Fifth Circuit addresses the internal nature of the polygraph exam. Baker, then the chief of police for Bay City, Texas, was informed that Hancock, a sergeant detective on his police force, had testified in a sexual assault case. Her testimony was in conflict with another officer's testimony and the Matagorda County District Attorney's Office requested that Baker investigate the conflicting testimony, per Texas's perjury statute. Baker initiated an administrative investigation and advised Hancock that self-incriminating information would not be used against her in a criminal proceeding. After questioning Hancock and the other officer involved, Baker requested the Texas Department of Public Safety ("DPS") to conduct a polygraph examination of the two officers. Baker advised DPS that "[t]his is being handled as an administrative matter, not a criminal case."

The DPS examiner advised "as a matter of procedure", that Hancock need to complete a consent form, waiving her *Miranda* rights. He told Hancock the results of the exam would be given to Baker. He also informed Hancock that he could give the results to the district attorney's office, if it requested them. The examiner advised her that the *Miranda* warnings and consent form were only a matter of procedure.

Hancock refused to waive her rights, and the examiner refused to conduct the exam. Baker subsequently fired Hancock for refusing to take the polygraph exam.

The Fifth Circuit cited the Supreme Court's holding that the dismissal of a police officer who refused to waive his Fifth Amendment rights against self-incrimination violated the officer's constitutional rights. *See, supra*. Accordingly, the Court found for Hancock.

VIII. CIVIL SERVICE

Unless a police union has accepted the regulations and laws through a collective bargaining agreement or it has been statutorily adopted by the specific jurisdiction, civil service laws will not apply. Because of its unique nature, the topic of civil service law is an entirely different issue and is deserving of its own presentation at another time.

IX. CONCLUSION

I hope that this paper has provided you a brief glimpse into some important personnel issues regarding law enforcement. Perhaps this can serve as a starting point or reference for some further research on any issues that interest you.

Should you have any questions or comments please free to call or e-mail.

Law Enforcement Personnel Issues

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The Hypothetical

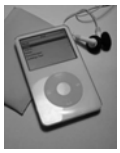


The Two Outcomes

- The Gun



- The MP3 Player



The Criminal Investigation

- *The Standard for Criminal Prosecution in Texas:*
  - Whether it reasonably appeared to defendant that he or she was in danger of death or serious bodily injury.

The Internal Investigation

- The officer will likely invoke the Fifth Amendment
- Employees may not be fired for refusing to waive his or her Fifth Amendment Right
- Provide a *Garrity* Warning
  - *Garrity* prohibits statements obtained under threat to be used in subsequent criminal proceedings. *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967).
  - *Garrity applies even in administering blood or urine tests*

The Internal Investigation

- *The Exception to Garrity:*
  - When an employee is asked questions that are narrowly and specifically tailored to the scope of his employment, the employee can be fired for failing to answer as long as the employer does not request a waiver of an employee's immunity. *Gardner v. Broderick*, 392 U.S. 273, 278 (1968)

Federal Use-of-Force Law

- *The Standard for Use-of-Force in Federal Law:*
  - Whether force was necessary;
  - The relationship between the need for force and the amount of force used;
  - The extent of the injury; and
  - Whether the force was applied in a good-faith effort to restore order or maliciously used with the purpose to cause harm.

The Wrongful-Death Action in Texas

- Two Year Statute of Limitations
  - Limitations are tolled if victim is not of majority age

Other Liabilities from the Hypothetical

- Employer liability through respondeat superior
  - Employer is not liable for negligent acts of an independent contractor, only intentional acts.
    - Includes security guards hired by property owners
- Negligent retention
  - Retaining an employee that is incompetent when the employer knew the employee was incompetent.

Self-Defense or Justifiable Homicide

- *The Justifiable Homicide Standard in Texas:*
  - If it reasonably appears to defendant that he or she is in danger of death or serious bodily injury, defendant may act on such appearances and is justified in killing the assailant. *Bradford v. Forth Worth Transit Co.*, 450 S.W.2d 919, 923 (Tex. Civ. App. – Forth Worth 1970, writ ref'd n.r.e.)

Attorneys for Officers?

- *Long-term Benefits of Retaining Counsel*
  - Preparing for potential lawsuits arising from the officer's conduct
  - Preventing off-the-cuff statements that may adversely affect the lawsuit

The Complaint Debate

- *The Requirement of a Signed Complaint*
  - A copy of the complaint against the officer shall be given to the officer within a reasonable time after the complaint is filed. TEX. GOV'T CODE § 614.023(a)
  - Before disciplinary action can be taken against the officer, a signed copy must be provided to the officer. TEX. GOV'T CODE § 614.023(b)

The Complaint Debate

- *The Dispute:*
  - Does "complaint" include internal allegations?
- *Case Law, Legislation and the Attorney General Say "Yes"*
  - *Guthrey v. Taylor*, 112 S.W.3d 715 (Tex.App. – Houston [14th Dist.] 2003, no pet.)
  - House Bill 639 which amended section 614.023
  - TEX. ATT'Y GEN. OP. GA-251 (2004)

Polygraphs

- *The Requirements:*
  - The complainant must submit to and pass a polygraph examination.
- *The Alternative:*
  - *Head of the employing agency:*
    - *Determines circumstances are extraordinary; or*
    - *Integrity of a peace officer or law enforcement organization are in question; and*
    - *Submits notice in writing to the officer.*

Conclusion

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