THE ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL
IDC QUARTERLY

Civil Rights Update

Brian Smith
Heyl, Royster, Voelker & Allen, P.C., Peoria

Internal Investigations, Criminal Prosecution and Civil Rights Lawsuits: A Brief Review of the Constitutional Questions Raised for Citizens and Officers

The events that give rise to § 1983 litigation are frequently investigated, internally and/or criminally, before a lawsuit is ever filed. After the use of force by an officer—be it a shooting or other use of force where injury occurs—multiple constitutional questions arise, both for the officer and the citizen. For the officer, law enforcement agencies frequently conduct internal and administrative investigations after the use of force. In these situations, an officer's Fifth Amendment right against self-incrimination could be implicated. For the citizen, questions arise as to whether the officer's use of force was justified or excessive, and whether a § 1983 claim should be brought against the officer for alleged violations of the citizen's constitutional rights. 42 U.S.C. § 1983 has a criminal analogue, 18 U.S.C. § 242. In addition to facing potential civil liability, officers may face criminal charges for constitutional violations such as excessive force. To ensure that both the citizen's and the officer's constitutional rights are protected, navigating the sequence of events and being mindful of each individual's constitutional rights at each phase—investigation, criminal prosecution, and/or civil lawsuit—should be considered.

Law enforcement agencies have a legitimate interest in investigating the use of force by their officers and conducting other internal investigations to self-evaluate whether their officers are upholding the law and comporting with the requirements of the Constitution, state laws and regulations. Often, the best source of information is the officer involved in the incident under investigation. However, requiring an officer to provide a statement about their own conduct could infringe on the officer's right against self-incrimination. To gather this information, some law enforcement agencies have threatened discipline or discharge if the officer does not cooperate and offer a statement or testimony as requested. This practice is permissible if the proper warnings and protections are in place. In *Garrity v. New Jersey*, 385 U.S. 493 (1967), the Supreme Court concluded that a law enforcement agency can compel an officer, under threat of losing his job, to provide a statement, even if it is incriminating, if the officer is first warned that the State will not use the statements in any subsequent criminal proceedings.

Recently, the Seventh Circuit evaluated the *Garrity* rule in the context of a § 1983 lawsuit brought by a police officer who was under investigation for officer misconduct. *Homoky v. Ogden*, 2016 U.S. App. LEXIS 3197 (7th Cir. Feb. 24, 2016). As part of an internal investigation, the officer was to submit to a voice stress test. If he did not, the officer was subject to dismissal. *Homoky*, 2016 U.S. App. LEXIS 3197 at *1. The officer received a letter that stated the investigation was an administrative investigation, not a criminal investigation, and that he was "afforded protection of the Garrity Rule." *Id.* at *2. The Seventh Circuit summarized the *Garrity* rule as follows: "that incriminating answers given during any examination of a public employee during an internal investigation of the employee's official conduct cannot be used against him in a subsequent criminal proceeding." *Id.* at *2-3 (citing *Garrity v. New Jersey*, 385 U.S. 593, 500 (1967)).

On the day of the voice stress test, the officer was instructed to sign a release that released the sheriff's department from liability and stated that the officer "'voluntarily, without duress, coercion, promise, reward or immunity' submitted

to the examination." *Id.* at *3. The officer, refused to sign the form, insisting that he was not there voluntarily and that he would not promise to not sue. *Id.* at * 4. He did not take the voice stress test, and was placed on unpaid administrative leave for insubordination because of his refusal. *Id.* at *4. Termination proceedings were commenced against the officer, and during the pendency of those proceedings, the officer filed a § 1983 claim alleging violations of his First and Fourteenth Amendment rights. The district court granted summary judgment in favor of all defendants. On appeal, the officer argued that the "attempts to force him to sign the release were attempts to compel [the officer] to waive his privilege against self-incrimination and remove his *Garrity* protection." *Id.* at *7.

The Seventh Circuit concluded that the officer's claim failed because no constitutional violation occurred. *Id.* at *9. The officer did not take the voice stress test. Thus, he did not provide any coerced statements that the government could use against him in a criminal proceeding. "So there was no violation of the Fourteenth Amendment's prohibition against the use of coerced statements." *Id.* at *9. Furthermore, there was no "Fifth Amendment violation because his employer compelled him to testify with *Garrity* protections in place." *Id.* at *9.

Homoky reaffirms that "a police department may, without violating the Constitution, compel a police officer to answer incriminating questions and prohibit him from invoking his Fifth Amendment right when it warns the officer that it will not use the information gained in any future criminal prosecution." *Id.* at *12 (citations omitted). Disciplinary action may be taken against an officer for his refusal to provide testimony or a statement, if proper *Garrity* warnings are given. However, *Garrity* does not insulate an officer from criminal prosecution.

An officer or public employee, acting under color of state law, who violates an individual's constitutional rights, may be subject to criminal charges. 18 U.S.C. § 242, states, in part,

> Whoever, under color of any law, statute, ordinance, regulation, or custom, *willfully* subjects any person in any State… to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined under this title or imprisoned . . . or both . . . .

18 U.S.C. § 242. Emphasis added).

To obtain a criminal conviction under § 242, the government must prove each of the following elements beyond a reasonable doubt: (1) the defendant was acting under color of law; (2) the defendant deprived an individual of a right secured or protected by the Constitution and laws of the United States; (3) the defendant intended to deprive the victim of this right; and (4) the individual was present in a state, territory, or district of the United States. Seventh Circuit Pattern Jury Instruction, 18 U.S.C. § 242, Deprivation of Rights Under Color of Law—Elements (2012). These elements are similar to those in civil claims brought under 42 U.S.C. § 1983. Both require the officer to be acting under color of law. However, in criminal cases, intentional conduct is expressly required. Penalties for violation of 18 U.S.C. § 242 can range from a fine to life in prison, or even death.

In a recent Seventh Circuit decision, an officer's sentence for violations of 18 U.S.C. § 242 was vacated and the case was remanded for a full resentencing. *U.S. v. Smith*, 2016 U.S. App. LEXIS 1353 (7th Cir. January 28, 2016). An officer was convicted of violating 18 U.S.C. § 242 for depriving two individuals of their constitutional rights not to be subjected to the intentional use of unreasonable and excessive force. The officer was sentenced to fourteen months in prison, to be followed by two years of supervised release. *Smith*, 2016 U.S. App. LEXIS 1353, at *1. The government appealed, arguing that the sentence was too short. The sentencing guidelines range was 33 to 41 months. *Id.* at *5. The testimony heard by the jury was that the officer assaulted victims, who were not resisting arrest. *Id.* After review of the cases and

sentences evaluated by the district court, the Seventh Circuit concluded the district court's analysis lacked adequate support for the brief sentence given to the officer. *Id.* at *9 -10.

In addition to an internal and/or criminal investigation and prosecution, an officer may face a § 1983 claim alleging the use of excessive force or other constitutional violation. As with any lawsuit, the defendant officer can be subjected to a deposition, answering requests for admissions, interrogatories and other discovery. Counsel should be aware of the potential for internal investigations or criminal proceedings under 18 U.S.C. § 242 or related criminal statutes. In § 1983 litigation, the citizen's constitutional rights are the focus. However, the officer's constitutional rights should not be forgotten. Notably, if both criminal charges and a civil lawsuit are simultaneously pending, precautions should be considered to protect the officer's right against self-incrimination, for example in a deposition. If charges have been filed, the best course of action is to seek a stay of the civil litigation pending the conclusion of the criminal matter.

About the Author

Brian Smith concentrates his practice in the areas of civil rights, professional liability, employment law and trucking/motor carrier litigation. Much of his practice entails defending government officials and medical professionals in cases alleging violations of constitutional rights. Brian also has experience defending employers before the Illinois Human Rights Commission and in federal court. He represents defendants in other tort litigation, including cases arising from automobile and trucking accidents.

Mr. Smith has extensive motion practice experience in both state and federal courts and has authored numerous successful motions to dismiss and motions for summary judgment. In addition, he has defended the firm's clients in depositions of plaintiffs, and fact and expert witnesses.

Mr. Smith began his career with *Heyl, Royster, Voelker & Allen, P.C.* by clerking in the firm's Urbana office. Following graduation from law school in 2007, he joined the firm in the Urbana office as an associate. During law school, he was a teaching assistant at the University of Illinois College of Law and a member of the *University of Illinois Law Review*.

About the IDC

The Illinois Association Defense Trial Counsel (IDC) is the premier association of attorneys in Illinois who devote a substantial portion their practice to the representation of business, corporate, insurance, professional and other individual defendants in civil litigation. For more information on the IDC, visit us on the web at www.iadtc.org or contact us at PO Box 588, Rochester, IL 62563-0588, 217-498-2649, 800-232-0169, idc@iadtc.org.