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Local Government Law Update

Presented by the Cincinnati Bar Association Local Government Law Practice Group

Friday, October 26, 2018

Cincinnati Bar Association

Local Government Law Update

October 26, 2018

8:25 a.m. **Welcoming Remarks**

8:30 a.m. **Current Trends in Police Liability** **TAB A**
Pamela J. Sears, Esq., *Hamilton County Prosecutors Office*

9:30 a.m. **Public Employee Collective Bargaining in the Workplace** **TAB B**
Kelly E. Babcock, Esq., *Clemans Nelson & Associates Inc*.

10:30 a.m. **Break**

10:45 a.m. **Fair Share Fees: Impact of the *Janus v. AFSCME Decision* on Public Sector Labor Unions** **TAB C**
Edward S. Dorsey, Esq., *Wood & Lamping*

11:15a.m. **Social Media: Public Employees' Rights and Obligations** **TAB D**
Brian Butcher, COO, *Clemans Nelson & Associates, Inc.*

11:45 a.m. **Adjourn**

TAB
A

PAMELA J. SEARS

Pamela J. Sears is an Assistant Prosecuting Attorney in the Hamilton County Prosecutor's Office. For approximately eight years Ms. Sears was a Chief Prosecuting Attorney in charge of the Municipal Division of the Hamilton County Prosecutor's office. Since 2005 Ms. Sears has been assigned to the Civil Division of the Prosecutor's Office as a senior litigator where she practices in both Federal and State Court, primarily in the areas of Civil Rights and Employment litigation.

Prior to her position as an Assistant Hamilton County Prosecutor, Ms. Sears was a prosecutor for the City of Cincinnati and prior to that worked in the private practice of law. Ms. Sears obtained her law degree from the University of Cincinnati College of Law and was admitted to the Ohio Bar in 1984. For two years immediately after graduating, Ms. Sears taught at the University of Cincinnati College of Law as an instructor of Legal Research & Writing and Oral Advocacy. In addition to her work as a prosecutor, Ms. Sears for the past several years has taught at the University of Cincinnati, Clermont Police Academy, as an adjunct professor,

CIVIL LIABILITY PURSUANT TO 42 USC § 1983

BY
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I. Introduction

Section 1983 is the vehicle by which a citizen sues for a government actor's violation of that citizen's constitutional rights. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

A municipal liability claim pursuant to § 1983 must be examined by applying a two pronged inquiry: (1) has the plaintiff asserted the deprivation of a constitutional right; and (2) is the municipality responsible for that violation.[1] A plaintiff must also show that conduct at issue was caused by an "established state procedure rather than random and unauthorized action."[2]

A § 1983 suit can be brought against a governmental entity by suing a currently serving elected official or current governmental employee. A suit against a governmental entity is brought by suing that elected official or employee in their "official capacity." A suit against an individual is brought by suing that individual in their individual capacity.

Claims brought against individuals in their "official capacities" are duplicitous claims for relief against the governmental entity.[3] In other words, if a plaintiff sues the elected sheriff as well as one of his deputies, each in their official capacities, in reality the plaintiff has asserted two duplicitous claims against the office of the sheriff.[4]

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[1] *Doe v. Claiborne County*, 103 F.3d 495, 505-06 (6th Cir. 1996).
[2] *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194 (1984).
[3] *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S. Ct. 3099, 87 L.Ed.2d 114 (1985) (official capacity suits are suits against the governmental entity); *Alkire v. Irving*, 330 F.2d 802, 810 (6th Cir. 2003) (suing a current employee of a governmental entity or an elected official in their official capacity is an action against the entity and not the individual).
[4] Note that offices, such as the Sheriff's Office, or geographical locations, such as Hamilton County, are not *sui juris* In other words offices and places are not capable of suing or being sued. See e.g. *Waymire v. Miami County Sheriff's Office*, 2016 WL 6995456 (S.D. Ohio). In order to bring a cognizable cause of action a plaintiff must sue a person as representative of an office or geographical location. An exception to this rule is a Board of County Commissioners, which as a matter of statute is a body which is *sui juris* and therefore capable of being sued. See

II. Official Capacity v. Individual Capacity Claims

A § 1983 suit must be brought against the elected official who is the final policy maker of that policy which allegedly caused the constitutional injury.[5] The Sixth Circuit has clarified that a public official has final policymaking authority when that official's decisions are "final and unreviewable and are not constrained by the official policies of superior officials." [6] For example, a county board of commissioners is not a proper party when suing the sheriff since the board is not the final policy maker concerning the policies a sheriff creates to run his office. [7]

Simply going along with discretionary decisions made by one's subordinates is not a delegation to them of authority to make policy.[8] Further if the policymaker sued committed no constitutional violation, no liability attaches to the municipality.[9]

Liability for a constitutional injury is not limited to a formal written policy. Rather liability also can predicated on a custom or practice that is "so pervasive as to be the functional equivalent" of a policy adopted by the final policymaker.[10]

III. Governmental Entity Liability

A governmental entity cannot be held responsible under a theory of *respondeat superior*.[11] It must be shown that the governmental entity, through a custom, practice or policy, caused the alleged constitutional violation because the custom, practice or policy was the "moving force" behind the violation.[12] In other words, government entities may only be liable when an injury is inflicted by a government's lawmakers or by those whose edicts or acts may fairly be said to represent "official policy". There is no vicarious liability of a government entity for the actions

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e.g. *State ex rel. Hamilton Cty. Bd. of Commrs. v. Hamilton Cty. Court of Common Pleas*, 126 Ohio St.3d 111, 931 N.E.2d 98 (2010) (dispute over special counsel, no individual commissioners named).

[5] *St. Louis v. Praprotinik*, 485 U.S. 112, 123 (1988) (citing *Pembaur v. Cincinnati.* 475 U.S. 469, 483 (1986)); *Smith v. Leis*, 407 Fed.Appx. 918, n. 7 (6th Cir. 2011) (insufficient to simply sue an elected official in the same county who is not the maker of the alleged unconstitutional policy).

[6] *Peath v. Worth Twp.*, 705 F.Supp2d 753, 765 (E.D. Mich. 2010) (quoting *Adair v. Charter County of Wayne*, 452 F.3d 482, 493 (6th Cir. 2006)).

[7] *Jones v. Commrs. of Lucas Cty.*, 57 Ohio St. 189, 48 N.E. 882 (1987); *Picciuto v. Lucas Cty. Bd. of Commrs*., 69 Ohio App. 3d 789, 795-96, 591 N.E.2d 1287 (1990) (board of county commissioners in its representative capacity is essentially limited to a county's financial matters).

[8] *St. Louis v. Praprotinik*, 485 U.S. at 130.

[9] *Greene v. Barber*, 310 F.3d 889, 894 (6th Cir. 2002). See *McKinney v. Laird*, 2012 WL 529828 (W.D. Ky. 2012) (collaboration by swat team member with others on strategy illustrated that he was not the final policy maker for the swat team).

[10] *Church v. City of Huntsville*, 30 F. 3d 1332 (11th Cir. 1994).

[11] *Doe v. Magoffin County Fiscal Court* , 174 Fed.Appx. 962, 967 (6th Cir. 2006) ("Municipalities cannot be held liable simply because they employ tortfeasors).

[12] *Monell v. New York Dept. of Social Services*, 436 U.S. 658, 691, 694 (1978) (no vicarious liability). See also *Cornett v. Byrd*, 2006 WL 3462962 (E.D. Ky. 2006) (under *Monnell*, county and school board cannot be liable unless plaintiff can establish officially executed policy, or the toleration of a custom that leads to, causes or results in the deprivation of a constitutionally protected right).

of its employees.[13] This is commonly referred to as a *Monell* claim. The Supreme Court has defined the term "policy", in the § 1983 context, as generally implying "a course of action consciously chosen from among various alternatives." [14]

Proof that the policy, custom, or practice was 'likely" to cause a particular violation is insufficient. There must be evidence of an affirmative link between the allegedly offending policy, custom or practice and the violation. The causal connection must be the "proximate" cause of the violation. It is insufficient simply to argue that "but for" the policy, custom or practice, the injury would not have occurred, which is referred to as a "but for causation in fact" theory." [15]

A plaintiff can establish that a governmental entity has proximately caused the alleged constitutional violation under any one of five theories: (1) an express municipal policy; (2) a "widespread practice" that, although not express, is "so permanent and well settled as to constitute a custom or usage" with the force of law; (3) the decision of a person with final policymaking authority; (4) deliberate indifference [which category includes deliberately indifferent supervision]; or (5) ratification. [16]

To prove the existence of municipal policy or custom plaintiffs can look to legislative enactments or official policies, actions by the final decision maker, a policy of inadequate supervision or a custom of tolerance of or acquiescence to a pattern of federal rights violations.[17] The plaintiff must prove that the policy, practice or custom was the moving force behind the constitutional violation in order for the governmental entity to be liable.[18]

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[13] *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1244-45 (6th Cir. 1989) (citing *City of St. Louis v. Praprotnik*, 468 U.S. 112, 108 S.Ct. 915 (1988)).

[14] *Oklahoma City v. Tuttle*, 471 U.S. 808, 823, 105 S.Ct. 2427 (1985).

[15] *Mann v. Helmig*, 289 Fed.Appx. 845, 850 (6th Cir. 2008). See also *Kneipp v. Tedder* 95 F.3d 1199, 1213 (3d Cir. 1996) (plaintiff must establish that government policy or custom was proximate cause of injuries sustained); *King v. Massarweh*, 782 F.2d 825, 828 (9th Cir. 1986) (§1983 inquiry is whether actions in question proximately caused alleged damages); *Francis v. Barlow*, 2006 WL 1382216 (W.D. Ky. 2006) (plaintiff must allege specific conduct was proximate cause of constitutional injury).

[16] See *Rush v. City of Mansfield*, 771 F.Supp.2d 827, 837 (N.D. Ohio 2011). See also *Mann v. Helmig*, 289 Fed.Appx. 845, 848 (6th Cir. 2008) (to prove existence of municipal policy or custom plaintiffs can look to legislative enactments or official policies, actions by final decision maker, policy of inadequate supervision or custom of tolerance or acquiescence of federal rights violations).

[17] *Mann v. Helmig*, 289 Fed.Appx. 845, 848 (6th Cir. 2008)

[18] *Collins v. City of Harker Heights*, 503 U.S. 115, 122, 112 S.Ct. 1061 (plaintiffs must show that the governmental entity proximately caused alleged injuries); *Ford v. County of Grand Traverse*, 525 F.3d 483, 495-96 (6th Cir. 2008); *Gregory v. City of Louisville*, 444 F.3d 725, 752 (6th Cir. 2006) (for local government entity to be liable under § 1983, the entity itself must be engaged in its "own wrongdoing"); *Doe v. Magoffin County Fiscal Court*, 174 Fed.Appx. 962, 963 (6th Cir. 2006) (act of rape reprehensible and unconscionable; whether county and fiscal officer were responsible for act another matter)); *Sexton v. Kenton County Detention Center*, 702 F.Supp.3d 784 (E.D. Ky. 2010) (supervisor liability requires that supervisor encouraged the specific incident of misconduct or in some other way participated directly in it) (citing Doe v. *Magoffin County Fiscal Court*, 174 Fed.Appx. 962, 970 (6th Cir. 2006); *Jackson v. Gordon*, 2006 WL 1308089 (W.D. Mich. 2006) (supervisor who ignored prisoner's grievance concerning unwelcome sexual advances made did not engage in "active unconstitutional behavior" such that he was liable when a second sexual advance was claimed); *Rucker v. City of Kettering*, 84 F. Supp.2d 917, 921 (S.D. Ohio 2000) (to satisfy requirements plaintiff must identify policy, connect policy to city itself and show that particular injury was incurred because of execution of policy); *Garner v. Memphis Police Dep't*, 8 F.3d 358, 364 (6th Cir. 1993) (quoting *Coogan v. City of Wixom*, 820 F.2d 170, 176 (6th Cir. 1987)).

A claimed constitutional violation must be based on more than just the acts of one's subordinates. Supervisory liability cannot be based upon the mere failure to act, but must be based upon active unconstitutional behavior.[19] At a minimum, a §1983 plaintiff must show that the supervisory official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending subordinate." [20]

Local government liability may be found only in instances where a decision to hire or retain an employee or a failure to supervise an employee amounts to deliberate indifference to [i.e. a conscious choice to ignore] a constitutional violation.[21] Determining whether deliberate indifference is present requires the application of an objective standard. [22]

The plaintiff "must show that the city acted with 'deliberate indifference' to the risk of the constitutional injury and that the city's deliberate indifference was the 'moving force' behind the assault." [23] "Deliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." [24] To prove deliberate indifference a plaintiff must show that: (1) the state actor subjectively perceived facts from which he could infer a substantial risk of harm; (2) the state actor "did in fact draw the inference"; and (3) the state actor "then disregarded that risk." [25] It is not sufficient for an officer to fail to act in the face of an obvious risk of which he should have known existed but in fact did not.[26]

A. Negligent Hiring, Retention and Supervision

In *Doe v. Magoffin County Fiscal Court*, [27] the Sixth Circuit considered whether the county court was liable when a janitor working for the county court held a young woman against her will and raped her in the courthouse. The plaintiff claimed that the court was negligent in hiring the janitor in that the court neglected to conduct a background check which would have revealed the janitor's criminal history. The *Magoffin* Court noted that

> [t]he Supreme Court has placed a heavy burden on plaintiffs seeking to impose municipal liability as a result of hiring decisions; the Court requires that the plaintiff demonstrate (1) sufficient fault in the form of "deliberate conduct" and (2) a causal link between the alleged policy or custom and the injury. [28]

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[19] *Greene v. Barber*, 310 F. 3d 889, 899 (6th Cir. 2002) (qualified immunity appropriate for police chief who showed up at the scene during an unlawful arrest).

[20] *Taylor v. Michigan Dept. of Corrections*, 69 F.3d 76, 81 (6th Cir. 1995) (emphasis in the original). See also *Gregory v. City of Louisville*, 444 F.3d 725, 751 (6th Cir. 2006).

[21] See *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1247-48 (6th Cir. 1989); *City of Canton Ohio v. Harris*, 489 U.S. 378, 389 (1989).

[22] *Id*; *Farmer v. Brennen*, 511 U.S. 825, 840-41, 128 L.Ed.2d 811 (1970).

[23] M*ize v. Tedford*, 375 Fed. Appx. 497, 500 (6th Cir. 2010).

[24] *Connick v. Thompson*, 563 U.S. 51, 131 S.Ct. 1350, 1360 (2011).

[25] See *Rouster v. Cty. of Saginaw*, 749 F.3d 437, 446 (6th Cir. 2014).

[26] *Estate of Carter v. City of Detroit*, 408 F.3d 305, 312 (6th Cir. 2005). See also *Shaver v. Brimfield Twp.*, 2015 WL 5845941, at *4-5 (6th Cir. 2015).

[27] 174 Fed.Appx. 962 (2006).

[28] 174 Fed. Appx. at 967 (quoting *Board of Cty. Comm's v Brown*, 520 U.S. 397, 404 (1997)).

The *Magoffin* court held the janitor's prior criminal record did not "reveal violent crimes" and that the crimes with which he had been charged in the past did "not demonstrate any propensity to commit sex crimes or to imprison someone." The *Magoffin* Court rejected the notion that the failure to perform a background check constituted "deliberate indifference" by the employer, where the consequences of failing to perform the check were not known or obvious. [29]

The *Magoffin* Court relied heavily on the reasoning of the Supreme Court in *Board of Cty. Comm's v. Brown* where the Supreme Court found that the plaintiff had not asserted a valid claim against the municipality for a deputy's excessive force, even though the plaintiff suffered severe damage to his kneecaps and the sheriff was aware of the deputy's record of "driving infractions and misdemeanor convictions for public drunkenness, assault, battery and resisting arrest". The Supreme Court held that "[a]dequate scrutiny of the deputy's background did not reveal that it would be 'highly likely' that this officer [would] inflict the particular injury suffered by the plaintiff." [30]

In *Amerson v. Waterford Twp.*,[31] the plaintiff argued that the failure to review and discipline police officers gave rise to a failure-to-supervise claim. The evidence was that the township offered no annual or other type of review of its officers once they completed field training. The plaintiff asserted that officers were allowed to maintain inadequate knowledge as to the proper use of force. The Sixth Circuit held that merely failing to conduct performance evaluations was insufficient to show deliberate indifference, especially in the absence of evidence of a pattern of excessive force, a record of officers going unpunished for excessive force, or other circumstances tending to show that the township was aware or could have been aware that the officer was prone to unwarranted application of force.[32]

The deliberant indifference test has a subjective component. In order to satisfy that prong a plaintiff must produce record evidence that: (1) "the official being sued subjectively perceived facts from which to infer substantial risk to the prisoner"; (2) the official "did in fact draw the inference"; and (3) the official "then disregarded that risk."[33] A plaintiff may satisfy the subjective component through ordinary methods of proof, "including inference from circumstantial evidence [.]" [34]

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[29] *Id.* (citing *Harris*, 489 US. at 390 (for liability to attach in a failure to train suit identified deficiency must be closely related to ultimate injury; to adopt lesser standard of fault and causation would open municipalities to unprecedented liabilities resulting in de facto respondeat superior liability and causing an endless exercise of second guessing of municipal employee training programs, implicating serious questions of federalism)).

[30] *Brown*, 520 U.S. at 967-68.

[31] 562 Fed. Appx. 484 (6th Cir. 2014).

[32] *Id.* 491-93.

[33] *Rouster v. Cty. of Saginaw*, 749 F.3d 437, 446 (6th Cir.2014). See also "*Connick*, 131 S.Ct. at 1360 (deliberate indifference is stringent standard of fault, requiring proof that municipal actor disregarded known or obvious consequence of his action); *Estate of Carter*, 408 F.3d at 312 (not enough for an officer to fail to act in face of obvious risk of which he should have known but did not).

[34] *Farmer v. Brennan*, 511 U.S. 825, 842, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). See also *Comstock v. McCrary*, 273 F.3d 693, 703 (6th Cir.2001) (prison official may be liable where he refuses to verify underlying facts that he

The subjective component may be satisfied by proving that the actor had constructive knowledge of the risk of harm, as opposed to actual knowledge. [35]

B. Failure to Train

"The inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train in a relevant respect amounts to deliberate indifference to the constitutional rights of persons with whom the police come into contact…Only where a failure to train reflects a 'deliberate' or 'conscious' choice by the municipality can the failure be properly thought of as an actionable city 'policy.' " [36]

"Moreover, the identified deficiency in the training program must be closely related to the ultimate injury. Thus, respondent must still prove that the deficiency in training actually caused the police officers' indifference…To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983; would result in *de facto respondeat superior* liability, a result rejected in *Monell;* would engage federal courts in an endless exercise of second-guessing municipal employee-training programs, a task that they are ill suited to undertake; and would implicate serious questions of federalism." [37]

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strongly suspects to be true, or declines to confirm inferences of risk that he strongly suspects); *Phillips v. Roane Cty.*, 534 F.3d 531, 541 (6th Cir.2008) (a plaintiff need not show that correctional officers acted with the "very purpose of causing harm or with knowledge that harm will result[.]'") Compare *Harrison v. Ash,* 539 F.3d 510, 519 (6th Cir.2008) (correctional officer not deliberately indifferent when upon inmate's complain, he requested nurse to "check on" him); *Smith v. Cty. of Lenawee,* 505 Fed.Appx. 526, 532 (6th Cir.2012) (correctional officer not deliberately indifferent when he, among other things, contacted doctor regarding inmate's medical condition and received assurances regarding inmate's medical status); *Clark–Murphy v. Foreback,* 439 F.3d 280, 291 (6th Cir.2006) (correctional officer was not deliberately indifferent when she asked about referring inmate for a psychiatric evaluation but took no further action upon learning one was already completed).

[35] But see *Golden v. Milford Exempted School District Board of Education*, 2011 WL 4916588 (Ohio App. 12 Dist.) (coach immune for negligent supervision claim where he was unaware of risk of student rubbing penis on another student's face and trying to force his penis into the student's mouth); *Prewitt v. Alexson Services, Inc*., 2008 WL 3893575, ¶¶29-35 (Ohio App. 12 Dist.) (employee's rape of co-worker did not give rise to liability on employer's part for negligent hiring, retention or supervision where there was no evidence that employee committed other crimes during employment, assault allegations previously made were unsubstantiated and no evidence that co-worker's known mental health issues made him violent or prone to commit sexual assault); *Daniel v. Cleveland Municipal School District*, 2004 WL 1945688 (Ohio App. 8 Dist.*), discretionary rev. denied* 104 Ohio St.3d 1441, 819 N.E.2d 1124 (2004) (allegation that district was aware of employee's aggressive nature and security tactics but nevertheless retained him insufficient to establish reckless retention); *Douglass v. Salem Community Hospital*, 153 Ohio App.3d 350, 794 N.E.2d 107, ¶¶51& 52 (Ohio App. 7 Dist 2003), *discretionary rev. denied* 100 Ohio St.3d 1530, 800 N.E.2d 47 (2003), *reconsideration denied* 101 Ohio St.3d 1471, 804 N.E.2d 43 (2004) (plaintiff could not sustain claim for negligent hiring and retention because record contained no evidence that hospital knew or should have known of employee's sexual improprieties with children); *Evans v. Thrasher*, 2103 WL 5864592 (Ohio App. 1 Dist.), *discretionary rev. denied* 138 Ohio St.3d 1449 (2014) (no evidence that employer had actual or constructive knowledge of employee's criminal propensities; employer only liable if shown that employer knew or should have known of employee's propensity to engage in similar tortious or criminal conduct).

[36] *City of Canton, Ohio v. Harris*, 489 U.S. 378, 379, 109 S. Ct. 1197, 1199-200 (1989).

[37] *Id.* See also *Connick v. Thompson*, 563 U.S. 51, 131 S. Ct. 1350 (2011); *Harvey v. Campbell County, Tennessee*, 453 Fed. Appx. 557, **3 (6th Cir. 2011) (plaintiffs failed to present any evidence of specific facts to establish that training was inadequate, deliberately disregarded or causally related to alleged injury).

An essential characteristic of a failure-to-train claim is that it requires more than merely substandard training. A plaintiff must show that the government entity's failure to train its employees in relevant respects is not merely a negligent omission; it must amount to a conscious "decision not to train certain employees about their legal duty to avoid violating citizen's rights.[38]

Two situations have been found to justify a finding of deliberate indifference in failure to train police officers: (1) the failure to provide adequate training in light of foreseeable consequences that could result from a lack of instruction; and (2) the city's failure to act in response to repeated complaints of constitutional violations by its officers.[39] The plaintiff has the burden to establish record evidence of a failure on the part of the law enforcement entity to respond to a "pattern" of repeated complaints of constitutional violations. If the plaintiff fails to do so the only theory left is what has been themed "the single incident theory" of failure to train. In a single incident failure to train situation the Supreme Court has held that it must be "obvious" that there is a need for specific training which hinges on a "lack of any knowledge". [40]

In a "failure-to-train liability" claim the court is concerned with the substance of the training, not the particular instructional format. The Supreme Court has held that § 1983 "does not provide plaintiffs or courts *carte blanche* to micromanage local governments throughout the United States." [41] An essential characteristic of a failure-to-train claim is that it requires more than merely substandard training.[42]

C. Ratification for Failing to Meaningfully Investigate Employee Misconduct

A ratification claim may rest on a failure to investigate alleged misconduct of an employee. Relatedly, a ratification claim may be based on the failure to meaningfully investigate alleged misconduct of an employee. A ratification claim based on an inadequate investigation has two elements: (1) that a final municipal policymaker approved an investigation; and (2) that the investigation was so inadequate as to constitute a ratification of the alleged constitutional violation.[43] The " 'mere acquiescence in a single discretionary decision by a subordinate is not

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[38] *Connick*, 131 S. Ct. at 1350, 1359 ([a] municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train").

[39] *Id*. at 1360-61.

[40] *Id*.

[41] *Id*. at 1363-64. See also *Smith v. City of Akron*, 476 Fed. Appx. 67, 70 (6th Cir. 2012); *Harvey v. Campbell Cty., Tenn.*, 453 Fed. Appx. 557, 564-67 (6th Cir. 2011).

[42] *Connick*, 131 S. Ct. at 1359. *See e.g*. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 391, 109 S. Ct. 1197, 1206, 103 L. Ed. 2d 412 (1989) (neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct). *Mayo v. Macomb County*, 183 F.3d 554, 558 (6th Cir. 1999) (presentation made to officers regarding arrests without a warrant blunts argument that municipality was deliberately indifferent); *Smith v. City of Akron*, 476 Fed. Appx. 67 (6th Cir. 2012) (officer's shortcomings may result from factors other than training program); *Mayo v. Macomb County*, 183 F.3d 554,558 (6th Cir. 1999) (not enough to show that injury could have been avoided if officer had more or better training to establish municipal liability).

[43] See *Rush*, 771 F.Supp.2d at 861-62 (municipality can be said to have ratified the unconstitutional acts by failing to meaningfully investigate them); *Leach v. Shelby County Sheriff*, 891 F.2d 1241 (sheriff ratified failure to provide medical care to paraplegic by failing to investigate and punish those responsible upon being made aware of treatment). See also *Wright v. City of Canton*, 138 F.Supp.2d 955, 966 (N.D. Ohio 2001); *Marchese v. Lucas*, 758 F.2d 181, 188 (6th Cir.1985).

sufficient to show ratification…Otherwise, the City would be liable for all of the discretionary decisions of its employees, and this would be indistinguishable from *respondeat superior* liability." [44]

"In cases where an investigation has been conducted, courts have been reluctant to impose municipal liability based on a ratification theory." [45] In both *Marchese v. Lucas,* and *Leach v. Shelby County Sheriff,* the sheriff failed to investigate the alleged unconstitutional behavior of his deputy.[46] In *Wright v. City of Canton,* there was evidence in the record that the investigation was not designed to discover what actually happened.[47] Courts in the Sixth Circuit have rejected the argument that the failure to discipline following an investigation of an employee's conduct is sufficient to impose liability on the entity on a ratification theory.[48]

In *Roell v. Hamilton County* the record evidence was that a comprehensive, detailed death investigation was done. There was simply no record evidence in the case that the investigation was deficient in any manner, and in fact the Sixth Circuit noted that in his deposition the plaintiff's police policy expert was forced to admit that was so. Consequently, the Sixth Circuit in *Roell* determined that the plaintiff had not met her burden on the failure to investigate ratification argument.[49]

IV. Section 1983 Liability Requires Proof of the Violation of a Clearly Established Constitutional Right

In order for a plaintiff to recover for a constitutional injury there must be proof that the state actor [either the entity through policy, practice or custom or an individual in the scope of his employment] violated an established constitutional right. Where there is no violation of an established constitutional right by the employees of a governmental entity there can be no claim against the entity itself. A municipality or county cannot be liable under 42 U.S.C. § 1983 unless plaintiff first proves an underlying constitutional violation by its officers.[50]

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[44] *Feliciano v City of Cleveland*, 988 F.2d 649, 656 (6th Cir. 1993) (citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127, 108 S. Ct. 915 (1988)). See also *Williams v. Ellington*, 936 F.2d 881 (6th Cir.1991).

[45] *Woodcock v. City of Bowling Green, Kentucky*, 2016 WL 742922, at *26 (W.D. Ky.); *Daniels v. City of Columbus*, 2002 WL 484622, at *6, (S.D. Ohio).

[46] *Marchese v. Lucas*, 758 F2d at 188; *Leach v. Shelby County Sheriff*, 891 F.2d at 1248

[47] *Wright v. City of Canton*, 138 F. Supp. at 966-67.

[48] See *Peabody v. Perry Twp., Ohio*, 2013 WL 1327026, at *12-15 (S.D. Ohio 2013); *Roell v. Hamilton County*, 870 F.3d 471 (2017). See also *Feliciano v. City of Cleveland*, 988 F.2d 649, 656 (6th Cir. 1993) (mere acquiescence in single discretionary decision of subordinate is not sufficient to show ratification); *Bear v. Delaware County, Ohio*, 2016 WL 234848, *14 (S.D. Ohio) (single incident of failure to discipline does not support theory of ratification); *Summer v. Leis*, 368 F.3d 881, 888 (6th Cir. 2004) (at minimum § 1983 plaintiff must show that supervisory official at least implicitly authorized, approved or knowingly acquiesced in unconstitutional conduct of offending subordinate); *Kies ex rel. Kies v. City of Lima, Ohio*, 612 F. Supp. 2d 888, 901 (N.D. Ohio 2009) (failure to discipline two officers regarding one alleged incident does not constitute "implicit ratification" indicative of a general policy of deliberate indifference toward unconstitutional conduct).

[49] *Roell*, 870 F.3d at 488 (Dr. Lyman testified that he could not think of any additional interviews that should have been conducted during the investigation, could not point to any physical evidence that was not preserved or test results that were not considered, and could not identify any specific inadequacies in the collection of testimonial or tangible evidence).

[50] *Blackmore v. Kalamazoo County*, 390 F.3d 890 (6th Cir. 2004).

The United States Supreme Court has emphasized that a court must find that the alleged constitutional violation was "clearly established" in order to give a reasonable police officer knowledge prior to an act that the doing of the act violates the constitution. The Court has differentiated between those cases where the constitutional violation is obvious as opposed to those cases where the constitutional violation hinges on a particular factual scenario. In the latter case the Supreme Court has made clear that the pivotal fact or facts that form the basis of the constitutional violation must be facts of which a reasonable police officer was on notice would constitute a constitutional violation. The Supreme Court has made clear that in these cases police officers must be on notice based on the operative facts or set of facts having been found previously by the Supreme Court or a court of binding authority to be a constitutional violation.[51]

The determination of whether the right allegedly violated was clearly established and whether the public official reasonably could have believed that his conduct was constitutional are issues of law for the Court.[52]

V. Individual Liability

A plaintiff can recover under § 1983 if he produces record evidence that an individual government employee violated his constitutional rights under the color of law, in other words when that governmental employee is acting within the scope of his employment. In these cases a governmental entity will have the responsibility to indemnify its employee for any judgment rendered against the employee, except a judgment for punitive damages.[53] Additionally, Ohio law provides that in these cases the governmental entity must provide the employee legal representation.[54] Claims of constitutional violations include, but are not necessarily limited to, claims regarding the First and Fifth Amendment, but the most frequent claims brought against law enforcement are claims that a plaintiff's Fourth or Eighth Amendment rights have been violated. These claims are often manifest as claims of false arrest or malicious prosecution, but the most common claim is a claim of excessive force.

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[51] *White v. Pauly*, 137 S.Ct. 548 (2017) (necessary to reiterate longstanding principle that "clearly established law" should not be defined at a high level of generality; although Court considers facts in light favorable to non-movant in qualified immunity analysis Court considers only those facts "knowable" to defendant officers); *Mullenix v. Luna*, 136 S.Ct. 305 (2015) ("clearly established right" for purposes of qualified immunity analysis is one that is sufficiently clear that every reasonable official would have understood that what he is doing violated that right). See also *Roell v. Hamilton County*, 870 F.3d 471 (6th Cir. 2017) (plaintiff did not establish that deputies violated clearly established constitutional rights where they used some force in response to perceived threat by deceased); *Arrington-Bey v. City of Bedford*, 858 F.3d 988 (6th Cir. February 24, 2017) (denial of qualified immunity reversed; no violation of clearly established constitutional right, citing *White v. Pauly*; plaintiff's case citations "at least one step removed" from fact pattern presented in the case).

[52] *Walton v. City of Southfield*, 995 F.2d 1331, 1336 (6th Cir. 1993) (*citing Daugherty v. Campbell*, 935 F.2d 780, 784 (6th Cir. 1991)).

[53] See *City of Newport v. Fact Concerts, Inc*., 453 U.S. 247, 101 S.Ct. 2748 (1981) (punitive damages not recoverable against municipality in § 1983 suit); *Spires v. City of Lancaster*, 28 Ohio St.3d 76 (1986) (punitive damages are not "sensibly assessed against governmental entity itself").

[54] R.C. § 2744.07 (A)(1)(2).

A. Claims for Excessive Force

In reviewing a claim of excessive force under the Fourth Amendment brought as a §1983 action, a trial court engages in a two-step inquiry: (1) do the facts establish that the officers violated a constitutional right; and (2) if so, was that right clearly established at the time it was allegedly violated? [55] Legal precedent must give fair warning to the officer that the action in question is unconstitutional.[56] Absent fair warning the police officer is entitled to qualified immunity for the action he took that the plaintiff complains caused him a constitutional injury. Qualified immunity also applies if reasonable officers could disagree as to whether the actions of the officers violated the right.[57]

The Supreme Court, in *Graham v. Connor*, has articulated three factors for courts to consider in determining the objective reasonableness of a particular use of force. These factors are: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest. The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene.[58]

In *Hill v. Miracle*, [59]the Sixth Circuit held, however, that the *Graham* factors are not exhaustive. In that case the Court reversed a denial of qualified immunity. The Court rejected plaintiff's argument that "any danger" posed by subject" was "ameliorated by simply stepping away". The Court found that this argument impermissibly ignored the subject's immediate need for medical assistance.

The Sixth Circuit has held that the time frame is crucial in "excessive force cases" The Court ruled that "[o]ther than random attacks, all such cases begin with the decision of a police officer to do something, to help, to arrest, to inquire. If the officer had decided to do nothing, then no force would have been used. In this sense, the police officer always causes the trouble. But it is trouble which the police officer is sworn to cause, which society pays him to cause and which, if kept with constitutional limits, society praises the officer for causing." [60]

A finding of excessive force requires a finding of extreme unreasonableness. [61] And liability for excessive force may not be premised on the officer's failure to use the least intrusive means available. [62]

1. Segmented Approach

[55] *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151 (2001). *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808 (2009).
[56] *Hope v. Pelzer*, 536 U.S. 730, 740-41, 122 S. Ct. 2508 (2002).
[57] *Thomas v. Cohen*, 304 F.3d 563 (6th Cir. 2002).
[58] *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989).
[59] *Hill v. Miracle*, No. 16-1818 (6th Cir. April 4, 2017).
[60] *Dickerson v. McClellan*, 101 F.3d 1151, 1161 (6th Cir. 1996).
[61] See e.g. *Ramage v. Louisville/Jefferson Cty. Metro Gov't*, 520 Fed.Appx. 341, 348 (6th Cir. 2013).
[62] *Lyons v. City of Xenia*, 417 F.3d 565, 576 (6th Cir. 2005).

In determining whether the force used by an officer was necessary and not gratuitous the Sixth Circuit uses what is referred to as a segmented approach. [63] The segmented approach involves the analysis of the moments immediately preceding the officer's use of force in order to determine whether the force employed was reasonable from the perspective of a reasonable police officer, rather than a gratuitous use of force which was unnecessary and therefore objectively unreasonable. The analysis does not involve consideration of the adequacy of planning or the length of time officers spent thinking through the problem at hand. The segmented approach is premised on the Sixth Circuit's determination that the Fourth Amendment prohibits unreasonable seizures, not ill advised conduct in general.[64]

There is a disturbing trend in other circuits and one advocated for by the more progressively liberal judges on the Sixth Circuit Court of Appeals: that the behavior of the officer prior to the decision to use force should be considered as the cause of the use of force, otherwise unreasonable, and therefore form a basis for liability.[65] This argument essentially is that by acting or failing to act the officer created the situation where the use of force became necessary and therefore the officer can have liability. This theory promotes and necessarily invites a jury's speculation that concerning whether if the officer would have approached the situation differently would the subject in turn have acted differently such that the officer would not have had to use force in response to the subject's actions as he did. Not only does this theory invite the imposition of liability based on speculation, it vitiates a Court's consideration of an officer's "split decision making" in "rapidly evolving scenarios" in which the risk of harm to police and the public are present as a basis for qualified immunity. This theory of recovery essentially would eliminate qualified immunity. The result would be that in every case where excessive

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[63] *Rucinski v. County of Oakland et al*., 655 Fed. Appx. 338 (6th Cir. 2016).

[64] *Id.* See also *Livermore v. Lubelan*, 476 F.3d 397, 407 (6th Cir. 2007) (this Court has rejected that plaintiff may survive summary judgment where a seizure is reasonable but where the reckless and unconstitutional actions of the police created the need to use force); *Chappell v. City of Cleveland*, 585 F.3d 901, 916 (6th Cir. 2009) (when confronted with what they perceived to be an imminent threat the officers were entitled to defend themselves irrespective of any errors that contributed to the circumstances; whether subject actually waving the knife irrelevant to the threat perceived by the officers); *Moore v. City of Memphis*, 853 F.3d 866 (6th Cir. 2017) (tactical decisions are not seizures in that they are not "applications of force" consequently such decisions are not reviewable under 4th Amendment excessive force analysis); *Shaver v. Brimfield Township*, 2015 WL 5845941 (6th Cir.) (citing *Estate of Carter v. City of Detroit*, 408 F.3d 305, 312 (6th Cir. 2005)) (not enough for officer to have failed to act in the face of an obvious risk of which he should have known but did not); *Patterson v. City of Toledo*, 2012 WL 1458115, at *3 (N.D. Ohio) (even if plaintiff was correct in alleging a question of fact of reasonableness of CIT trained officer's initial actions in dealing with mentally disabled person, that had no bearing on immediate question of reasonableness in using deadly force).

[65] See *Roell v. Hamilton County*, 870 F.3d 471 (6th Cir. 2017) (argument of plaintiff that failure to verbally de-escalate prior to going hands on supported liability for subject's excited delirium death). Compare *Shreve v. Franklin County, Ohio*, 743 F.3d 126, 137 (6th Cir. 2014) (officers not constitutionally required to exhaust *all* possible alternatives before using a Taser); *Lyons v. City of Xenia*, 417 F.3d 565, 576 (6th Cir. 2005) (question is whether officer's actions were objectively reasonable, not whether means used were least intrusive available) (citing *Illinois v. Lafayette*, 462 U.S. 640, 103 S.Ct. 2605 (1983) (in Fourth Amendment context reasonableness of governmental activity does not hinge on existence of a less-intrusive alternative)); *McVay ex rel. Estate of McVay v. Sisters of Mercy Health Sys.*, 399 F.3d 904, 908-09 (8th Cir. 2005) (patient disoriented and exhibiting signs of lacking of mental control was threat to himself; only 20/20 hindsight leads to conclusion that tackle resulted in head injury which resulted in death; not every push or shove that later seems unnecessary in a judge's chambers violates the Fourth Amendment); *Rudlaff v. Gillispie*, 791 F.3d 638, 643 (6th Cir. 2015) (refuse to create a *de-minimis* standard for resisting arrest in light of the allowance required for the split-second judgments that police must make in circumstances that are tense, uncertain, and rapidly evolving).

force is alleged the case would not withstand summary judgment. This of course would be a boon for the plaintiffs' bar in that most cases result in settlement even in those cases where liability is believed to be non-existent. The reality of § 1983 litigation is that even where liability is not believed to exist, settlement is often perceived as the lesser of evils based on defense counsel's uncertainty of a jury's inability to resist an emotional argument by the plaintiff, the manipulation of the record by the judge resulting in the inability to put certain exculpatory evidence before the jury or because the spectre of a potential attorney's fees award suggests settlement of the case as an appropriate business decision.

For example in *Roell v. Hamilton County* the theory of the plaintiff was that the officers' failure to *attempt* verbal de-escalation created liability where the subject charged at the officers immediately upon the officers encountering him. In *Roell*, when the subject charged at the officers he held a potted plant in one hand and a hose with a metal sprinkler attachment in his other hand. The subject failed to respond to the officers' verbal commands to stop and to drop the environmental weapons. The subject also failed to be deterred from moving aggressively toward the officers by the arcing of a Taser. The plaintiff argued that the officers should face liability even though the effect of any verbal de-escalation attempt to change the outcome of the necessity of the use of force was purely speculative.[66]

Any attempts to dilute or eliminate the segmented approach to analyzing an officer's use of force should be aggressively resisted when defending these cases. Otherwise there effectively will be no defense to the use of force because in every case it can be argued that only if the officers would have done something differently the subject would not have acted in a manner that justified a particular use of force. In that legal environment qualified immunity would be eliminated and strict liability would become the reality.

2. Reasonable force when confronting the obviously mentally ill subject.

In *Martin v. City of Broadview Heights* [67], the Sixth Circuit held that when confronted with a person clearly mentally unstable and unarmed an officer is required to **de-escalate the situation and adjust the application of force downward.** The Court found that the officers' use of force was excessive in light of the subject's mental state and the fact that he was unarmed. Although the subject initially approached the officers in a submissive manner, he abruptly turned and began jogging away from them. At that point Officer No. 1 tackled Martin and fell on top of him; Officer No. 2 dropped his knee into Martin's side, fell on top of him, and delivered one or two "compliance body shots" to Martin's frame; Officer No. 1 punched Martin twice in the face; Officer No. 2 struck Martin's face, back, and ribs at least five times; Officer No. 1 wrapped his legs around Martin's upper thighs, hips, and pelvis and gripped Martin's chin or neck with his right arm; Officer No. 3 kneeled on Martin's calves, helped cuff him, and used force to keep him down. After Martin was handcuffed and subdued, officers 1 and 3 used their arms to keep Martin in a face-down position and did not roll him onto his side until he made a "gurgling" noise.[68]

[66] *Roell*, 870 F.3d 471 (6th Cir. 2017). Compare *Ruiz-Bueno III v. Scott*, 2016 WL 385294, *7 (6th Cir.) (case cannot go forward on theory rooted in speculation rather than evidence).
[67] 712 F.3d 951, 962 (6th Cir. 2013).
[68] *Id*. at 958-59.

The *Martin* court characterized the force used against Martin as "severe" and found that it did not match the threat the subject presented.[69] Further, in *Martin* there was expert testimony disputing the cause of death. This expert opinion characterized the officers' actions during the arrest as "compressive events," which could have caused asphyxiation. The expert also opined that the gurgling noise just prior to the subject's death indicated asphyxiation as well.[70]

Contrasting *Martin* are the Sixth Circuit cases of *Roell v. Hamilton County*, discussed above, and *Cook v. Bastin* [71] which the Sixth Circuit relied upon in *Roell* in affirming summary judgment for the officers and Hamilton County. In doing so the *Roell* Court rejected the applicability of *Martin*, discussed above.

In *Cook*, police were called to an adult daycare regarding a severely retarded subject with autism who was being disruptive. According to an officer at the scene it was "obvious" from the destruction of the subject's room, his demeanor and his bloody clothing that he was a danger to himself and possibly others. The officers were unaware that the subject was non-verbal. They were able to handcuff the subject without incident, but as the officers attempted to remove him from the facility to take him to a mental health hospital the situation deteriorated. The officers struggled with the subject and immobilized his arms, legs and torso. At no time did the officers use weapons, punch, body-slam or kick the subject. Nor was there any evidence of the application of compressive body weight during the struggle. The subject collapsed, was rushed to the hospital and pronounced dead. The cause of death was determined to be "acute sympathomimetic intoxication" and "autisminduced excited delirium during prone restraint." [72]

The estate in *Cook* argued: 1) the officers should not have taken Campbell into custody because he had committed a minor offense; 2) the officers used excessive force in subduing Campbell when he tried to free himself from the handcuffs; 3) the officers should have taken more time to learn about Campbell's mental condition before attempting to restrain him, which unnecessarily escalated the situation; and 4) the estate's expert report, in which the expert opined that the officers "should have" approached the situation differently.[73]

The Sixth Circuit agreed with the trial court in *Cook* that, under the totality of the circumstances, the officers acted reasonably, from the perspective of a reasonable officer on the scene based on the reasonable determination that the subject posed a threat to himself and others. [74]

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[69] *Id*. at 958.
[70] *Id*. at 955-56.
[71] 590 Fed.Appx. 523 (6th Cir. 2014).
[72] *Id*. at 526.
[73] *Id*. at 528-531.
[74] *Id*. at 530. See also *Hall v. Huffman*, 2017 WL 1409971 (N.D. Ohio 2017) (officers on notice that subject was experiencing a medical emergency; however subject's medical condition was not discernable or apparent to the officers at the time therefore court declined to consider whether medical condition necessitated lesser use of force) (citing *Aldaba v. Pickens*, Nos. 13-7034 & 13-7035 (10th Cir. December 20, 2016) (court reversed its previous denial of qualified immunity after remand from the United States Supreme Court ordering reconsideration in light of *White v. Pauly*; on remand court determined that *White v. Pauly* required a more restrictive precedential analysis than originally undertaken such that the officers were found not to have violated a clearly established constitutional right by "hog tying" a subject with diminished capacity, which resulted in the subject's death)).

3. Liability based on a failure to protect an individual from the excessive force of another.

Officers can be held liable for the use of excessive force even where they do not personally physically engage the subject. [75] An officer may be held liable for failure to protect/intervene when "(1) the officer observed or had reason to know that excessive force would be or was being used; and (2) the officer had both the opportunity and the means to prevent the harm from occurring."[76] However, no duty exists where one officer's act of excessive force occurs so rapidly that another officer on the scene lacks "a realistic opportunity to intervene and prevent harm." [77]

B. Substantive Due Process/Shocks the Conscience Standard

The Due Process Clause of the Fourteenth Amendment has a procedural component and a substantive component. [78] Each component has as its precursor the government's intrusion on a constitutional protected right such as life, liberty or property. In order to establish a violation of substantive due process, a plaintiff must first establish the existence of a constitutionally protected property or liberty interest. [79] "[A] substantive due process violation of the sort that would shock the conscience" can only result from "an intentional, not a negligent" act. [80]

When substantive due process is predicated on actions of a government official which "shock the conscience", the official's actions must be "so severe, so disproportionate to the need presented, and such an abuse of authority" as to transcend the bounds of ordinary tort law, thereby establishing a deprivation of a constitutional right.[81]

"In order to succeed on a §1983 a claim for substantive due process in a non-custodial setting, a plaintiff must prove either intentional injury or arbitrary conduct intentionally designed to punish someone." [82] The relevant inquiry is whether "the defendants made a deliberate decision to inflict pain and bodily injury." [83]

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[75] *Goodwin v. City of Painesville*, 781 F.3d 314, 329 (6th Cir. 2015).
[76] *Id.*
[77] *Wells v. City of Dearborn*, 538 Fed. Appx. 631, 640 (6th Cir. 2013). See also *Ontha v. Rutherford County*, 222 Fed. Appx. 498, 507 (6th Cir. 2007).
[78] See *Howard v. Grinage*, 82 F.3d 1343, 1349 (6th Cir.1996).
[79] See *Silver v. Franklin Twp. Board of Zoning Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992); *McGee v. Schoolcraft Community College*, 167 Fed.Appx. 428, 436 (6th Cir. 2006); *Brown v. City of Ecorse*, 322 Fed.Appx. 443, 446 (6th Cir. 2009); *Richardson v. Brady*, 218 F.3d 508, 518-19 (6th Cir. 2000).
[80] *Braley v. City of Pontiac*, 905 F.2d 220, 226 (6th Cir. 1990). See also *Young v. Township of Green Oak*, 471 F.3d 674, 684 (6th Cir. 2006) (substantive due process "protects specific fundamental rights of individual freedom and liberty from deprivation at the hands of arbitrary and capricious government action).
[81] *United States v. Salerno*, 481 U.S. 739, 746, 107 S.Ct. 2095 (1987). See also *Miller v. Knuze*, 865 F.2d 259, at 7 (6th Cir. 1988) (§1983 substantive due process claim must result from an egregious abuse of governmental power; court may not enforce its own conception of wise or humane policy on local officials).
[82] *Upsher v. Grosse Pointe Public School System*, 285 F.3d 448, 452-53 (6th Cir. 2002) (courts should carefully scrutinize so-called substantive due process claims brought under §1983 "because guideposts for responsible decision making in this uncharted area are scarce and open-ended") (citing *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 120, 112 S.Ct. 1061)).
[83] *Id.*

Courts have held that when a person is taken into custody the government has a duty to protect him and provide for his basic necessities. [84] The affirmative duty arises because of the limitations the state places on the individual's ability to act on his own behalf. [85]

In *Stemler v. City of Florence*,[86] the Sixth Circuit determined that police officers violated a woman's liberty interest. The Court found that by forcing the deceased into the car which subsequently was in an accident resulting in her death, that the officers had taken her into custody. This case should be compared with *Lewellen v. Metropolitan Gov't of Nashville & Davidson County*,[87] where the court expressed doubt as to whether even deliberate indifference by state actors could give rise to substantive due process claim by plaintiff who was not in the custody of the state.

C. Qualified Immunity

Qualified immunity serves to shield government employees from liability when performing discretionary functions in the course of their employment.[88] Its purpose is to provide immunity from suit to protect public officials from broad ranging discovery that can be peculiarly disruptive to effective governance.[89] A plaintiff has the duty to establish record evidence in support of claims for which relief is sought to defeat qualified immunity and summary judgment. [90]

Government officials are presumptively entitled to immunity for acts they perform in the scope of their employment.[91] "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." [92] Thus, qualified immunity protects public officials from liability when a reasonable person in the official's position would not have known that the alleged actions violated a person's constitutional rights.[93] The doctrine of qualified immunity protects all but the plainly incompetent or those who knowingly violate the law. Before a public official may be denied qualified immunity, existing precedent must have placed the constitutional question **beyond debate**.[94]

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[84] See *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 200, 109 S.Ct. 998 (1989).
[85] *Id.*
[86] 126 F.3d 856 (6th Cir. 1997).
[87] 34 F.3d 345, 350 n. 4 (6th Cir. 1994).
[88] *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982).
[89] *Id.* at 806; *Wallin v. Norman*, 317 F.3d 558, 563 (6th Cir. 2003).
[90] *Ruiz-Bueno III v. Scott*, 2016 WL 385294, at *6, *7 (6th Cir.); *Amerson v. Waterford Township*, 562 Fed.Appx. 484, 491 (6th Cir. 2014); *Burdine v. Sandusky County, Ohio*, 524 Fed.Appx. 164, 169-71 (6th Cir. 2013); *Smith v. City of Akron*, 476 Fed.Appx. 67, 70 (6th Cir. 2012); *Harvey v. Campbell County, Tennessee*, 453 Fed.Appx. 557, 565-68 (6th Cir. 2011) (citing *Matsushita Elec. Indus. Co., Ltd. V. Zenith Radio Corp*., 475 U.W. 674, 586, 106 S.Ct. 1348 (1986)); *Chappel v. City of Cleveland*, 585 F.3d 901, 912-13 (6th Cir. 2009); *Plinton v. County of Summit*, 540 F.3d 459, 464-65 (6th Cir. 2008); *Boyd v. Baeppler*, 215 F.3d 594, 603 (6th Cir. 2000); *Mayo v. Macomb County, Michigan*, 183 F.3d 554, 558 (6th Cir. 1999).
[91] See *Mays v. City of Dayton*, 134 F.2d 809, 813 (6th Cir. 1998).
[92] *Harlow*, 457 U.S. at 818.
[93] *Id*. at 819.
[94] *Ashcroft v. Al-Kidd*, 563 U.S. 731, 131 S. Ct. 2074, 2083 (2011) (emphasis added).

Qualified immunity demands the application of a three part test: (1) has a constitutional violation occurred; (2) does the violation involve a clearly established constitutional right of which a reasonable person would have known; and (3) has the plaintiff offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights.

The issue of qualified immunity may not be decided by the court on summary judgment if a genuine issue of material fact is established as to whether the underlying acts violated a clearly established right. When the defendant official raises qualified immunity as a defense, plaintiff bears the burden of demonstrating that the defendant is not entitled to qualified immunity or that a genuine issue of material fact exists.[95]

The Sixth Circuit has repeatedly affirmed that it is the plaintiff that has the duty to establish record evidence in support of the claims for which relief is sought to defeat qualified immunity and summary judgment.[96] A plaintiff may not simply fail to develop evidence in discovery and then rely on the lack of that evidence to defeat summary judgment.[97] The Sixth Circuit has been unequivocal that a plaintiff may not rely on the opinion of an expert without more to defeat qualified immunity and summary judgment, where that expert's opinion is not based on evidence in the record.[98] This position has recently been affirmed by the United States Supreme Court. [99]

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[95] *Everson v. Leis*, 556 F.3d 484, 494 (6th Cir. 2009).

[96] *Ruiz-Bueno III v. Scott*, 2016 WL 385294, at *6, *7 (6th Cir.); *Amerson v. Waterford Township*, 562 Fed.Appx. 484, 491 (6th Cir. 2014); *Burdine v. Sandusky County, Ohio*, 524 Fed.Appx. 164, 169-71 (6th Cir. 2013); *Smith v. City of Akron*, 476 Fed.Appx. 67, 70 (6th Cir. 2012); *Harvey v. Campbell County, Tennessee*, 453 Fed.Appx. 557, 565-68 (6th Cir. 2011) (citing *Matsushita Elec. Indus. Co., Ltd. V. Zenith Radio Corp*., 475 U.W. 674, 586, 106 S.Ct. 1348 (1986)); *Chappel v. City of Cleveland*, 585 F.3d 901, 912-13 (6th Cir. 2009); *Plinton v. County of Summit*, 540 F.3d 459, 464-65 (6th Cir. 2008); *Boyd v. Baeppler*, 215 F.3d 594, 603 (6th Cir. 2000); *Mayo v. Macomb County, Michigan*, 183 F.3d 554, 558 (6th Cir. 1999).

[97] See e.g. *Harvey v. Campbell County, Tenn*., 453 Fed.Appx. 557, 565 (6th Cir. 2011) (appears that plaintiffs have conducted discovery not designed to uncover facts supporting their allegations; instead they rely on speculative, unsupported allegations to create metaphysical doubt, which clearly does not amount to a genuine issue of material fact); *Chappell*, 585 F.3d at 912 (inferences must be drawn from record evidence not from a lack of record evidence).

[98] See *City and County of San Francisco v. Sheehan*, 135 S.Ct. 1765, 1777 (2015) (plaintiff cannot avoid summary judgment by simply producing an expert's report that an officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless; jury does not automatically get to second-guess officer's life and death decisions, even though there is a plausible claim that situation could better have been handled differently; *Boyd. v. Baeppler*, 215 F.3d 594, 603-04 (6th Cir. 2000) (expert opinion that subject "might not" have been able to turn and point weapon but did not definitively conclude that it would have been impossible was speculative and did not form basis of dispute as to material fact); *Berry v. City of Detroit*, 25 F.3d 1342, 1354 (6th Cir. 1994) (expert could not opine that use of baton was not justified, not warranted and totally improper); *Thomas v. City of Columbus*, 2016 WL 1090963 (S.D. Ohio) (beliefs of experts based on assumptions and not based on evidence; opinions of expert extant to issue of whether force employed was reasonable). See also *Burdine*, 524 Fed.Appx. at 169-71; *Harvey*, 453 Fed.Appx. at, 565-68 (6th Cir. 2011).

[99] *Sheehan v. City and County of San Francisco*, 135 S.Ct. 1765, 1777-78 (2015) (in close cases jury does not automatically get to second guess life and death decisions even though plaintiff has expert and a plausible claim that situation could better have been handled differently).

VI. Failure to Accommodate under Title II of the Americans with Disability Act, ["ADA"] as a §1983 Violation

There are two types of claims under Title II of the Americans with Disabilities Act, an intentional discrimination claim and a reasonable accommodation claim.

Intentional Discrimination: In order to state a claim of intentional discrimination under Title II of the ADA based on the use of force at issue, a plaintiff must show that he "was *intentionally* discriminated against *solely because of* ... [his] *disability* in the context of [a] public service, activity, or program, or that *reasonable accommodations were not made to provide [him]* with [accommodations] that were as effective as those provided to non-disabled persons." [100]

Failure to Accommodate a Known Disability: While neither the United States Supreme Court nor the Sixth Circuit has applied Title II of the Americans with Disabilities Act to the criminal arrest context, the circuits that have analyzed such claims have held that the duty to reasonably accommodate a disabled criminal suspect is relevant only after the scene is secure and law enforcement officers have determined there is no threat to human safety.

In *Hainze v. Richards*,[101] the Fifth Circuit Court of Appeals held "Title II does not apply to an officer's on-the-street responses to reported disturbances or similar incidents . . . prior to the officers securing the scene and ensuring there is no threat to human life." The *Hainze* court explicitly held an arresting officer must reasonably accommodate a disabled individual only after the scene is secure and law enforcement officers determine there is no threat to human safety.[102]

The Seventh Circuit adopted the *Hainze* test, noting that it recognizes "that the safety of officers and civilians must be weighed in the context of Title II's mandate to accommodate a disability." [103] The court further stated that any requirement to accommodate a disability exists only after the exigent circumstances surrounding the struggle of the arrest cease.[104]

The Eighth Circuit, citing the Sixth Circuit in *Tucker v. Tennesee* [FN: 100] and the 5th Circuit in *Hainze*, has held that the reasonable accommodation inquiry is fact-specific and varies in each case. The court held that it would not second-guess an officer's judgment where he or she is presented with unexpected or exigent circumstances. [105]

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[100] See *Tucker v. Tennessee*, 539 F.3d 526 (6th Cir. 2008). See also See also *Everson v. Leis*, 412 Fed.Appx. 771, 774–75 (6th Cir. 2011); *Roell v. Hamilton County*, 870 F.3d 471 (2017).
[101] 207 F.3d 795, 801 (5th Cir. 2000).
[102] *Id*. at 802.
[103] *Sallenger v. City of Springfield*, No. 03-3093, 2005 U.S. Dist. LEXIS 18202 (C.D. Ill. Aug. 4, 2005) (*aff'd*, 473 F. 3d 731 (7th Cir. 2007)).
[104] *Id*. at 92.
[105] *De Boise v. Taser Int'l, Inc.*, 760 F.3d 892, 899 (8th Cir. 2014) (citing *Gorman v. Bartch*, 152 F.3d 907, 912 (8th Cir. 1998). See e.g. *Bircolli v. Miami-Dade County* 480 F.3d 1072, 1086 (11th Cir. 2007) (hearing impaired individual brought suit against several public entities alleging that they violated the ADA by failing to obtain an interpreter before performing field sobriety tests; court rejected claim that ADA was violated for failure to provide interpreter prior to field sobriety tests; court concluded that waiting for interpreter before performing tests and

In *Everson v. Leis,*[106] the Sixth Circuit noted that

> [i]n *Tucker*, this court ruled that [w]here…officers are presented with exigent or unexpected circumstances, it would be unreasonable to require certain accommodations be made in light of the overriding public safety concerns…we rely on and expect law enforcement officers to respond fluidly to changing situations and individuals they encounter…And in *Dillery*, this court held that, when police officers properly discharged their duties to maintain the safety of others, their stopping a disabled woman for conduct related to her disability did not constitute intentional discrimination.

Where the record is that a mentally ill person behaves in a violent, aggressive manner in the presence of police, the response of the officers to control that person's aggression does not run afoul of the ADA.[107] The view of the Sixth Circuit in *Thompson* is in accord with that of the Fifth Circuit which has held that "Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life." [108]

These cases illustrate the current view of the Sixth Circuit: the first duty of law enforcement is to secure a scene and ensure public safety. [109] An officer's actions may be found to be objectively reasonable even if the suspect has a perceived mental disturbance when there is probable cause to believe the suspect poses an imminent threat of serious physical harm either to the officer or to others. [110]

In the reasonable force context courts currently will not second-guess an officer's reasonable perception during the exigent, rapidly evolving circumstances present at a scene of an arrest by imposing a duty to accommodate under the ADA. However, there is a disturbing trend among more politically progressive jurists to erode this legal constriction on police liability that should be monitored and pushed back against.[111] However, the current available precedent analyzing a duty to reasonably accommodate a criminal suspect makes clear that "the essence of [the reasonable accommodation during arrest] theory is that once the police have a situation under control, the police have a duty to accommodate a disability." [112]

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making arrest was not reasonable given exigent circumstances presented by DUI stop, "on-the-spot judgment required of police," and public safety concerns).

[106] 412 Fed. Appx. 771, *5 (6th Cir. 2011)

[107] See *Thompson v. Williamson County Tenn*., 219 F.3d 555, 558 (6th Cir. 2000).

[108] *Hainze v. Richards,* 207 F.3d 795, 801 (5th Cir.2000).

[109] Compare *Ali v. City of Louisville*, 395 F. Supp. 2d 527, 540 (W.D. Ky. 2005) *amended*, 2006 WL 2663018 (W.D. Ky.); *Hainze v. Richards*, 207 F.3d 795, 802-03 (5th Cir. 2000); *Wilson v. Blackman Charter Twp.*, 2010 WL 1923794, at *8 (E.D. Mich.).

[110] See *Sheffey v. City of Covington*, 564 Fed.Appx. 783, 795–96 (6th Cir. 2014); *Johnson ex rel. Estate of Johnson v. Combs*, 2005 WL 2388274, at *4–5 (W.D. Ky.).

[111] See e.g. *Roell v. Hamilton County*, 870 F.3d 471 (2017) (dissent by Judge Moore).

[112] See e.g. *Glover v. City of Willington*, 966 F. Supp. 2d 417, 428-429 (D. Del. 2013).

VII. State Law Claims

A. Political Subdivision Immunity in Ohio Pursuant to R.C. Ch. 2744.02 et seq.

1. Political Subdivision Immunity

R.C. Chapter 2744 sets forth a three-tiered analysis for determining immunity from liability of the political subdivision.[113] Under Ohio law, when a party sues an employee of a political subdivision in his official capacity he is protected by the immunity which protects the political subdivision itself. [114]

First, R.C. 2744.02(A)(1) confers on all political subdivisions a blanket immunity which provides that they are not "liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function." R.C. 2744.01(C)(1) defines a governmental function as a function of a political subdivision that is specified in R.C. 2744.01(C)(2) and includes a function that the general assembly mandates a political subdivision to perform. [115]

Second, R.C. 2744.02(B) lists five exceptions to the blanket immunity: (1) the negligent non-emergency operation of a motor vehicle by a government employee within the scope of employment; (2) the negligent act of a government employee with respect to proprietary functions of the political subdivision; (3) the failure to keep public roads in repair; (4) negligence by governmental employees that causes injury within or on the grounds of, and is due to physical defects within or on the grounds of, buildings used in the performance of a governmental function; and (5) liability that is expressly imposed upon the political subdivision by other sections of the Revised Code including R.C. 2743.02 and 5591.37. In addition, R.C. 2744.02(B)(5) states that liability shall not be construed to exist under another section of the Revised Code merely because a responsibility is imposed upon a political subdivision or because of a general authorization that a political subdivision may sue and be sued.

When none of the exceptions to immunity set forth in R.C. § 2744.02(B) are applicable the governmental entity is immune as a matter of law. [116]

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[113] *Cater v. Cleveland*, 83 Ohio St.3d 24, 28, 697 N.E.2d 610 (1998).
[114] *Oswald v. Lucas County Juvenile Detention Center, et al.*, 2000 WL 1679507 (6th Cir. 2000).
[115] See R.C. § 2744.01(C)(2)(x).
[116] See *Surface v. Conklin*, 2015 WL 2406075, at *6-7 (S.D. Ohio May 20, 2015). See also *Griffits v. Newburg Heights*, 2009 WL 280376, ¶ 26 (Ohio App. 8 Dist.); *Terry v. City of Columbus*, 2009 WL 2697312 (S.D. Ohio); *Wilson v. Stark Cty. Dept. of Human Services*, 70 Ohio St.3d 450, 452, 639 N.E.2d 105; *Ramey v. Mudd*, 154 Ohio App.3d 582, 587-88, 798 N.E.2d 57 (2003); *Ratcliff v. Darby*, 2002 WL 31721942 (Ohio App. 4 Dist.); *Maggio v. City of Warren*, 2006 WL 3772258 (Ohio App. 11 Dist.); *Thornton v. City of Cleveland*, 176 Ohio App.3d 122, 890 N.E.2d 353 (Ohio App. 8 Dist).

Third, even if a political subdivision is potentially liable under any of the R.C. 2744.02(B) exceptions to immunity, immunity for the political subdivision can be reestablished pursuant to applicable defenses contained in R.C. 2744.03(A).

> R.C. § 2744.03(A)(3) reads: "The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee."
>
> R.C. § 2744.03(A)(5) which reads: "The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner."

2. Immunity of Employees of Political Subdivisions

The analysis of employee immunity under Ch. 2744 begins R.C. § 2744.03(A)(6). However, "[t]here are exceptions to §2744.02 immunity when a government employee acts beyond the scope of his or her employment with malicious purpose, in bad faith, or in a wanton or reckless manner." [117]

The Sixth Circuit has held that a failure to establish objective unreasonableness under the 4th Amendment excessive force analysis evidences a failure to sufficiently establish that the officers acted in a wanton, willful or reckless manner. [118] Therefore, in cases where the officers did not engage in excessive force and therefore are entitled to qualified immunity, they also will be entitled to immunity R.C. § 2744.02 et seq. on the state claims.

B. Intentional Torts

In Ohio, employers and supervisors are not liable for the intentional torts or crimes of their employees.[119] A tortious act of an employee is outside the scope of his employment where the act is not calculated to further the interests of the employer. Where an employee acts willfully, for his own purposes, the employer is not responsible even if the employee was on duty at the time of the act. [120] The focus in these circumstances should not be on alleged wrongful nature of

[117] See *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 315 (6th Cir. 2005) (quoting R.C. §2744.03(A)(6)).
[118] See *Chappell v. City of Cleveland*, 585 F.3d 901, 916 n.3 (6th Cir. 2009); *Burdine v. Sandusky Cty., Ohio*, 524 Fed. Appx. 164, 171 (6th Cir. 2013); *Ruiz-Buenno III v. Scott*, 2016 WL 385294, *11 (6th Cir) (citing *Farmer v. Brennan*, 511 U.S. 825, 836 (1994)).
[119] *Thomas v. Speedway Superamerica, LLC*, 2006 WL 2788522 (Ohio App. Dist. 9 2006); *Feichtner v. Ohio Dept. of Transportation*, 114 Ohio App.3d 346, 359, 683 N.E.2d 112 (Ohio App. 10 Dist. 1995).
[120] See *Browning v. Ohio State Highway Patrol*, 151 Ohio App.3d 798, 786 N.E.2d 94 (Ohio App. 10 Dist. 2003) (citing *Byrd v. Faber*, 57 Ohio St.3d 56, 58, 565 N.E.2d 584 (1991)).

employee's act but on whether the act is so divergent from the interests of the employer that its very nature severs the relationship between employer and employee.[121]

An employee acts within scope of employment under Ohio law when the act performed is the kind the employee is employed to perform, the act occurs substantially within the time and place authorized by the employment and the act is actuated at least in part by a purpose of serving the employer. [122]

An interceding criminal act breaks the chain of proximate cause and such an act is outside the scope of one's employment. The Ohio Supreme Court has acknowledged that "[t]he state can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct. Arguably, intentional acts are even more difficult to anticipate because one bent on depriving a person of his property might well take affirmative steps to avoid signaling his intent." [123]

C. Gross Negligence

Gross negligence has been defined as "intentionally [doing] something unreasonable with disregard to a known risk or a risk so obvious that [the actor] must be assumed to have been aware of it, and of such a magnitude such that it is highly probable that harm will follow." [124]

D. Wrongful Death Claims

A wrongful death claim in Ohio has three elements: (1) a *duty* owed to the decedent; (2) a *breach* of that duty; and (3) *proximate causation* between the breach of duty and the death. [125]

Proximate cause is defined as:

> that which immediately precedes and produces the effect, as distinguished from a remote, mediate, or predisposing case that from which the fact might be expected to follow without the concurrence of any unusual circumstances that without which the accident

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[121] See also *RMI Titanium Co. v. Westinghouse Elec. Corp*., 78 F.3d 1125, 1144 (6th Cir. 1996).

[122] *Osborne v. Lyles*, 63 Ohio St.3d 326, 587 N.E.2d 825, 829 (1992); *Martinez v. U.S.*, 254 F.Supp.2d 777, 783 (S.D. Ohio 2003).

[123] See *Hudson v. Palmer*, 468 U.S. 517, 533, 104 S.Ct. 3194 (1984). See also *Siler v. Webber*, 442 FedAppx. 50(6th Cir. 2011) (intentional violent act performed far outside the scope of duties cannot be something that was obvious to occur); *Jefferson County v. Lindsey*, 124 F.3d 197 (6th Cir. 1997) (*Brown* requires a "direct causal link" between action or inaction of governmental bodies and particular injury suffered by plaintiff); *Wilborn v. Payne*, 2011 WL 5517184 (W.D. Tenn. 2011) (prior history of rape did not make it "plainly obvious" that employee would commit sexual assault in the course of his employment); *Haley v. City of Elsmere*, 2010 WL3515564 (E.D. Ky. 2010) (history of drug abuse did not put deputy at risk of engaging in excessive force).

[124] *Miller v. Kunze*, 865 F.2d 259, at 7 (6th Cir. 1988) (citing *Nishiyama v. Dickson County*, 814 F.2d 277, 282 (6th Cir. 1987) (en banc)). See also *Mohat Mentor Exempted Village School District Board of Education*, 2011 WL 2174671, at 8 (N.D. Ohio 2011) (school district bore no responsibility for students suicide for failure to properly train its employees on proper procedures to handle bullying; claim based on the board's inaction rather than clear and persistent pattern of violating a constitutional right, notice or constructive notice of violation, tacit approval of unconstitutional conduct or custom that was "moving force" behind violation).

[125] See *Littleton v. Good Samaritan Hospital & Health Center*, 39 Ohio St.3d 86, 92, 529 N.E.2d 449 (1988).

would not have happened, and from which the injury or a like injury might have been anticipated.[126]

In *Roell* the record evidence was developed with an eye toward proximate causation being lacking. The record evidence that the District Court found dispositive was that there was no evidence establishing that the decedent's death was caused by the deputies: (1) the coroner ruled that the manner of the decedent's death was natural and that the of cause of the death was excited delirium; (2) the coroner found no evidence of asphyxiation; and (3) the coroner ruled that the Taser was not a factor in the decedent's death because there was no physical evidence of a Taser barb contact in the pre-cordial (heart region) of the chest, there were four abrasions that the coroner opined were the result of Taser barb contact [three to the decedent's back and one to his buttocks area] and at none of the four abrasion sites did the coroner find any evidence of an electrical burn upon microscopic analysis.[127]

In Roell, the Taser was deployed three times: twice in dart mode and once in drive stun mode. The coroner's findings comported with the testimonial evidence by the deputies regarding the Taser deployments that NMI [Neuromuscular Interference] did not occur as a result of any Taser deployment.

The coroner's determination that the Taser device was not contributory in any manner to Roell's death was also consistent with the analysis of Bryan Chiles, a Technical Compliance Manager employed by Taser International, Inc. Mr. Chiles examined the engineering and pulse logs associated with the Taser used in this event. Mr. Chiles found that the logs evidenced that none of the Taser activations during the incident "appeared to have had the potential of incapacitating" Roell. And in fact, the second trigger deployment, according to Mr. Chiles, "appeared to have no connection, and had no potential to be effective in incapacitating"

The role of a coroner in determining the cause of death has been described by the Ohio Supreme Court as a medical expert rendering an expert opinion on a medical question." [128] The only method of challenging the legally accepted cause of death as determined by a coroner is to file an action in the court of common pleas of the county in which the death has occurred. [129] If at the hearing, the findings of the coroner concerning the manner, mode, and cause of death are rebutted by competent, credible evidence the common pleas court may direct the coroner to change the death certificate to comport with the judge's findings.

Left unchallenged "[t]he coroner's factual determinations concerning the manner, mode and cause of death, as expressed in the coroner's report and the death certificate, create a nonbinding rebuttable presumption concerning such facts in the absence of competent, credible evidence to

[126] See *Jeffers v. Olexo*, 43 Ohio St.3d 140, 143, 539 N.E.2d 614 (1989).
[127] *Roell v. Hamilton County*, 2016 WL 4363112 (S.D. Ohio). The District Court was affirmed on appeal [*Roell v. Hamilton County*, 870 F.3d 471 (2017) (dissent by Judge Moore)], but a state court case is pending alleging Assault and Battery and Wrongful Death in Hamilton County [Case No. A 1605115].
[128] See *Vargo v. Travelers Ins., Co.*, 34 Ohio St.3d 27, 30, 514 N.E.2d 226 (1987).
[129] See R.C. 313.19.

the contrary…R.C. 313.19 does not deprive a civil litigant of due process of law. The statute does not compel the fact-finder to accept, as a matter of law, the coroner's factual findings concerning the manner, mode and cause of decedent's death." [130]

One instructive aspect of the Roell case regarding the development of the record in a Taser related death case is that it is imperative that the Coroner's examination of the body includes documentation of any Taser barb site as well as microscopic examination to determine whether electrical burns are even present. Often the testimonial evidence by law enforcement is that the Taser had no NMI effect, yet the plaintiff still argues that the Taser either caused the death or was contributory. This allows judges who are sympathetic to plaintiff to craft decisions which defeat summary judgment and force settlement. To the maximum extent possible physical and technical evidence regarding the Taser deployment should be developed in the record to combat allegations of the Taser's contribution to injury and/or death.

E. Assault and Battery under Ohio Law

In Ohio the tort of assault consists of the willful threat or attempt to harm or touch another offensively, which threat or attempt reasonably places the other in fear of such contact. The threat or attempt must be coupled with a definitive act by one who has the apparent ability to do the harm or to commit the offensive touching. [131] An essential element of the tort of assault is that the actor knew with substantial certainty that his or her act would bring about harmful or offensive contact.[132] The act must also be such as to cause reasonable fear of immediate physical violence.[133]

The tort of battery exists when a person acts with the intent to cause a harmful or offensive contact and such a harmful contact actually results. [134] Assault then, in the civil sense, is the beginning of an act which, if consummated, would constitute battery. [135]

The key to both torts is the element of intent. In Ohio, "it is well-established that intent to inflict personal injury upon another is an essential element of an action based upon assault and battery.[136]

In *Peabody v. Perry Twp., Ohio,* [137], the plaintiff alleged that the officer committed assault and battery when he deployed his Taser at a fleeing suspect who was climbing a fence. At the time the Taser contacted the suspect it caused the suspect to fall forward. The suspect suffered a head injury and subsequently died as a result. The plaintiff argued that the initial deployment of the Taser constituted assault and battery. The plaintiff argued that the officer was not immune from

[130] *Vargo v. Travelers Ins. Co.*, 34 Ohio St. 3d 27, 27–28, 516 N.E.2d 226, 227 (1987).
[131] *Scott v. Perkins*, 74 Ohio Opinions 2d 280 (Ohio App. 1975) (liability for the intentional tort of battery occurs when there is a harmful or offensive contact).
[132] See *Stevens v. Provitt*, 2003 WL 23097088, at *3 (Ohio App. 11 Dist.); *Smith v. John Deere Co.*, 83 Ohio App.3d 398, 614 N.E.2d 1148 (Ohio App. 10 Dist. 1993).
[133] See *Ryan v. Conover*, 59 Ohio App. 361, 18 N.E.2d 277 (1937).
[134] *Love v. City of Port Clinton*, 37 Ohio St.3d 98, 99, 524 N.E.2d 166 (1988).
[135] *Ryan*, 59 Ohio App. 361.
[136] *Scott v. Perkins*, 74 Ohio Opinions 2d 280 (Ohio App. 1975) ((liability for the intentional tort of battery occurs when there is a harmful or offensive contact).
[137] 2013 WL 1327026, at *15-16 (S.D. Ohio).

the deployment because the deployment was accomplished with a malicious purpose, in bad faith, or in a wanton, willful or reckless manner.

The *Peabody* Court held that no reasonable jury could find that the officer acted with a malicious purpose, in bad faith or in a willful, wanton or reckless manner. The Court observed that there was no evidence that the officer harbored an ill will directed at the suspect or that the officer's actions reflected ill will or conscious wrongdoing. The Court found that the evidence "fell well short' of showing the officer failed to exercise any care whatsoever or exhibited a disposition to perversity.[138]

F. Punitive Damages

A local government unit or individuals acting in their official capacity are not liable for punitive damages under § 1983.[139] Further, pursuant to RC 2744.05(A), punitive or exemplary damages under Ohio law shall not be awarded in an action against a political subdivision. But a plaintiff may recover punitive damages against a governmental employee sued in his or her individual capacity.

To state a claim for punitive damages against a political subdivision employee in his or her individual capacity plaintiff must produce evidence of conduct that is motivated by an evil intent or motive or involves the reckless or callous indifference to the rights of others.

VIII. Liability may not Rest on Speculation

A case should not go to trial "rooted in speculation rather than evidence."[140]

As the *Ruiz-Buenno III* Court noted

> It may well be that the tragic death of Edward Peterson was avoidable. If jail officials had known about his heart condition, or noticed that something was wrong with him on the morning of September 4, 2011, they may have been able to save his life. But the Fourteenth Amendment does not permit claims against jail official for negligence, that is, claims regarding what jail official *should* have known or *should* have done. Instead, it requires *deliberate indifference* to a known substantial risk of serious harm. In this case

[138] *Id*.
[139] *City of Newport v. Facts Concerts, Inc.*, 455 U.S. 247, 271 (1981); *Spires v. City of Lancaster*, 28 Ohio St.3d 76 (1986) (punitive damages are not "sensibly assessed against governmental entity itself")..
[140] *Ruiz-Buenno III*, 2016 WL 386294, *7 (6th Cir.); *Kendzierski v. Carney*, 2005 WL 3482397, ¶ 29 (Ohio App. 9 Dist.)

there is insufficient evidence for a jury to find that any of the defendants acted with deliberate indifference.

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TAB
B

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Public Employee Collective Bargaining in the Workplace

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Chapter 1

CLEMANS·NELSON & ASSOCIATES, INC.

History of Ohio Public Sector Collective Bargaining

- March 17,1983 S.B. 133 passed
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Chapter 3 – ORC 4117 Process

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Questions?

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LOCAL GOVERNMENT LAW UPDATE

Ohio Collective Bargaining Law
ORC Chapter 4117:
Foundations of Public Sector Bargaining

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Presented By:

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& ASSOCIATES, INC.

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CHAPTER 1

HISTORY OF PUBLIC SECTOR BARGAINING

In the early years of the 20th century, President Woodrow Wilson established the first War Labor Board to arbitrate disputes that had hampered America's war effort in WWI. That National War Labor Board was later reestablished by President Roosevelt in 1942 for the same purpose, and was disbanded in 1946. The public sector, however, had no such body; and, in many instances, patronage overshadowed the Constitutional mandate for "merit and fitness" in the first half of the twentieth century.

Not surprisingly, after World War II, the ranks of public employees were augmented by returning veterans who were more militant in their views than had been their predecessors. As such, during the late 1940s, in Ohio, a number of strikes captured the attention of the Ohio General Assembly.

Early Pre-Act: 1940s

In 1947, the Ohio General Assembly passed GC §17-7 (later renumbered as the "old" R.C. 4117), which was the **"Ferguson Act."** The Ferguson Act adopted the age-old precept that strikes by public employees should be illegal *per se*.

Under that PRIOR section R.C. 4117, the Ferguson Act would take effect:

— once workers were notified that they were on strike; and

— that they were fired; and

— that they could not be rehired at a rate of pay higher than that which they were paid when they had gone on strike; and

— if rehired, they were on a two-year probationary period.

Reflecting the mood of the times, the Ohio Supreme Court, that same year (1947), held that it was unlawful for a public employer to deduct union dues from the wages of public employees. See Hagerman v. Dayton (1947) 147 Ohio St. 313.

Against that backdrop, the Ferguson Act worked, in that there were few strikes, and public sector unions struggled for existence.

Although Ohio was rocked by numerous private sector work stoppages in the 1950s, few strikes involved public employees, largely because of that law.

Organized Labor Learns to Lobby

All through the 1950s, public employee unions were learning that the key to their success would lie in political lobbying. In order to do that, however, they needed money.

In 1959, public employee unions achieved what could easily be one of their greatest all-time victories. In 1959 they convinced a majority of legislators to legislatively overrule the Hagerman decision, and allowed dues deduction. Thus, with the stroke of a pen, GC 486-21 was enacted.

GC 486-21 was later renumbered, and became the FORMER R.C. 9.41 (later repealed along with the Ferguson Act by S.B. 133 in 1984).

Under *Former* R.C. 9.41, public employees were permitted to have dues deduction, if they individually signed a dues authorization card. This gave public employee unions a "war chest."

Still, at that time, the prevailing philosophy was that some aspects of collective bargaining could not be carried out, constitutionally. Back then, legal scholars believed that the delegation of power to an arbitrator was an unauthorized abrogation of democracy and legislative power; since arbitrators were not elected, had no rules, and, in most cases, would not be overturned by courts.

Although this was the philosophy at the time, public employee unions nonetheless executed a number of "agreements." At times, these were proposed as ordinances that were to become effective only if ratified by a legislative body. At other times these were "members only" contracts (state agencies).

Because of this unusual climate, practice before the State Civil Service Commission (later renamed the State Personnel Board of Review) often involved representatives of public employee unions, who were providing a group legal service in discipline and layoff cases.

In 1970 John Gilligan succeeded James Rhodes as governor, and launched two significant initiatives. First, Governor Gilligan tried, unsuccessfully, to pass a collective bargaining law patterned after legislation in another state (Pennsylvania). Second, Governor Gilligan launched an initiative to review and reclassify state and county civil service workers.

On the local front, public employee unions continued to attempt negotiations, sans law. Without arbitration, however, this meant that every "dispute" ended up as a "declaratory judgment" action in Common Pleas Court being fought, first, on jurisdictional grounds. The courts hated this because judges are elected officials, who hate to take sides in labor battles.

In 1975, the Ohio Supreme Court issued its landmark decision in the case of Dayton Classroom Teachers Association v. Dayton Board of Education (1975), 41 Ohio St.2d 127.

In Dayton, *supra*, an association of teachers had negotiated an "agreement" with the school board purporting to cover "teaching environment, salaries, payroll deductions, leaves of absence,

promotions, teacher enforcement of discipline, teacher evaluation, transfers, paydays, and academic freedom."

That agreement also purported to have an arbitration provision; but when the union grieved over parking, working conditions, and salary scale placement, the employer refused to go to arbitration. The union then sought to compel arbitration under R.C. 2711.

On appeal to the Supreme Court, the Court astounded everyone by siding with the union, holding that, while public employers had no duty to bargain, they were obligated to honor their contract if they did. The Court went on to validate arbitration, as long as the arbitrator was prohibited from making any decision that was contrary to the contract, **"or law."**

The unions were on a roll … and they now knew that they would need a collective bargaining law.

In 1975, the General Assembly passed a collective bargaining law, only to have it vetoed by Governor James Rhodes, who had, by then, returned to office for another two terms.

Two years later, in 1977, the General Assembly passed the same bill again. Again, it was vetoed by Governor Rhodes.

By that point, the intensity of the issue was reaching a boiling point. Between 1973 and 1980, Ohio had experienced 428 public employee work stoppages;[1] and was one of only eleven states to have no public sector bargaining law.

In 1982, Richard F. Celeste was elected governor, and with him a democratically controlled General Assembly came into power.

The Law Emerges

On March 17, 1983, S.B. 133 was introduced in the Ohio Senate by Eugene Branstool. On party lines, it passed the Senate and House, and was signed on July 6, 1983, to take effect on "April Fool's Day" 1984, a Sunday.

Some parts of the law, however, had taken effect on October 6, 1983, so that the State Employment Relations Board could be set up, in business, and open on April 1, 1984. On that date, a line of union representatives literally wrapped around the block at Broad and High.

In late 1983, Governor Celeste had appointed William Sheehan and Helen Fix as board members. Although Ted Dyke was initially named SERB chairman, he resigned shortly after the law took effect; and Jack Day, a former Court of Appeals judge from Cleveland, was named as his successor in June of 1984.

[1]Student Project: Public Sector Collective Bargaining in Ohio: Before and after S.B. 133 (1983), 17 Akron L. Rev 229.

For reasons unknown, the State Personnel Board of Review, back then, was placed under SERB from 1983 to 1987, although the two entities never really shared staff or functions, and never really worked well at sharing hearing rooms. In more recent years they have gone back to a combined status, but with better coordination.

Once passed, S.B. 133 was a wonder to behold.

In order to meet the needs of organized labor, an "uncodified" section of that bill provided that:

> Exclusive recognition through a written contract, agreement, or memorandum of understanding by a public employer to an employee organization whether specifically stated or through tradition, custom, practice, election, or negotiation [that] the employee organization has been the only employee organization representing all employees in the unit is protected subject to the time restriction in division (B) of section 4117.05 of the Revised Code. Notwithstanding any other provision of this act, an employee organization recognized as the exclusive representative shall be deemed certified until challenged by another employee organization under the provisions of this act and the State Employment Relations Board has certified an exclusive representative. (Emphasis added.) 140 Ohio Laws, Part I, 367.

Although designed to protect the interests of public employee unions, that uncodified section soon proved troublesome.

In Ohio Counsel 8, AFSCME v. City of Cincinnati, (1994) 69 Ohio St.3d. 677, the Ohio Supreme Court was called upon to decide exactly how that "uncodified" section would work. In that case, AFSCME had a "deemed certified" unit that had existed since 1958. In 1990, the city filed with SERB five different petitions seeking "clarification" of that unit.

AFSCME objected, saying that the city had no right to amend or clarify deemed certified units until representation is challenged by a rival employee union.

The SERB ALJ ruled that SERB could consider the petitions that claimed that it was unlawful to have certain employees all in the same unit. When this was affirmed by the full Board, AFSCME appealed.

In appeal, in an opinion by Justice Resnick, the Supreme Court held that nothing could alter or adjust a "deemed certified unit," absent a challenge by a rival union.
In time, however, this approach came back to haunt a few unions.

In State ex rel. Brecksville Ed. Ass'n. OEA v. SERB, (1996) 74 Ohio St.3d 655, the Court considered a case in which the UNION had convinced a school system that it would make sense to amend a "deemed certified" unit to include tutors. When SERB refused (citing AFSCME), the union filed a Mandamus action.

The Supreme Court backpedaled, and reasoned that nothing in the uncodified law prevented a joint petition to ADD classifications to the "deemed certified" unit.

This, also, proved cumbersome, and in 2000 the Supreme Court changed direction yet AGAIN. In Ohio Counsel 8, AFSCME v. SERB, 88 Ohio St.3d 460, the Court held that a "deemed certified" unit could be modified by an arbitrator, without SERB's involvement. The decision implied that "anything goes" as long as both sides agree.

SERB, today, believes that "deemed certified" units are immune from most forms of unilateral alteration, even more specific subsequent legislation that would render membership unlawful. In Mahoning Edu Assn v. Mahoning County Board of MRDD, 2005-08, SERB held that "Service and Support Administrators" had to remain in a "deemed certified" unit, even though the General Assembly had passed a law making that unlawful.

The Age-old Battle of Law Versus Politics

In 1984, the city of Rocky River had found itself in negotiations with the IAFF, and were on track for conciliation, when the city raised two arguments. First, the city argued that R.C. 4117 was unconstitutional because it violated "home rule". Next, the city made a classical argument, claiming that "binding arbitration" was an "unauthorized delegation of a legislative function." In Rocky River v. SERB ("Rocky I") (1988) 39 Ohio St.3d 196, the Supreme Court ***agreed*** with the city. (November of 1988) (Moyer, Locher, Holmes, Wright — concurring; Sweeney, Douglas, Brown — dissenting)

What happened after that is the stuff of conspiracy novels.

The union requested "reconsideration," and on December 22, 1988, the Court issued its decision ("Rocky II") 40 Ohio St.3d 606 **reaffirming** its original opinion.

In January, 1989, the balance of power on the Court shifted with the election of Justice Renick. Thereafter, on the basis of procedures unprecedented in the annals of Ohio Jurisprudence, the "new" Court granted a "rehearing," and REVERSED itself 4 to 3. (Douglas, Sweeney, Brown, Resnick for IAFF; Moyer, Holmes, Wright — dissenting). See "Rocky III", 43 Ohio St.3d 1 (1989).

Rocky III is a lengthy, and pedantic, writing that used slight-of-hand to undo TWO prior rulings by the Court that should have been, by then, "final".

Status Today

R.C. 4117 is imperfect and costly, but it is unlikely that much will happen that will change it after the 2011 SB 5 debacle.

CHAPTER 2
(BONUS CHAPTER)*

NON-124 LAWS AFFECTING PUBLIC SECTOR EMPLOYMENT IN OHIO

*A "bonus chapter" is material that will not be specifically addressed as a discreet block in this seminar. It is included because we feel that it is useful background material.

CHAPTER 2: NON-124 LAWS AFFECTING PUBLIC SECTOR EMPLOYMENT IN OHIO

CONSTITUTIONAL

1. **Amendment I, U.S. Constitution**
(freedom of speech, assembly, etc.)

2. **Amendment XIV, U.S. Constitution**
(due process, equal protection**)**

3. **Ohio Constitution, Article I, §16**
(due process)

4. **Ohio Constitution, Article XV, §10**

"Appointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations. Laws shall be passed providing for the enforcement of this provision."

5. **Ohio Constitution, Article XVIII, §3**
(granting all cities "home rule" powers)

6. **Ohio Constitution, Article XVIII, §7**
(allowing charter cities)

FEDERAL LAWS

7. **Age Discrimination in Employment Act, 29 U.S.C. § 621.** Prohibits age-based dismissals of employees over 40 years of age. "RFOA" defense is based on job analysis. Applies where employer has 20 or more employees. (3-year retention of all payroll records; 1 year of personnel records) (Enforcement modeled after FLSA, disparate impact analysis not available) [1996 Amendment restored 623(j), eff. 9/30/96] (exhaustion required)

Regulations: 29 C.F.R. § 1625

8. **Americans With Disabilities Act, 42 U.S.C. § 12101.** Effective for employers who have 15 or more employees, the law acts as a general prohibition against discrimination involving individuals with disabilities. "Essential functions" based on PDs. (Same record retention as Title VII) (Same definitions as Rehab. Act of 1973)

Regulations: 29 C.F.R. § 1630; 28 CFR § 41; 28 CFR § 35

9. **Brady Bill, 18 U.S.C. § 921.** BATF memo of 11/26/96 states that any misdemeanor conviction of domestic violence will render police officer unable to carry firearm also

invoked by "Civil Protection Orders" issued by domestic relations courts. (R.C. 2917.11) (See also R.C. 3113.31 and R.C. 2919.26)

10. **Civil Rights Act of 1866, 42 U.S.C. § 1981.** Prohibits discrimination on the basis of race. Amended in 1991, new 42 U.S.C. § 1981(A) caps compensatory damages and exempts political subdivisions from punitive damages in civil rights actions.

11. **Civil Rights Act of 1871, 42 U.S.C. § 1983.** Creates federal cause of action against policy making government officials and entities for deprivations of liberty or property without due process. Complex personal immunity issues. Two (2) year statute of limitations.

12. **Civil Rights Act of 1871, 42 U.S.C. § 1985(3).** Prohibits conspiracy to deprive any person of equal protection under the Law.

13. **Civil Rights Act of 1871, 42 U.S.C. § 1986.** Imposes duty to prevent conspiracy under 42 U.S.C. § 1985(3).

14. **Civil Rights Act of 1964, (Title VI) 42 U.S.C. § 2000(d).** Prohibits discrimination in federally-funded activities. Requires affirmative action plans. Works with Executive Order 11246.

15. **Civil Rights Act of 1964, (Title VII) 42 U.S.C. § 2000(e).** Prohibits discrimination because of race, religion, sex, or national origin for employers of at least 15 employees in government, or an industry affecting interstate commerce. Has elected official staff exemption. (2 year retention of applications)

    Regulations: 29 C.F.R. § 1604 Sex Discrimination Guidelines
    29 C.F.R. § 1607 (Uniform Guidelines for Employee Selection, 1978)
    29 C.F.R. § 1608 AAPs
    29 C.F.R. § 60-2 AAPs

    Policy: EEOC Guide on Veterans' Preference (N-915-056)
    (EEOC August 10, 1990) (protects veterans' preference under VII)

16. **Civil Rights Act of 1968, 18 U.S.C. § 245.** Criminal penalties for threats or intimidation based on race, color, religion, or national origin. Often used against law enforcement officers in connection with 42 U.S.C. § 1983, "excessive force" areas. (See also: 128 U.S.C. § 242.)

17. **Civil Rights Remedies for Gender Motivated Violent Crime, 42 U.S.C. § 13981.** Remedy for any felonious gender-motivated violent act. (Held unconstitutional in part. See U.S. v. Morrison, 82 FEP Cases 1313 (U.S. Sup. Ct., 5/15/00))

18. **Clean Air Act, 42 U.S.C. § 7622.** Prohibits discharge of employees who commence or testify against their employer in actions for violations.

19. **Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), 29 U.S.C. § 1161.** Amended ERISA, Internal Revenue Code, and Pub. Health Service statutes to allow for continued employer group coverage at individual expense upon the happening of a qualifying event. "Gross misconduct" exception (29 U.S.C. § 1163(2)). Parallel state statute at R.C. 3923.38 et seq.

20. **Consumer Credit Protection Act, 15 U.S.C. § 1674.** Prohibits discharge of employees because of garnishments of wages for any one (1) indebtedness.

21. **Drug Free Workplace Act of 1988, 41 U.S.C. § 702 (102 Stat. 4181, PL 100-690).** Requires reporting of workplace drug convictions, dissemination of information. Applies to recipients of federal funds, but frequently appears as a contractual provision in sub-contracts. Window dressing, no real clout. (Note 41 USC 701 refers to federal contractors)

22. **Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1140.** Prohibits discharge of employees so as to prevent them from attaining vested pension rights.

23. **Equal Pay Act of 1963, 29 U.S.C. § 206(d).** Prohibits wage disparity based on sex in substantially equal jobs. (3-year retention of records)

    Regulations: 29 C.F.R. § 1620

24. **Fair Credit Reporting Act, 15 U.S.C. § 1681.** Potential impact on employee background checks, even in public sector. Sexual harassment investigations by outsiders may trigger notification requirements according to a 1998 FTC opinion. Amended in 2003 by the **Fair and Accurate Credit Transactions Act (FACT)** which effectively nullified the 1998 FTC opinion by specifically removing an investigation report of suspected misconduct related to employment from the definition of "consumer report." **15 U.S.C. § 1681(a)(y)(1)**

25. **Fair Labor Standards Act, 29 U.S.C. § 201.** Overtime law, prohibits dismissal of employee who files claim or complaint concerning minimum wage, overtime pay, comp time, or maximum hours. Has staff exclusion. (3 year retention of time sheets, payroll records) "White collar" exemptions: 29 U.S.C. § 213(a)(1). Non-retaliation: 29 U.S.C. § 215(a)(3).

    Regulations: 29 C.F.R. § 541 (salary); 29 C.F.R. § 785 (hours)

26. **False Claims Act**, **31 U.S.C. § 3729-3730**. Protects employees from retaliation for investigating fraud committed against the federal government.

27. **Family and Medical Leave Act, 29 U.S.C. § 2601.** Twelve (12) weeks unpaid leave. Complex definitions. FLSA staff exemption applies. Difficult notice provisions for employers. "Chronic" conditions.

28. **Federal Merit System Standard, 42 U.S.C. § 4701.** Merit and fitness, hiring standards applicable to federally funded programs. Uses term "relative" ability. See 42 USC 4767 re: termination of funds. (Former 5 C.F.R. § 900)

29. **Federal Unemployment Tax Act, 26 U.S.C. § 3309.** Major non-tenured policy makers cannot get unemployment benefits under any state law.

30. **Federal Water Pollution Control Act, 33 U.S.C. § 1367.** Prohibits discharge of employees who commence or testify against their employer in actions for violations.

31. **Federal Wiretapping Act, 18 U.S.C. § 2511** (Civil action for interception of communication) 18 USC 2511 (1)(b) IV (prohibits leaving "bug" at a business)

32. **GUN Violence Control Act Amendments 1996, 18 U.S.C. § 921.** (HR 4208) Police officers convicted of domestic violence, or involuntarily committed, cannot carry a firearm.

33. **Hatch Act, 5 U.S.C. § 1501, et seq.** Ban on partisan political activity by classified employees whose salary is completely funded by federal loans or grants. (See also R.C. 124.57)

34. **HIPAA (COBRA) 42 U.S.C. § 1301 et seq., Pub. L. 104-191. Health Insurance Portability and Accountability Act.** Protects health insurance coverage for workers and their families when they change or lose their jobs. Also contains confidentiality requirements related to employees' medical information.

35. **Immigration Control Reform Act, 8 U.S.C. § 1324.** Requires I-9 forms. Prohibits national origin discrimination. (3-year retention of records)

    Regulations: 8 C.F.R. § 274a; see 73 FR 76505;
    https://www.uscis.gov/sites/default/files/files/form/i-9.pdf

36. **Jury System Improvement Act, 28 U.S.C. § 1875.** Prohibits discharge of employees who engage in jury duty.

37. **Law Enforcement Misconduct Statute, 42 U.S.C. § 14141.** Makes it a crime for an agency or person to engage in a pattern of conduct interferes with constitutional rights.

38. **Occupational Safety and Health Act, 29 U.S.C. § 651.** (via H.B. 308) General duty to provide safe workplace, specific standards, mandatory reports, MSDS. Record retention can run to career plus 30 years for blood borne pathogens. Useful in connection with ADA cases. See also OAC 4112-5-08 (occupational hazard defense).

39. **Older Workers Benefit Protection Act, 29 U.S.C. § 626 (104 Stat. 978).** Makes termination agreements more complex as to release of ADEA liability. 21 days in which to consider (29 U.S.C. § 626(f)(1)(F)(i)). Seven (7) days to revoke. Different rules for RIFs.

40. **Omnibus Transportation Employee Testing Act, 49 U.S.C. § 31306.** (CDL Drug Testing)

    Regulations: 49 C.F.R. § 40 (Drug testing requirements)

41. **Pregnancy Discrimination Act of 1978**, **42 U.S.C. § 2000e(k**). Amended Title VII of the Civil Rights Act of 1964 to prohibit sex discrimination on the basis of pregnancy.

42. **Racketeer Influenced and Corrupt Organizations Act. 18 U.S.C. § 1961 et seq.** Possible basis for sexual harassment suit. (39 FEP 1469)

43. **Rehabilitation Act of 1973, 29 U.S.C. § 706.** Prototype for ADA, applies to federal contractors and recipients of federal funds. Both administrative and private enforcement.

44. **Title IX of Education Amendments of 1972, 20 U.S.C. § 1681.** Prohibits discrimination based on sex in education programs financed by federal funds.

45. **Uniformed Services Employment and Reemployment Right Act (108 STAT. 3149) (38 U.S.C. § 4301).** Nondiscrimination on basis of service, protects a reemployed veteran from discharge except "for cause" for one (1) year. (Amended 11/98)

46. **USA Patriot Act, Pub L. 107-56,** Gives law enforcement greater ability to track and intercept communications, as well as creating new crimes, new penalties, and new procedures for use against domestic and foreign terrorists.

47. **Vietnam Era Veterans Readjustment Assistance Act, 38 U.S.C. § 4101-4110 (also 38 U.S.C. § 4211-4214).** Requires affirmative action for Vietnam veterans with 30% disability. Non-statistical AAP and VET-100 required in all contracts over $10,000. No private cause of action.

48. **Violence Against Women Act of 1994, 42 U.S.C. § 13981.** Authorizes a cause of action for unlimited damages for violence motivated by gender. (Held unconstitutional in part. See U.S. v. Morrison, 82 FEP Cases 1313 (U.S. Sup. Ct., 5/15/00)).

49. **WARN, 29 U.S.C. § 2101.** Plant closing law, 60-day notice if employing 100 workers, and 50 are to be affected. Beware separation packages, as there can be interplay between WARN notice and mandated 45-day period under 29 U.S.C. § 626.

STATE LAWS

50.	3.06 ORC	Deputies and Clerks serve "at pleasure of."
51.	3.07 ORC	Misconduct in Office–forfeiture
52.	9.03 ORC	Bans use of public funds to oppose unions in publications.
53.	9.35 ORC	Officials may contract out "ministerial functions."
54.	9.36 ORC	County may hire management consultants without competitive bidding.
55.	9.41 ORC	No employee can be paid unless DAS or CSC certifies that they have been hired, promoted, etc., pursuant to R.C. 124. (Personal liability for noncomplying office holders)
56.	9.44 ORC	Anniversary date for public employees, prior service credit. Amended in S.B. 99.
57.	9.47 ORC	Affirmative Action Plans required in projects under R.C. 153 and R.C. 5525.
58.	9.481 ORC	Residency requirements prohibited for certain employees.
59.	9.61 ORC	Fire Chief cannot be required to live in his district.
60.	9.73 ORC	Cannot question criminal record on employment app.
61.	9.84 ORC	Witness has right to counsel.
62.	9.86 ORC	Immunity of public officer.
63.	102.02 ORC	Must report any single gift of over $75.
64.	102.03 ORC	Ethics in government, public employees. Complex interaction with R.C. 2921.42. Some nepotism prohibited.
65.	102.03(B) ORC	Prohibition against revealing confidential information.
66.	102.09(D) ORC	Appointing authorities are required to furnish each new appointee with a copy of ethics law within 15 days of hire.

67.	117.01 ORC	Public officials are liable for all public money received or collected by them or by their subordinates under color of office.
68.	117.28 ORC	Finding for recovery by State Auditor.
69.	119.03 ORC	Rule-making procedure.
70.	119.09 ORC	Adjudication hearings.
71.	119.092 ORC	Attorneys' fees in some adjudication hearings.
72.	121.22 ORC	Open meeting law. 24-hour notice.
73.	125.111 ORC	All contracts for purchases made by political subdivisions must require affirmative action programs of vendors. (See also R.C. 9.47) Must be filed with DAS annually.
74.	145.01(A)(1)	Employer still pays PERS, where work contracted out, but same employees.
75.	145.296 ORC	If employer has paid disability leave program, must pay <u>both</u> employer and employee portions of PERS, if employee is on leave.
76.	145.35 ORC	PERS disability retirement; medical exam.
77.	145.381 ORC	Reemployment of a retiree.
78.	149.351 ORC	Unlimited public records retention.
79.	149.38 ORC	County Records Commission; six (6) month meeting schedule; 60-day notice to Ohio Historical Society.
80.	149.43 ORC	Public records law, limited exceptions. Must provide copy on request. See: (B)(7)(c)(i) for *"commercial purpose"* restriction.
81.	153.59 ORC	All construction contracts by political subdivisions must have non-discrimination clause and an affirmative action program. (See also R.C. 5525 and 9.47)
82.	305.171 ORC	County Commissioners alone contract for group health insurance for county workers.
83.	305.29 ORC	County Administrator serves "at the pleasure of".

84.	305.30 ORC	Commissioners can delegate all personnel functions to county administrator.
85.	307.07 ORC	Director of Economic Development is unclassified.
86.	307.56 ORC	Appeal to court from decision of county commissioners.
87.	325 ORC	County employment, compensation schedules.
88.	325.12 ORC	Prosecutor's FOJ fund.
89.	325.17 ORC	Hiring employees cannot exceed aggregate budget; each office holder may contract with consultants.
90.	325.19 ORC	County vacation accrual; holidays; CSB exemptions, DD Board exemptions.
91.	329 ORC	County DJFS.
92.	329.02 ORC	DJFS Directors unclassified (allows personal service contracts for up to three (3) years; reopener after each Commissioner elected).
93.	339.06 ORC	County Hospital Administrator removed when in the best interests.
94.	340.12 ORC	Each community mental health agency must have an AAP.
95.	341.05(B)	Sheriff – females perform procedures for female prisoners. Must have on duty
96.	505.38 ORC	Appointment of Fire Chief, firefighters
97.	505.49 ORC	Township appeals to CPC in discharge cases.
98.	505.491 ORC	Charges against Chief or police employees
99.	505.60 ORC	Township Firefighter is PT, if under 1500 hours – (G)(1)
100.	509.01 ORC	Appointment of Constables, removal
101.	733.22 ORC	City can contract up to $5000 on P.O.
102.	733.35 ORC	Mayor can file charges against department heads
103.	737.05 ORC	Safety Director may commission private police (unclassified)

104.	737.052 ORC	Termination of Chief for felony conviction, R.C. 119.12.
105.	737.07 ORC	Police not to exceed eight hours work per day (city)
106.	737.12 ORC	Suspension of police and fire personnel.
107.	737.13 ORC	Director of public safety controls police/fire class plan.
108.	737.11 ORC	Police and Fire Departments must be in classified service.
109.	737.171 ORC	Procedure for removal of village Chief of Police.
110.	742.38 ORC	Police and Fire medical testing of newly hired.
111.	955.12 ORC	County Dog Warden serves "for such periods of time . . . as the board considers necessary . . .".
112.	1329.10 ORC	Entity with fictitious name cannot sue.
113.	1333.81 ORC	Employee cannot knowingly disclose confidential information (this is a first-degree misdemeanor – RC 1333.99).
114.	1347 ORC	Personal Information Systems, annual report, rights of individuals.
115.	1347.05 ORC	One (1) person must be named to coordinate system.
116.	1347.09 ORC	Disputes over information in database.
117.	2151.13 ORC	Juvenile court employees serve at "pleasure of the judge."
118.	2152.41 ORC	Juvenile Detention Center under Judge = Unclassified
119.	2305.07 ORC	Six (6) year statute if based on contracts not in writing.
120.	2307.70 ORC	Converts selected crimes to a basis for a civil action.
121.	2313.19 ORC	A permanent employee may not be discharged for having taken time off for jury duty.
122.	2317.02 (B)(1) ORC	Physician-patient privilege.
123.	2317.07 ORC	Right to call opposing parties, as if on cross examination.

124.	2323.51 ORC	Can bring action for attorneys' fees if action was frivolous.
125.	2501.16 ORC	Court of Appeals employees "at the pleasure of . . . ".
126.	2506 ORC	Appeals to Common Pleas Court from adjudications, quasi-judicial proceedings.
127.	2711 ORC	Arbitration and appeals from arbitration.
128.	2711.13 ORC	Three (3) months in which to seek vacature of award.
129.	2716.05 ORC	Prohibits discharge based upon a single wage garnishment within a twelve (12) month period.
130.	2712.12 ORC	In any proceeding that alleges that a statute or ordinance is unconstitutional, the attorney general shall also be served with a copy of the pleading; must actually name OAG, if alleging statute is unconstitutional.
131.	2721.03	Any person whose rights are affected by a constitutional provision, statute, or rule as defined in RC 119.01, can file a declaratory judgment action. (The ability to do this can be an adequate remedy that must be pursued prior to any procedural due process claim under 42 USC 1983.)
132.	2744.02 ORC	Any order denying immunity is immediately appealable.
133.	2744.03 ORC	Political subdivision tort immunity. Immunity for officials as to state court actions and causes of action.
134.	2744.06 ORC	Payment of judgment over 10-year period.
135.	2913.04 ORC	Unauthorized use of property and computers.
136.	2917.12 ORC	Interfering with a Public meeting
137.	2921.02 ORC	Bribery/accepting bribes by public employees prohibited.
138.	2921.03 ORC	Intimidation of public servants prohibited.
139.	2921.05 ORC	Retaliation against public servants prohibited.
140.	2921.13 ORC	Falsification with purpose to mislead public officials prohibited.

141.	2921.22 ORC	Felony to fail to report felony.
142.	2921.41 ORC	Theft in office by public employees prohibited; forfeit PERS.
143.	2921.42 ORC	Unlawful interest on public contract prohibited; applies to civil service employment, nepotism.
144.	2921.43 ORC	Soliciting improper compensation prohibited.
145.	2921.44 ORC	Dereliction of duty; criminal; bar to reinstatement.
146.	2921.45 ORC	Public officials, employees criminally liable for deprivations of civil rights.
147.	2923.13 ORC	Firearm disqualification for persons committed for treatment at mental facility – Pivar v. Summit Co. Sheriff, 170 Ohio App 3d. 705 (applies even to "voluntary" admission).
148.	2961.01 ORC	Convicted felon cannot hold public office.
149.	3301.32 ORC	Criminal record check; Head Start employees.
150.	3319.16 ORC	Discharge of public school teacher; just cause standard.
151.	3319.39 ORC	Criminal record check; school employees.
152.	3517.092 ORC	Elected officials cannot solicit or accept contributions from employees.
153.	3599.05 ORC	Employer cannot threaten employee with termination in order to affect his/her vote in an election; cannot put political fliers in pay envelopes.
154.	3599.06 ORC	Employee cannot be discharged for taking a reasonable amount of time off in order to vote.
155.	3701.881 ORC	Criminal record check; home healthcare.
156.	3709.11 ORC	Health Commissioner non-tenured.
157.	3709.13 ORC	Board is appointing authority with health commissioner, employees are classified.
158.	3721.121 ORC	Criminal record check; nursing homes

159.	3721.13 ORC	Elderly Bill of Rights.
160.	3923.38 ORC	(Mini-COBRA) Right to group coverage for twelve (12) months. Not available unless employee was entitled to U.C. at time of separation.
161.	4101.11 ORC	State "General Duty" clause.
162.	4101.12 ORC	Prohibition against requiring, permitting, or suffering an employee to work in an unsafe place.
163.	4101.13 ORC	No employee shall interfere with any method or process adopted to protect employees. Unlawful to disobey order.
164.	4109.02-99 ORC	Statutes involving employment of minors.
165.	4111.02 ORC	State minimum wage.
166.	4111.03 ORC	State, city, and county employers, and employers with sales gross over $150,000 per annum, must pay overtime; county comp time outlined.
167.	4111.08 ORC	Duty to maintain employee records for three (3) years.
168.	4111.09 ORC	Duty to post regulations.
169.	4111.13 ORC	Non-retaliation against employee who enforces overtime right.
170.	4111.17 ORC	Prohibition against discrimination based upon sex, race, color, religion, or national origin in payment of wages. (MINI-EQUAL PAY ACT) Merit pay exception.
171.	4112.02 ORC	State Level Title VII, prohibits discrimination on basis of race, color, religion, sex, national origin, handicap, age, or ancestry. (OCRC)
		Regulations: OAC 4112-1-02 et seq.
172.	4112.14 ORC	Prohibits age discrimination; not available where employee can go to arbitration.
173.	4113.21 ORC	Employer must pay cost of medical examinations required of applicants for employment.
174.	4113.23 ORC	Employee is entitled to a copy of any medical report from a work-related examination.

175. 4113.41 ORC — Employer cannot fire employee for being late, if employee is responding to an emergency as a volunteer firefighter/medical services provider.

176. 4113.51 ORC — General "Whistleblower" protection.

177. 4113.71 ORC — Limited immunity for employee reference checks.

178. 4115.06 ORC — Prevailing wage must be paid on public contract work.

179. 4117 ORC — Public sector collective bargaining laws.

180. 4117.10 ORC — All county office holders and agencies must submit collective bargaining agreements to the "legislative body."

181. 4117.10(A) ORC — 4117 prevails over conflicting laws.

182. 4117.11 ORC — Unfair Labor Practices.

183. 4121.17 ORC — Right to complain of unsafe conditions to BWC.

184. 4123 ORC — Workers' Compensation Law.

- OAC 4123-5-20 agreements to reimburse "sick leave" from temporary disability payments
- Resolution 86-1-95 (9/3/86) Industrial Commission disfavors discharge of employees who are on W/C. (courts disagree — see Metheney v. Sajar, 69 Ohio App.3d 428)
- OAC 4123:1-21-02 (P)(3) annual SCBA medical certification of firefighters

185. 4123.01 ORC — Injury does not include psychiatric conditions except where they arise from physical injury. RC 4123.01(C)(1). Under 4123.68, mental illness is not an occupational disease.

186. 4123.54 ORC — Rebuttable presumption that injury was caused by alcohol or drugs where employee tests positive or refuses test.

187. 4123.56 ORC — Temporary disability ends with offer of work within employee's ability, or maximum improvement.

188.	4123.90 ORC	Prohibition against discrimination where employee has filed Workers' Compensation claims. 180-day statute of limitations, 90-day notice period to employees.
189.	4125.03 ORC	Employer must provide devices and methods to prevent the contraction of a disease or illness from job. Written as generic "general duty" clause but falls under "Lead Poisoning" chapter.
190.	4141 ORC	Unemployment Compensation Law.
191.	4141.01(B)(3)(c)(v) ORC	Major non-tenured policymakers not eligible for benefits.
192.	4141.21 ORC	JFS file information for exclusive use of JFS.
193.	4141.281(D)(8) ORC	No JFS decision can be given collateral estoppel effect.
194.	4141.29(D)(1)(a)	Labor dispute disqualification from unemployment benefits.
195.	4167 ORC	Codification of H.B. 308, public sector OSHA (incorporate by reference 29 CFR 1910 and 1926).
196.	4167.13 ORC	Appeals to SPBR, Civil Service Commissions over OSHA/safety retaliation; 60-day appeal period.
197.	5120.10 ORC	Minimum standards for jails. OAC 5120:1-8-17 (gender-based staffing) (See also: RC 341.05).
198.	5126 ORC	DD employment; limited contracts; DD control over classifications; right to hire counsel.
199.	5126.07 ORC	DD boards must have Affirmative Action Plan.
200.	5153.10 ORC	CSB Executive Director unclassified.
201.	5153.11 ORC	CSB Executive Director is dual appointing authority with Board.
202.	5153.111 ORC	Criminal record check; CSB.
203.	5155.01 ORC	County Home Administrator is appointing authority, but wages are set by commissioners.

204.	5155.03 ORC	County Home Administrator; commissioners must authorize administrator to hire an assistant.
205.	5502.26 ORC	Disaster Services Director (unspecified unless federal funds).
206.	5589.12 ORC	Unlawful for anyone, without authorization, to have in his possession property belonging to state, county, or township. (Note: Have fun with this the next time that an employee helps himself/herself to records for use in an arbitration!).
207.	5705.41 ORC	Certificate of availability in contracts of non-regular employment. Need for certificate of available funds for contract services; contracts without certificate are void.
208.	5705.45 ORC	Personal liability for spending without a certificate of availability.
209.	5705.46 ORC	6/10 cap in 6 months.
210.	5903.02 ORC	Public employee veterans' reemployment; cannot fire public employee who is called to military duty.
211.	5923.05 ORC	Public employee military leave without loss of pay; 22 8-hour days/calendar year; employee must furnish orders. (During one (1) month employee gets full pay plus reserve pay.)

CHAPTER 3

THE 4117 PROCESS

A. Who is covered?

1. Public Employer Defined

As used in Chapter 4117 of the Revised Code, "public employer" means the state or any political subdivision of the state located entirely within the state, including without limitation, any municipal corporation with a population of at least 5,000 according to the most recent federal decennial census; county; township with a population of at least 5,000 in the unincorporated area of the township according to the most recent federal decennial census; school district; state institution of higher learning; public or special district; state agency, authority, commission, or board; or other branch of public employment.

O.R.C. §4117.01(B)

2. Public Employee Defined

As used in Chapter 4117 of the Revised Code, "public employee" means any person holding a position by appointment or employment in the services of a public employer including any person working pursuant to a contract between a public employer and a private employer and over whom the national labor relations board has declined jurisdiction on the basis that the involved employees are employees of a public employer.

O.R.C. §4117.01(C)

B. Determining Bargaining Units

1. Initial Determination

Once a petition for representation election, or for voluntary recognition, has been filed, one of the first things that must be done is to determine the proper bargaining unit. The employer and the union can agree on the proper unit, but if they don't, SERB will make the final decision. SERB has exclusive authority to determine an appropriate bargaining unit:

O.R.C. §4117.06

In re State of Ohio, Office of Collective Bargaining, SERB 91-008 (9-19-91)

In re City of Gallipolis, SERB 94-005 (3-3-94)

This authority has been affirmed by the Ohio Supreme Court:

> Franklin County Law Enforcement Assn v. F.O.P., Capital City Lodge No. 9, 59 OS(3d) 167, 1991 SERB 4-55 (1991)

2. Exclusions from Bargaining Units

O.R.C. §4117.01(C) (1) – (18)

Supervisors — O.R.C. §4117.01(F)

> ***In re Mahoning County Dept of Human Services***, SERB 92-006 (6-5-92)

Management level employees — O.R.C. §4117.01(L)

> ***In re Univ of Cincinnati***, SERB 98-003 (2-26-98)

Professional employees — O.R.C. §4117.01(J)

Confidential employees — O.R.C. §4117.01(K)

> ***In re Poland Twp.***, SERB 2002-001 (1-25-2002)
>
> ***In re Ohio Dept. of Administrative Services,*** SERB 2002-002 (3-14-02)
>
> ***Professionals Guild of Ohio & Taylor Mem'l Pub. Library n/k/a Cuyahoga Falls Library***, 21 OPER 168 (July 20, 2004)

Seasonal and casual employees — O.R.C. §4117.01(C)(13)

> ***In re Ohio Turnpike Comm.***, SERB 93-022 (12-21-93)

3. Amending Bargaining Units

Chapter 4117 does not specifically give SERB the authority to amend bargaining units, but the authority is implied.

The types of petitions are described in O.A.C. 4117-5-01(E)(1) and (2).

O.A.C. 4117-5-01(G) — addition to bargaining unit must be "substantially smaller" than original unit.

In re Pickaway County Human Services Dept, SERB 95-015 (9-29-95)

4. Deemed Certified Units

A "Deemed Certified" unit is one in which there was in effect a lawful written agreement, contract, or memorandum of understanding between the public employer and an employee organization which as of the April 1983 (eff. date of 4117.05) has been recognized by a public employer as the exclusive representative of the employees in a unit which by tradition, custom, practice, election, or negotiation has been the only employee organization representing all employees in the unit.

O.R.C. §4117.05(B)

Parties can agree to amend deemed certified bargaining units in any manner that they choose.

> Ohio Council 8, Am Fedn. Of State, Cty. & Mun. Emp., AFL-CIO v. State Emp. Relations Bd. (2000) 88 Ohio St.3d 460.

5. Objections

Objection to inclusion of captains in bargaining unit must occur *before* the unit is certified by SERB.

> ***Ohio Patrolmen's Benevolent Ass'n & Boardman Twp***., 22 OPER 42 (February 9, 2005)

6. Elections

After a petition for representation is filed, the public employer may request that a representation election take place by the appropriate bargaining unit employees.

C. Negotiations

1. The Duty to Bargain

All matters pertaining to wages, hours, or terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement are subject to collective bargaining, except as otherwise specified in this section.

O.R.C. §4117.08(A)

Large, but not all inclusive, listing of mandatory subjects of bargaining.

In re Montgomery County Joint Vocational School Dist Bd of Ed, SERB 89-017 (7-14-89)

Employers must bargain with and reach agreement with the union when any change to a mandatory subject of bargaining is proposed.

In re Toledo City School District Board of Education, SERB 2001-005 (10-1-01)

The conduct and grading of civil service examinations, the rating of candidates, the establishment of eligible lists from the examinations, and the original appointments from the eligible lists are not appropriate subjects for collective bargaining.

O.R.C. §4117.08(B)

2. Management Rights

O.R.C. §4117.08(C)

Employer must bargain over the decision to exercise a management right, if it "affects" wages, hours, etc.

In re City of Lakewood, SERB 88-009 (7-11-88)

Employers must bargain over "affects" of decision to exercise management right regardless of whether the topic is permissive or mandatory.

Lorain City School Didst Bd of Ed v. SERB, 40 OS(3d) 257, SERB 4-2 (1988)

In re SERB v Youngstown City School Dist Bd of Ed, SERB 95-010 (6-30-95)

"Balancing test" for exercise of management rights.

In re Youngstown City School Dist Bd of Ed, SERB 95-010 (6-30-95)

"Rules" and definitions that are not contained in the collective bargaining agreement (that is, bargained over and agreed to) may not be enforced by an arbitrator.

Internat'l. Assn. of Firefighters, Local 67 v. Columbus (2002) 95 Ohio St.3d 101

Summit County Children Servs. Bd. v. Comm. Workers, Local No. 4546, 2006 Ohio 389; 2006 Ohio App. LEXIS 344 (9th Dist. 2006) (Going outside of CBA to define "just cause.")

City of Cuyahoga Falls v. FOP, 2004 Ohio 6739; 2004 Ohio App. LEXIS 6265 (9th Dist. 2005) (Imposing progressive discipline in discharge case where no such procedure exists in the agreement.)

3. Duration of Agreement

No agreement shall contain an expiration date that is later than three years from the date of execution.

O.R.C. §4117.09(E)

Employer must maintain terms and conditions of expired collective bargaining agreement.

City of Cincinnati v. Ohio Council 8, AFSCME, 62 OS(3d) 658, 1991 SERB 4-87 (1991)

At expiration of contract, the terms of the agreement expire if either party acts in a manner that would lead to the conclusion that the party no longer wishes to be bound by the contract's terms.

State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn., 82 Ohio St.3d 222, 694 N.E.2d 1346 (1998)

4. Chapter 124 Rights

Unless the collective bargaining agreement specifically waves statutory rights, employees retain those rights.

State ex rel Ohio Assn. of Pub. School Emp./AFSCME, Local 4, AFL-CIO v. Batavia Local School Dist. Bd. of Edn. (2000), 89 Ohio St.3d 191

If the agreement provides for a final and binding ***arbitration*** of grievances, public employers, employees, and employee organizations are subject solely to that grievance procedure and the state personnel board of review or civil service commissions have no jurisdiction to receive and determine any appeals relating to matters that were the subject of a final and binding grievance procedure.

O.R.C. §4117.10(A)

D. Impasse Procedures

1. Fact-Finding

O.R.C. §4117.14(C)(3)(a), (4), (5), (6)

O.A.C. Rule 4117-9-05

The seven days to reject the recommendations of the fact-finder begin with the day the recommendations are sent, i.e., mailed.

In re Richland County Bd of MRDD, SERB 95-022 (12-29-95)

In re Erie County Care Facility, SERB 88-002 (3-14-88)

The vote must be filed at SERB within 24 hours of the vote or the end of the seven-day period.

In re Lima, SERB 85-002 (1-25-85)

Party cannot amend notice of accepting fact-finder's report once seven day period has passed.

IAFF, Local 377 v. SERB, 06CVF02-278 (Ct. of Common Pleas, Franklin County, 7/19/06)

2. Conciliation

The position statement must be submitted to the conciliator five days before the conciliation hearing, notwithstanding any contrary language in OAC; and a "late" submission cannot be considered.

O.R.C. §4117.14(G)(3)

In re Greenville Patrol Officers Assn, SERB 2000-005 (6-13-00)

The remedy where the union submits its offer late may be meaningless.

In re FOP, Ohio Valley Lodge No. 112, SERB 2000-011 (11-22-00)

Increases in rates of compensation and other matters with cost implications awarded by the conciliator may be effective only at the start of the fiscal year next commencing after the date of the final offer settlement award; provided that if a new fiscal year has commenced since the issuance of the board order to submit to a final

offer settlement procedure, the awarded increases may be retroactive to the commencement of the new fiscal year. The parties may, at any time, amend or modify a conciliator's award or order by mutual agreement.

O.R.C. §4117.14(G)(11)

3. MADs

Employers and union may agree to a method other than the one listed in O.R.C. §4117.14 to negotiate an agreement. This is referred to as a mutually agreed-to alternative dispute resolution procedure (MAD).

O.R.C. §4117.14(C)(1)(f)

O.A.C. Rule 4117-9-03

For strike-prohibited units, a MAD is not valid unless it compels final resolution (interest arbitration, conciliation).

O.A.C. Rule 4117-9-03(C)

In re Columbus SERB 85-004 (2-6-85)

4. Ultimate Impasse

Ultimate impasse is a legal concept developed by the NLRB and occurs when there is "no realistic possibility that continuation of discussion at that time would have been fruitful."

> ***In re Vandalia-Butler City School Dist Bd of Ed,*** SERB 90-003 (2-9-90) (citing of American Federation of Television and Radio Artists (Taft Broadcasting Co.), 395 F.2d 622, 628 (D.C. Cir. 1968)), aff'd sub nom. Vandalia-Butler City School Dist Bd of Ed v. SERB, 1990 SERB 4-90 (CP, Montgomery, 10-1-90), aff'd > 1991 SERB 4-81 (2d Dist Ct App, Montgomery, 8-15-91)

An employer may implement its last, best offer when the parties have reached ultimate impasse in bargaining or when the employer has made good-faith attempts to bargain the matter before time constraints necessitated the implementation of its last, best offer.

> ***In re SERB v. Youngstown City School Dist Bd of Ed,*** SERB 95-010 (6-30-95)

Ultimate impasse not reached where the union has indicated it is ready, willing and able to move on any remaining issues still on the table, including allowing the employer to put its new insurance proposal on the table in exchange for giving employees a break on co-payments.

In re Twinsburg City School Dist Bd of Ed, SERB, 2005-010 (12-2-2005)

5. Executing the Agreement

Failing to sign an agreement (regardless of how it became effective) is an unfair labor practice.

In re East Palestine City School Dist Bd of Ed, SERB 86-011 (3-20-86)

In re SERB v. Licking County Sheriff, SERB 88-003 (4-5-88)

Adding additional parties to the signature line is NOT an unfair labor practice.

Stark County Educator's Assn v. SERB, 1992 SERB 4-11 (5th Dist Ct App, Stark, 1-14-92) (Note: This was an appeal from SERB's adoption of the Hearing Officer's Proposed order. The proposed order was not published in the SERB Reporter.)

E. Unfair Labor Practices

O.R.C. §4117.11(A) & (B)

O.R.C. §4117.11(A)(1)

An (A)(1) violation is a "catch-all" and will be imposed whenever it is found that the employer has violated one of the other sections (A)(2) through (8). A (B)(1) violation is NOT automatically found when a union violates one of the other sections (B)(2) through (8).

O.R.C. §4117.11(A)(3)

State Employment Relations Bd. v. Adena Local School Dist. Bd. of Edn., 66 OS 3d 485, 1993 SERB 4-43

In re Fort Frye Local School Dist Bd of Ed, SERB 94-016 (10-14-94)

1. Direct Dealing as ULP

In re Vandalia-Butler City School Dist Bd of Ed, SERB 90-003 (2-9-90)

In re Central Ohio Transit Auth, SERB 89-032 (11-28-89)

In re Dist 1199/HCSSU/SEIU, AFL-CIO, SERB 96-004 (4-8-96)

In re SERB v. OAPSE Local 530, SERB 96-001 (6-28-96)

2. Concerted Activity

In re Cincinnati Metropolitan Housing Auth, SERB 93-002 (4-6-93)

3. Deferral to Arbitration

In re Upper Arlington Ed Assn, SERB 92-010 (6-30-92)

4. Right to Representation

In re Davenport, SERB 95-023 (12-29-95)

In re City of Cleveland, SERB 97-011 (6-30-97) ("***Cleveland I***")

In re City of Cleveland, SERB 97-017 (11-21-97) ("***Cleveland I***")

In re Ross Correctional Inst, SERB 99-004 (2-12-99)

Wild card: R.C. 9.84 (See In re Civil Service Charges Against Piper, 88 Ohio St.3d 308)

5. ULP for Union to File Frivolous Grievances

AFSCME, Ohio Council 8 and Local 1768, SERB 99-013 (6-17-99)

6. Surface Bargaining as ULP

Facts suggesting mere surface bargaining, in violation of the duty to bargain in good faith, include: (1) an employer's request for a delay in bargaining but then returning from the delay with no proposal on insurance, which is a major area of contention; (2) inability to agree with the union on a committee to discuss insurance; (3) responding that it is "not interested," in response to most of thirty proposals offered by the union; (4) refusal to engage in any give and take; and (5) responding to union requests for the rationale behind the employer's proposals by answering that "we prefer it that way."

In re Twinsburg City School Dist Bd of Ed, SERB , 2005-010 (12-2-2005)

F. Strikes

1. Partial Strike Is Unauthorized

   O.R.C. §4117.01(I)

2. May Not Picket Residence of Employer
   O.R.C. §4117.11(B)(7)

3. Must Give Ten (10) Day Notice of Strike or Picketing

   O.R.C. §4117.11(B)(8)

   O.R.C. §4117.14(D)(2)

4. Benefits for strikers

   Aliff v. Ohio Bureau of Employment Services, 2002 Ohio App. LEXIS, 2002-Ohio-2642 (Ninth Dist. 5/29/02) (No unemployment benefits payable where, at impasse, the employer unilaterally implemented its final offer. Held: strike.)

CHAPTER 4

THE COLLECTIVE BARGAINING AGREEMENT

A. Introduction

It is not uncommon even for the most seasoned negotiator to delay thinking seriously about negotiations until just a few days before the first scheduled session. There are many possible reasons for this; a perceived familiarity with the process, an often nauseating familiarity with the union and the proposals likely to be submitted, an assumption that the employer knows what burning issues need to be addressed at the bargaining table, and, for some, pure dread of the process itself. A novice to the negotiations process may not even know how to begin preparing for negotiating a new agreement. But being a veteran of the process can bring with it as many disadvantages as advantages. Experience can lead to the temptation to be lazy and skip the prep work that should precede well in advance any set of negotiations.

Below is a checklist of what preparation should occur several weeks, and in some cases several months, before negotiations are even scheduled to commence.

B. Where to Start

Contrary to popular belief, a collective bargaining agreement does not exist in a vacuum. It is important to compile all external sources of information that have impacted labor/management relations during the term of the previous agreement. Such sources include, but are not limited to:

- Policies and procedures (both written and unwritten) contained in policy manuals, SOPs, handbooks, internal memos and word of mouth ("This is the way we have always done it").
- All local legislation that may impact employees (e.g., resolutions, ordinances, civil service rules, charter etc.).
- All grievances, arbitration awards, EEOC/OCRC charges, lawsuits, court ordered judgments, ULPs, civil service appeals, and any other administrative or court ordered award.
- Wage and benefit information relating to both bargaining unit and nonbargaining unit personnel.
- Budget appropriation and expenditure predictions for the term of the current agreement and for the projected term of the new agreement.

C. Bargaining History

While many try very hard to forget the bargaining process immediately upon conclusion, to do so would be disastrous in the long run. In order to properly understand the current agreement it is necessary to recall how its terms and conditions were reached. Consider compiling the following information relating to the last set of negotiations:

- All past agreements
- Union and employer proposals
- Notes or minutes taken during each session
- Side agreements and MOUs
- Key issues presented by both sides and the success or failure of incorporating corresponding language in the agreement
- Fact-finding and conciliation notebooks and awards if applicable

D. Contract Analysis

1. Where Do We Start?

Now that we have assembled and reviewed all of the relevant, external data we are ready to analyze the agreement itself. The key to a proper contract analysis is to assume nothing and question everything. Just like any proper investigation, the following questions should be asked for each article/section of the current agreement as applicable:

- Who?
- What?
- When?
- Where?
- How?
- How many?
- How often?

Of course, some articles will require a slightly more refined line of inquiry, but keeping the above questions in mind will help ensure that you obtain the fundamental information you need for a proper analysis. Consider the type of questions that might be appropriate when reviewing the agreement's recognition clause:

- What is the purpose of this article?
- Is this an economic issue?
- Who is in the unit?
- Who is excluded?
- Is the language specific or is the status merely "assumed?"
- What type of unit is it? Deemed or board certified?
- When was the unit designation first made?
- Has it changed?
- If so when? How?
- Have there been additions/subtractions? Has this changed the certified status of the unit?

2. What Do We Do with the Information?

In order to be of any real use, the information obtained from the above should be compiled into a written, well organized document. The structure of this document should mirror the collective bargaining agreement itself, and should clearly state the advantages and disadvantages of the agreement's current language. While there is no specific format that must be used, you may consider the following examples:

LAYOFF AND RECALL

Section 10.7. (Time in which to report) The recalled employee shall have fourteen (14) calendar days following the date of mailing of the recall notice to notify the employer of his intention to return to work and shall have fifteen (15) calendar days following the mailing date of the recall notice in which to report for duty, unless a later date for returning to work is otherwise specified in the notice.

Purpose of the Language: Establishes the rules for notification of the employee's intent to resume his former position and for returning to work.

Status: Economic.

Positive Aspects: Gives the employee a generous amount of time to receive the recall notice, consider his options, and make arrangements for his departure from current employment and return to his original position.

Negative Aspects: The process is too long, and conflicts with terms of Article 9, Section 9.1.B.4 (above)

Otherwise Governed by Law: Yes. Batavia language needed.

Comments: The same comments apply here as above: the process takes too long, because it could be almost a month before an employee finally declines a return to

work. This is not fair to the employer, the other employees, and it is not consistent with the overall 14-day time limit established in Article 9 to return to work without losing seniority.

E. Generic Table of Contents

Every contract is different, but some topics seem to be nearly universal. A typical table of contents might include:

1. Agreement and Purpose
2. Recognition
3. Dues Deduction
4. Exclusive Representatives
5. Management Rights
6. Discipline
7. Grievance/Arbitration
8. Labor Management/Health & Safety Committee
9. No Strike/No Lockout
10. Probationary Periods
11. Vacancies/Promotions
12. Seniority/Layoff/Recall
13. Drug/Alcohol Testing
14. Work Rules/Midterm Changes
15. Hours of Work/Overtime
16. Leaves of Absence/FMLA
17. Sick Leave
18. Vacation
19. Holidays
20. Miscellaneous Leaves
21. Insurance
22. Wages
23. Uniforms
24. Training & Education
25. Severability/Savings Clause
26. Waiver in Case of Emergency
27. Duration/Zipper

You will note that we have not included a "Preamble." This is because we don't believe that a "Preamble" is a part of contract. In fact, its inclusion in a contract often allows the union to "cite" it as a basis for a grievance.

F. MOUs & LCAs

Recently, SERB issued an opinion holding that a "memorandum of understanding" that changed the terms of the Collective Bargaining Agreement needed to be negotiated; and, presumably ratified by the union membership.

In re Williams County Sheriff, SERB 2012-001. See also: *In re* Clark-Shawnee Local Ed. Assn., SERB 2011-007 (11-17-2011).

Couple this with Trumbull County Sheriff v. OPBA, 2003 Ohio App. Lexis 6504 (11th, 2003), wherein the Court held that a last chance agreement is a "contract" in itself; and an employer is left guessing.

G. Conclusion

Once each article has been reviewed and analyzed, the employer's bargaining team is ready to develop an overall bargaining strategy and may begin drafting appropriate proposals.

NEGOTIATIONS TIMELINES
(STRIKE PERMITTED)

	EVENT	TIME
1.	Notice to Negotiate filed *R.C. § 4117.14(B)(1)* *O.A.C. § 4117-9-02* File Notice of Appearance and Request for Advance Notice with SERB Inform SERB if doing multi-unit bargaining Inform SERB if parties have agreed to MAD or whether there is a MAD in contract *O.A.C. § 4117-9-03*	Starts 90-day process for cases involving first Agreements Starts 60-day process for cases involving successor Agreements (counted backward from date of expiration of CBA)
2.	Mediator appointed *R.C. § 4117.14(C)(2)* *O.A.C. § 4117-9-04*	45 days prior to the expiration of the 90-day or 60-day period
3.	List of 5 fact-finders sent by SERB *R.C. § 4117.14(C)(3)* *O.A.C. § 4117-9-05(A) & (B)* Rank panel, strike list with union, and notify SERB of selection prior to deadline	After appointment of a mediator and after a request by either party for a panel 7 calendar days from date of submission by SERB, unless extended
4.	Fact-finder appointed *R.C. § 4117.14(C)(3)* *O.A.C. § 4117-9-05(D)* Notify SERB of any extension of fact-finding	Within 15 calendar days after the receipt of a request for fact-finding panel or appointment of a mediator, whichever occurs later
5.	Parties submit position statement to Fact-finder and other party *O.A.C. § 4117-9-05(F)*	Prior to the day of the fact-finding hearing

	EVENT	TIME
6.	Fact-Finder holds hearing and issues recommendations *R.C. § 4117.14(C)(4) & (5)* *O.A.C. § 4117-9-05(H)-(L)* Notify SERB of any extension of the fact-finding deadline	Within 14 days following appointment unless parties agree to extension File with SERB within 5 days of execution of extension
7.	Parties accept/reject recommendations *R.C. § 4117.14(C)(6)* *O.A.C. § 4117-9-05(N) & (O)* Rejection requires three-fifths vote of legislative body's or union's total membership or recommendations are deemed accepted Notify SERB of legislative body's vote on fact-finders recommendation.	Within 7 days after recommendations are sent by Fact-finder File certification of vote NO LATER THAN 24 hours from time of vote.
8.	If rejected, SERB publishes Fact-finder's recommendations *R.C. § 4117.14(C)(6)* *O.A.C. § 4117-9-05(P)*	Upon SERB's receipt of the notice of rejection or 7 days after recommendations were sent by the Fact-finder
9.	Union may strike *R.C. § 4117.14(D)(2)*	7 days after publication AND 10 days after giving Notice of Intent to Strike
a.	Parties reach tentative agreement Notify SERB so clock can be stopped Notify SERB if TA is rejected by union so SERB can start clock again	Anytime
b.	Present TA to legislative body *R.C. § 4117.10(B)*	Within 14 days of reaching TA
c.	Legislative body accepts/rejects TA *R.C. § 4117.10(B)*	Within 30 days of its presentation (if rejected by either party, the SERB process resumes where it left off)

	EVENT	TIME
d.	Sign Agreement *O.A.C. § 4117-9-07* One original signed contract shall be filed with SERB.	No statutory time limit. Should be signed per Guidelines for Negotiations

NEGOTIATIONS TIMELINES
(STRIKE PROHIBITED)

	EVENT	TIME
1.	Notice to Negotiate filed *R.C. § 4117.14(B)(1)* *O.A.C. § 4117-9-02* File Notice of Appearance and Request for Advance Notice Inform SERB if doing multi-unit bargaining Inform SERB if parties have agreed to MAD or whether there is a MAD in contract *O.A.C. § 4117-9-03*	Starts 90-day process for cases involving first Agreements Starts 60-day process for cases involving successor Agreements (counted backward from date of expiration of CBA)
2.	Mediator appointed *R.C. § 4117.14(C)(2)* *O.A.C. § 4117-9-04*	45 days prior to the expiration of the 90-day or 60-day period
3.	List of 5 Fact-finders sent by SERB *R.C. § 4117.14(C)(3)* *O.A.C. § 4117-9-05(A) & (B)* Rank panel, strike list with union, and notify SERB of selection prior to deadline	After appointment of a mediator and after a request by either party for a panel 7 calendar days from date of submission by SERB, unless extended
4.	Fact-finder appointed *R.C. § 4117.14(C)(3)* *O.A.C. § 4117-9-05(D)* Notify SERB of any extension of fact-finding	Within 15 calendar days after the receipt of a request for fact-finding panel or appointment of a mediator, whichever occurs later
5.	Parties submit position statement to Fact-finder and other party *O.A.C. § 4117-9-05(F)*	Prior to the day of the fact-finding hearing

	EVENT	TIME
6.	Fact-Finder holds hearing and issues recommendations *R.C. § 4117.14(C)(4) & (5)* *O.A.C. § 4117-9-05(H)-(L)* Notify SERB of any extension of the fact-finding deadline	Within 14 days following appointment unless parties agree to extension File with SERB within 5 days of execution of extension
7.	Parties accept/reject recommendations *R.C. § 4117.14(C)(6)* *O.A.C. § 4117-9-05(N) & (O)* Rejection requires three-fifths (3/5) vote of legislative body's or union's total membership or recommendations are deemed accepted Notify SERB of legislative body's vote on Fact-finder's recommendation.	Within 7 days after recommendations are sent by fact-finder File certification of vote NO LATER THAN 24 hours from time of vote.
8.	If rejected, SERB publishes fact-finder's recommendations *R.C. § 4117.14(C)(6)* *O.A.C. § 4117-9-05(P)*	Upon SERB's receipt of the notice of rejection or 7 days after recommendations were sent by the fact-finder
9.	SERB directs case to conciliation and issues panel of 5 conciliators***** *R.C. § 4117.14(D)(1)* *O.A.C. § 4117-9-06(A) & (B)* Rank panel, strike list with union, and notify SERB of selection prior to deadline	7 days after publication of fact-finder's recommendations Notify SERB within 5 calendar days of issuance of list of selected conciliator
10.	Conciliator appointed *R.C. § 4117.14(D)(1)* *O.A.C. § 4117-9-06(C)*	6th day after SERB directs case to conciliation
11.	Parties submit position statement to conciliator, union, and SERB *R.C. § 4117.14(G)(3)* *O.A.C. § 4117-9-06(E)*	NOT LATER THAN 5 calendar days before conciliation hearing

	EVENT	TIME
12.	Conciliation hearing *R.C. § 4117.14(G)(2), (4) & (6)* *O.A.C. § 4117-9-06(F)-(H)*	Within 30 days of SERB's direction of case to conciliation (See #9 above)
13.	Conciliator issues award *R.C. § 4117.14(G)(7) & (10)* *O.A.C. § 4117-9-06(I)*	Within 30 days of the last date of hearing, unless extended
14	Award must be implemented *R.C. § 4117.14(I)* *O.A.C. § 4117-9-06(J)*	Upon receipt
a.	Parties reach tentative agreement Notify SERB so clock can be stopped Notify SERB if TA is rejected by union so SERB can start clock again	Anytime
b.	Present TA to legislative body *R.C. § 4117.10(B)*	Within 14 days of reaching TA
c.	Legislative body accepts/rejects TA *R.C. § 4117.10(B)*	Within 30 days of its presentation (if rejected by either party, the SERB process resumes where it left off)
d.	Sign Agreement One original signed contract shall be filed with SERB. *O.A.C. § 4117-9-07*	No statutory time limit. Should be signed per Guidelines for Negotiations

***** The Conciliator may not make any monetary award that is effective the same FISCAL year in which the case is directed to conciliation [4117.14(G)(11)].

TAB
C

Edward S. "Ned" Dorsey, Esq.
Wood & Lamping

Ned Dorsey is a highly experienced labor and employment attorney. He devotes much of his practice to providing advice to employers and governmental bodies in labor relations, including organizing campaigns, collective bargaining, contract administration, arbitrations, and matters before the National Labor Relations Board and SERB. Ned also has extensive experience in employment law matters. His experience encompasses employment contracts, race, sex, pregnancy, and disability discrimination, sexual harassment, family medical leave, wage and hour disputes, non-competition agreements and related litigation, and employee benefits issues. Ned is also an experienced trial and appellate attorney. He is counsel of record in over 30 published decisions in federal and state courts, and has argued labor and employment law matters before nearly every circuit of the United States Court of Appeals across the U.S. *(Please see Representative Experience listing below.)* Ned also has significant experience in representing corporations with general corporate and business issues.

While attending law school at Catholic University in Washington, D.C., Ned clerked for John Fanning, the Chairman of the National Labor Relations Board. After graduation, Mr. Fanning's recommendation landed Ned a position with NLRB's elite Appellate Court Branch. There, he briefed and argued dozens of labor law cases throughout the United States. In addition to representing many smaller employers in various matters, he successfully defended a Fortune 100 company through to jury verdict in a sexual harassment case brought jointly by two women. Ned has also often represented employees in claims against their former employers. Ned frequently addresses employer groups on various employment and labor law issues. Since the early 1990's, Martindale Hubbell/LexisNexis has recognized Ned as AV® Preeminent™ Peer Review Rated, the highest possible rating in both legal ability and ethical standards.

Bar Admissions

- Bar of the Supreme Court of Ohio (1987)
- Bar of the Supreme Court of Pennsylvania (1977) (currently on inactive status due to the difficulty of obtaining CLE credits locally)
- Bar of the Court of Appeals for the District of Columbia (1978) (currently on inactive status for the same reason)
- Bar of the Court of Appeals of Maryland (1985)
- The Bars of the United States Courts of Appeals for the Second, Fourth, Fifth, Sixth, Ninth, Tenth, and District of Columbia Circuits (1979, 1983, 1979, 1987, 1978, 1978, and 1983 respectively)
- The Bars of the United States District Courts for the Southern District of Ohio, and the District of Maryland (1987 and 1985, respectively)

Janus v. AFSCME

585 U. S. _____ (2018)

What does the future hold?

WOOD + LAMPING ATTORNEYS AT LAW

Janus v. AFSCME

- Going to review three aspects of this case:
  - The basics of Fair Share Fees;
  - What are the likely impacts of the decision; and how will unions respond; and
  - What litigation will it prompt.

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The Basics

- In *Janus*, the Supreme Court held that fair share fees for public sector employees violate the First Amendment to the U. S. Constitution.

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The Basics: What are Fair Share Fees

- Unions get paid by the employees they represent.
  - Unions are certified to represent a defined "unit" of employees.
    - The unit is certified by SERB.
    - Employees in the generally have common interests with respect to collective bargaining.
  - The employees they represent break down in to two types.
    - Union members
    - Employees who have chosen to not to become members of the Union.

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The Basics: What are Fair Share Fees

- Unions have a duty of fair representation.
  - This means that a Union has an obligation to represent all of the employees in the defined unit fairly, regardless of whether or not they are members of the Union.

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The Basics: What are Fair Share Fees

- Employees who join the Union are obligated to pay:
  - Dues.
  - Initiation fees.
  - Assessments.
  - All usually by payroll deduction.
  - Are also obligated to abide by Union rules.

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The Basics: What are Fair Share Fees?

- Unit employees who do not join the Union that represents them pay nothing.
- So, the Union has a duty to fairly represent non-members free of charge.
- That means the Union has to:
  - Collectively bargain on their behalf.
  - Handle any grievances they may have.
  - Pursue grievance to arbitration where appropriate.
- Unions call these employees "free riders."

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The Basics: What are Fair Share Fees?

- To deal with the free rider issue, the General Assembly included Fair Share Fees in Ohio's Collective Bargaining Statute in 1983.
- Fair Share Fees were intended to be a pro rata share of Union membership dues.
  - Intended only to cover the costs of collective bargaining and contract administration.
  - Not intended to cover other Union expenses such as lobbying or support of political candidates.
  - Fair Share Fees are usually about 80 to 90% of full membership dues.
- There has long been speculation that the accounting behind the determination of the amount of Fair Share Fees is not accurate.
  - That is, Fair Share Fees may have been higher than they should be.
  - This was one of the reasons Justice Alito used to disallow Fari Share Fees.

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The Basics: What are Fair Share Fees?

- Fair Share Fees are not automatic under Ohio law.
  - Must be agreed to by the employer in the applicable collective bargaining agreement.
  - Many employers have resisted Fair Share Fee provisions.
- Usually paid by payroll deduction, just like membership dues.

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The *Janus* Decision

- The Court's Rationale for finding these unconstitutional.
  - The Court found that when a public sector Union engages in collective bargaining, the positions it takes at the bargaining table are matters of public concern.
    - How much should public employees be paid?
    - How much should public employees contribute to their health insurance?
    - How much vacation should public employees get?
  - Because those kinds of issues are matters of public concern, a Union's discussion of those issues at the bargaining table constitutes "speech" under the First Amendment.

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The *Janus* Decision

- The Court's Rationale for finding these unconstitutional.
  - Fair Share Fees compel a public sector employee to support the Union's speech at the bargaining table.
  - Forced support for speech violates the First Amendment.
- In so ruling, the Court expressly overturned a 40 year old precedent that had approved Fair Share Fees.
  - *Aboud v. Detroit Bd. Of Ed.*, 431 U.S. 209 (1977).

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The *Janus* Decision.

- *Aboud* held that any intrusion on an employee's Free Speech rights was justified by:
  - the need for labor peace; and
  - To deal with the "free rider" issue.

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What are the likely impacts of *Janus*, and how will Unions respond?

- The impact will depend upon the Union.
  - Fire and Police tend to have full Union membership.
  - Unions representing other types of units will have larger problems.
    - AFSCME.
    - Teamsters.

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What are the likely impacts of *Janus*, and how will Unions respond?

- Revenue will decline, but by how much?
  - Estimates say an 8 to 10% decline.
  - But that may be low.
    - Before *Janus*, many employees had a choice of paying full Union dues, or Fair Share fees.
    - That was perhaps a choice between paying, for example, $1000 a year and paying $800 a year.
    - Many employees may have made the choice to pay the extra $200, just to be sure that they got the full service from the Union if they needed it.

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What are the likely impacts of *Janus*, and how will Unions respond?

- Revenue will decline, but by how much?
  - Post-*Janus,* those employees will have a choice of $1000, or $0.
  - Much different choice. Many may go with zero.
- Unions themselves have undoubtedly made estimates, but they have been tight lipped.
  - Have not yet seen evidence of significant belt-tightening.

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What are the likely impacts of *Janus*, and how will Unions respond?

- In any event, it is clear that public sector Unions will have less money in the future.
  - Less money for political contributions.
  - Less money for organizing.
  - Less money for basic operations.

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What are the likely impacts of *Janus*, and how will Unions respond?

- How will Unions respond?
  - If past is prologue, unions will become more aggressive.
  - It is an axiomatic union belief that they way they convince employees that they are doing a good job is by being aggressive.
  - Being more aggressive is their view of better customer service.
  - This likely means more aggressive bargaining.
    - Higher wage demands.
    - More aggressive demands on benefits.
    - More matters going to fact finding.

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What are the likely impacts of *Janus*, and how will Unions respond?

- Unions will likely be more aggressive.
  - More aggressive contract administration.
    - More grievances.
    - More arbitrations.
  - More aggressive organizing.
    - One way to get more members.
    - One Union business agent recently told me he's now spending an extra 10 to 20 hours a week on organizing.
    - NOTE: If you have clients with unrepresented units, it might make sense to take basic steps to prepare for an organizing campaign.
      - If you want assistance with that, please see me at the break.

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What are the likely impacts of *Janus*, and how will Unions respond?

- Unions will likely be more aggressive.
  - In multiple units, we've had Union requests for names, addresses, and telephone numbers for non-members in units they represent.
  - Their purpose is to contact those non-members, and try to persuade them to join the Union.
  - This contact may be innocuous.
  - Or it could be harassing.
  - Employees often do not like being contacted by union representatives while at home or on their personal cell
  - Good idea to be vigilant.

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What are the likely impacts of *Janus*, and how will Unions respond?

- Unions will likely be more aggressive.
  - Note that as the bargaining representative, the Union has the right to obtain the names and contact information for everyone in the bargaining unit.
  - That is independent of their right to make public records requests.
  - Stems from the union's role as the bargaining representative.

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What are the likely impacts of *Janus*, and how will Unions respond?

- Unions will seek contract modifications.
  - Unions are demanding a half hour or so of each new hire's time during the on-boarding process.
  - The Union president or business agent would meet with the new hire to try and persuade the employee to join the Union.
  - The unions want this to be paid time.
    - Probably for both the new hire and the Union President.
  - Question: Can a public sector employer legally require an employee to meet with Union representatives against the employee's wishes?
    - What if the employee refuses?

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What are the likely impacts of *Janus*, and how will Unions respond?

- Unions will seek contract modifications.
  - Unions are demanding that they get a half hour each year with each unit member for the same kind of indoctrination.
  - Again, this would be paid time.
- My alternative to these proposals is to negotiate a neutral statement advising employees of their right to join the Union, or to refrain from joining.
  - This statement would explain the basic nuts and bolts of Union membership.
    - Exposure to Union dues, fines and assessments.
    - Duty of Fair Representation.
    - Other terms as appropriate.
  - This statement would be given to new hires.
  - This statement would also give the Union's contact information.
  - This statement would be attached to the contract as an appendix.

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What are the likely impacts of *Janus*, and how will Unions respond?

- Other alternatives for Unions.
  - Fee for service.
    - Specifically referenced as a possibility by Justice Alito,
    - Fee to file a grievance, or go to arbitration.
    - Justice Alito implied that a Union could charge such fees only to non-members without violating its Duty of Fair Representation.
      - Fee would likely need to be reasonable when compared with dues.
  - Belt Tightening.
    - Staff reductions.
    - Abandoning units with low membership participation.
    - Political re-alignment.

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What are the likely impacts of *Janus*, and how will Unions respond?

- Employee withdrawals from Union membership.
  - Employees are withdrawing from Union membership.
    - Being encouraged by mailings and a website run by the Buckeye Institute.
  - This should be an easy issue, right?
    - Employees have a Constitutional right not to pay the Union that represents them.
    - And a Constitutional right of free association.
    - So they should have the right to resign their Union membership and stop paying Union dues, right?

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What are the likely impacts of *Janus*, and how will Unions respond?

- Employee withdrawals from Union membership.
  - Not so fast.
  - Unions have restrictions on resigning union membership.
  - AFSCME's authorization card provides that a member can only resign during a 15 day window that opens 45 days before contract expiration and closes 30 days before contract expiration.
    - That's a 15 day window every three years.
  - Other unions have similar restrictions.
  - Some collective bargaining agreements incorporate by reference the withdrawal restrictions on the authorization cards.
    - Without saying what those are.

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What are the likely impacts of *Janus*, and how will Unions respond?

- Employee withdrawals from Union membership.
  - So, how does this conflict play out?
  - I've got two grievances on this issue.
  - AFSCME claims that the authorization card is a binding contract.
  - And that the employer cannot lawfully refrain from continuing to deduct dues in violation of that contract.

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What are the likely impacts of *Janus*, and how will Unions respond?

- In my view, local government employers should honor as soon as possible employee withdrawals from union membership.
  - An employee's Constitutional rights trump contractual obligations.
    - A local government cannot by contract restrict its employee's Constitutional rights, at least not without the employee's agreement.
    - A local government should not risk violating its employees' Constitutional rights.
  - A union could argue that the authorization card constitutes a waiver of the employee's rights under *Janus*.
    - But waivers of Constitutional rights must be knowing and voluntary and made in clear and unmistakable language.
      - An authorization card signed before *Janus* issued could hardly be a knowing waiver of *Janus* rights.
      - The language on authorization cards make no reference to *Janus* rights.

WOOD + LAMPING ATTORNEYS AT LAW

What are the likely impacts of *Janus*, and how will Unions respond?

- Employee withdrawals from Union membership.
  - Recommendation: address withdrawal in collective bargaining.
    - Specifically allow withdrawal immediately, or on specified notice.
    - Right should be notwithstanding anything contained in an authorization card, or the union's constitution or by-laws.
    - How will fact finders deal with this issue?

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Litigation begets litigation.

- Post-*Janus* litigation.
  - *Janus* has prompted additional litigation.
  - The issue in these cases is recovering Fair Share Fees that have previously been paid.
    - Supreme Court decisions on Constitutional issues are retroactive.
    - They do not interpret the Constitution prospectively.
    - They theoretically interpret the Constitution as it has existed since 1789, as amended.
  - Since the decision in *Janus*, a number of suits have been filed to recover previously collected Fair Share Fees.
    - These have been filed as class actions.
    - One firm in Michigan has filed at least six of them.
    - Several on the West Coast.
    - Not aware of any in Ohio.
    - Yet.

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Litigation begets litigation.

- Post-*Janus* class actions.
  - These cases are brought both against the union that received the Fair Share Fees, but also against the employer that deducted them from the employees' pay.
  - As class actions, they accumulate all of the Fair Share Fees the employer has deducted within the limitations period.
  - Filed for a violation of Constitutional Rights under 42 U.S.C. 1983.
- A ray of sunshine for employers.
  - Dues deduction provisions in collective bargaining agreements usually contain a provision whereby the union indemnifies the employer on any claims arising out of payroll deductions.
    - Sample: The Union will hold the Employer harmless for all money deducted and remitted to the Union pursuant to the provisions of this contract.
  - So most public sector employers should be protected, provided that unions have assets sufficient to satisfy possible judgments.

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Litigation begets litigation.

- Are these cases validly brought as class actions?.
  - *Riffey v. Rauner*, 873 F.3d 558 (7th Cir. 2017).
    - Highly instructive pre-*Janus* decision regarding suits to recover previously paid Fair Share Fees.
    - Since 2003, the SEIU has represented home healthcare workers in Illinois.
    - Considered to be public sector employees under Illinois law.
    - The State negotiated a collective bargaining agreement with the SEIU that included Fair Share Fees.
    - Employees sued in 2010 bringing *Janus*-type claims alleging that the Fair Share Fees violated their First Amendment rights.
    - Case wound up in the Supreme Court in 2013.

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Litigation begets litigation.

- *Riffey*
  - In a decision presaging *Janus*, the Supreme Court sided with the plaintiffs and found the Fair Share Fees to be unconstitutional. *Harris v. Quinn*, 570 U.S. 948 (2013).
  - After the Supreme Court's decision in *Harris*, the plaintiffs filed a class action against the SEIU and the State of Illinois attempting to recover Fair Share Fees for roughly 80,000 home healthcare workers.
  - Amount in dispute exceeds $32 million.

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Litigation begets litigation.

- *Riffey.*
  - In *Riffey*, the Seventh Circuit denied class certification.
    - The main reason was that there were too many individual issues to be a class action.
    - The SEIU contended that many of the employees in the alleged class would have voluntarily agreed to pay Fair Share Fees even in the absence of the Fair Share Fee provision in the bargaining agreement.
    - The provided affidavits from employees in support of that assertion.
  - The Supreme Court accepted *Riffey* for review.
  - One day after *Janus* was decided, the Supreme Court remanded *Riffey* for further consideration in light of the Court's decision in *Janus*.
    - Does that action suggest that the Supreme Court thinks the Seventh Circuit got *Riffey* wrong?
    - Or does it just want further briefing?
    - No clue in the decision.

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Litigation begets litigation.

- What if these Fair Share Fee recovery cases cannot be brought as class actions?
  - Individual claims, or claims for groups of named plaintiffs, could still be brought under 42 U.S.C. 1983.
    - Two year statute of limitations in Ohio.
    - Each individual's claim may be less than $2,000.
  - While the amounts of those claims may be relatively small, they may be able to be pursued economically.
    - Section 1983 allows for recovery of attorney fees.
      - So the economic limitations posed by contingent fee arrangements are not there.
    - Section 1983 also allows claims for punitive damages.
      - On one hand, *Aboud* expressly allowed for Fair Share Fees. That would rule out a basis for punitive damages.
      - But Unions have continued to collect Fair Share Fees since the 2013 Supreme Court decision in *Harris*, which could open the door for punitive damages.
    - Stay tuned.

WOOD + LAMPING ATTORNEYS AT LAW

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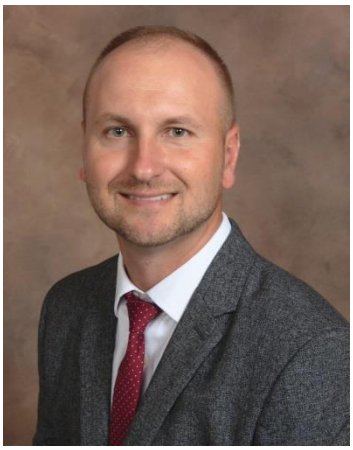

Brian D. Butcher is Vice President and Chief Operations Officer. He also sits on the Board of Directors. Brian advises clients in human resource management, classification and compensation, labor relations and negotiations, regulatory compliance, discipline, and policy development. He regularly conducts training on a variety of human resource and labor issues such as FLSA, FMLA, ADA, discriminatory harassment, leave abuse, and the use of social media in the workplace. Brian also has experience advocating on behalf of his clients in front of various administrative agencies. In addition, Brian has become a frequent lecturer for public sector statewide associations and has been an instructor for the Ohio State John Glenn School of Public Affairs. He is also an adjunct faculty member at Franklin University teaching both undergraduate and graduate level courses. Brian received his J.D. from Capital University Law School and his B.A. from Muskingum University in both Business and Political Science.

Social Media:
Public Employees' Rights and Obligations

CLEMANS·NELSON & ASSOCIATES, INC.

FRQVXOWDQWV WR PDQDJHPHQW

Introduction

CLEMANS·NELSON & ASSOCIATES, INC.

- How many of you read the newspaper today?
- How many of you have checked your Facebook, Twitter, or Instagram account today?

Introduction

Stat of the Day

County	Population
China	1,401,586,609
India	1,251,695,616
United States	322,583,006

Guess how many people use Facebook worldwide?

2,300,000,000 (1.74B Mobile Users)

Introduction

- Pros:
  - Free and easy way to communicate
  - Widespread, instantaneous exchange of information (RSS feeds)
  - Increase problem-solving capabilities – survey residents, pulse of the community assessment
  - Provide live feed meetings without local cable access (Ustream)
  - Advance tourism/local business interests
  - Forum for ideas on how to improve government, administration, or community relations
  - Facilitate meetings without travel
  - Potential to increase time and improve focus upon mission
  - Increase information flow to and from government
  - Increase community involvement (local businesses, residents, etc.)

Employee Use

- What does this non-work time look like? Personal emails: 30 percent
- ***Social networks: 28 percent***
- Sports sites: 8 percent
- Mobile games: 6 percent
- Online shopping: 5 percent
- Entertainment sites: 3 percent

Social Media & Employees

- Can Employers discipline employees for off-duty social media comments, posts, etc. on
- What standards apply for employee off-duty conduct?
- How "freely" may employees "speak"?

Defining the Problem

1) Employees making disparaging comments about their employer, or discriminatory or defamatory comments about coworkers.
2) Employees posting information that reflects badly on them, or the agency.
3) Employees posting, or emailing confidential information.
4) Misuse of employer equipment.
5) Employees being cross-examined for bias about matters that they included in online profiles, or about comments posted online. (consider what happened to Mark Fuhrman in the O.J. Simpson trial…)
6) Employers using material from an applicant's social media site as a basis for hiring or not hiring.

Barriers to Fixing the Problems

Governmental employment is different. At the outset, public employees often have either civil service protection or collective bargaining agreements. Beyond that, however, governmental employers must honor an employee's constitutional and statutory rights.

Sources of Rights

1) First Amendment
2) Fourth Amendment
3) Federal and State Wiretap Laws/ Stored Communication Act

These provisions shape "what process is due," (or not due), under various laws and the 14th Amendment.

Fourth Amendment: Accessing Employee's Phones and Computers

- Policies must reinforce the notion that the workplace, and all of its equipment, are the property of the employer, who can make rules about use and inspection.
- O'Connor v. Ortega, 480 U.S. 709 (1987) – public employees can have a "reasonable expectation of privacy" unless the employer cuts it off.
- Two Part Analysis under the 4th Amendment:
  1) Employee must have a *subjective* expectation of privacy
  2) Expectation must be *objectively* reasonable under the circumstances
- City of Ontario, California v. Quon, (Slip Opinion No. 08-1332.) Argued April 19, 2010 – decided June 17, 2010.

Federal and State Wiretap Laws

- Employers sometimes want to "get the goods" on a bad worker. On the other hand, some employees (and a few unions) sometimes want some "intelligence" information to use against the employer.
- It is not uncommon for unethical people to leave a voice recorder "on" in an empty room to "catch" its next user. Indeed, some of the devices listed above allow microphones, cameras, and recorders on cell phones to be turned on from a safe distance away…
- One federal law to watch is **18 USC 2511** (wiretaps — intentional interception of any wire, oral, or electronic communication).

Federal and State Wiretap Laws (continued)

- Another is the "Stored Communication Act," (USC) **18 USC 2701**. The latter forbids the intentional and unauthorized accessing of stored communication, and has broader exceptions than the Wiretap Act because it excludes those with "authorized access."
- See Pietrylo v. Hillstone Restaurant Group, Docket No. 2:06-CV-05754 (D.N.J. 2008)

First Amendment: Can We Punish Them for What They Said?

- Courts look to a four-part test to determine if an individual's right to free speech has been violated by the government, in cases where some adverse employment action results from the speech in question. The test is as follows:
  1) Whether the speech touched on a matter of "public concern."
  2) If so, whether the employee's interests in the speech outweigh the employer's interest in promoting efficient operations.
  3) Whether the speech played a substantial role in leading to the adverse employment action.
  4) Whether the government can show, by a preponderance of the evidence, that it would have taken the same employment action absent the protected speech.

Matters of Public Concern

- Connick v. Myers, 461 U.S. 138

  Meyers prepared a questionnaire that was distributed throughout the office concerning the office transfer policy, office morale, the need for a grievance committee, confidence in supervisors, and pressure to work campaigns. Meyers was terminated for refusal to accept transfer and for being insubordinate by distributing questionnaire. Meyers alleged wrongful termination because she exercised her First Amendment rights.

What did the Court hold?

The Court held that because the questionnaire only touched on one question which was of public concern that the questionnaire (considered a work-related gripe) was not protected free speech. Furthermore, the Supreme Court stated that the "public concern" analysis shall focus on the content, form, and context of the speech, with emphasis being placed on the content.

- Garcetti v. Ceballos, 547 U.S. 410 (2006)

  "When public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."

Balancing of Interests:

If the Court does find that the speech is a matter of public concern, the balancing test is applied.

- *Pickering v. Board of Education*, 391 U.S. 563 (1968)

  Pickering is the landmark case that established the balancing test that courts look to when analyzing whether the government has infringed upon one's right to free speech. The Court stated that one should give deference in the analysis to whether the speech impairs working relationships for which loyalty and confidentiality are important or whether it impedes the performance of duties or impairs discipline or harmony among coworkers. The Court further stressed that an employer does not have to wait to see if actual harm from the speech has taken place before taking action, but may act upon reasonable predictions of disruption.

KEVIN PATRICK BUKER, et al., Plaintiffs v. HOWARD COUNTY, et al., Defendants. US Circ. 4th (2017).

- Battalion Chief Buker posts: "*My aide had an outstanding idea . . lets all kill someone with a liberal . . . then maybe we can get them outlawed too! Think of the satisfaction of beating a liberal to death with another liberal . . . its almost poetic . . .*"
- Firefighter Mark Grutzmacher responds: *But . . . was it an "assault liberal"? Gotta pick a fat one, those are the "high capacity" ones. Oh . . . pick a black one, those are more "scary". Sorry had to perfect on a cool idea!*
- BC Buker *"likes" the post and replies "LMFAO! Too cool…"*

KEVIN PATRICK BUKER, et al., Plaintiffs v. HOWARD COUNTY, et al., Defendants. US Circ. 4th (2017).

- This prompts the Assistant Chief to advise BC Buker to review his social media postings and remove anything inconsistent with the department's social media policy.
- BC Buker then states: *To prevent future butthurt and comply with a directive from my supervisor, a recent post (meant entirely in jest) has been deleted. So has the complaining party. If I offend you, feel free to delete me. Or converse with me. I'm not scared or ashamed of my opinions or political leaning, or religion. I'm happy to discuss any of them with you. If you're not man enough to do so, let me know, so I can delete you. That is all. Semper Fi! Carry On.*
- Another user then questions BC Buker why he is not able to express his own opinions?

KEVIN PATRICK BUKER, et al., Plaintiffs v. HOWARD COUNTY, et al., Defendants. US Circ. 4th (2017).

- BC Buker then posts: *Unfortunately, not in the current political climate. Howard County, Maryland, and the Federal Government are all Liberal Democrat held at this point in time. Free speech only applies to the liberals, and then only if it is in line with the liberal socialist agenda. County Government recently published a Social media policy, which the Department then published it's own. It is suitably vague enough that any post is likely to result in disciplinary action, up to and including termination of employment, to include this one. All it took was one liberal to complain . . . sad day. To lose the First Amendment rights I fought to ensure, unlike the WIDE majority of the Government I serve.*

KEVIN PATRICK BUKER, et al., Plaintiffs v. HOWARD COUNTY, et al., Defendants. US Circ. 4th (2017).

- Three (3) weeks later another firefighter posted a picture of an elderly woman with her middle finger raised. The photo included the statement: "*THIS PAGE, YEAH THE ONE YOU'RE LOOKING AT IT'S MINE[.] I'LL POST WHATEVER THE FUCK I WANT[.]*"
- The firefighter added his own comment "*for you Chief*." BC Buker then "liked" the photograph.
- BC Buker was put on administrative leave and given his notice of termination notice. He and FF Gruztmacher claimed retaliation for exercising First Amendment Speech and for having a vague social media policy.

KEVIN PATRICK BUKER, et al., Plaintiffs v. HOWARD COUNTY, et al., Defendants. US Circ. 4th (2017).

- What issues do we have here?
  - Circuit court essentially stated that the Employer's interest in workplace efficiency and preventing disruption (insubordination with chain of command) outweighed free speech (did acknowledge the gun control comment was a matter of public concern).
  - Circuit also focused on the fact a Fire Department is a paramilitary organization held to a higher standard.
  - Circuit seemed particularly upset with the racial commentary and its impact on the public trust (especially with racial tensions high in the country).

Questions?

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