

# Employment Constitutional Claims against Government Employers

Presented by:

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# Employment At Will

## Private Employers

FLSA

Title VII and § 1981

Texas Labor Code

FMLA

ADA

USERRA

## Government Employers

All of the Above plus

Whistleblowers

Constitutional Claims\*\*

# Bill of Rights and Constitutional Claims

- U. S. Constitution (1787). Ratification process by the states determined needed Bill of Rights.
- Bill of Rights (1791)
  - Guarantees Certain Rights for citizens that cannot be violated by the government.
- 14<sup>th</sup> Amendment (1868)
  - Incorporation Doctrine
- Typically think of people being arrested, burning flag, excessive force, denial of medical care to inmates
- When persons work for the government, the government employer cannot violate those employees rights
- One local government official can be final policy maker and be the arm of the government and make the local government liable

# Bill of Rights – Rights of the people

- First Amendment – Right to Free Speech, Religion, Free Press, Assemble, and petition the government for a redress of grievances.
- Second Amendment – Right to keep and bear Arms
- Third Amendment – no soldiers quartered in your house
- Fourth Amendment – Right to be free of unreasonable search and seizure
  - no warrants without probable cause supported by oath and specific
- Fifth Amendment – no self incrimination, double jeopardy, due process, no taking of private property without public purpose and just compensation
- Sixth Amendment – Right to speedy and public trial in criminal cases, impartial jury, informed of charge, right confront witnesses against him, compel to obtain his witnesses and right to a lawyer
- Seventh Amendment – Right to trial by jury
- Eighth Amendment – no excessive bail, fines or cruel and unusual punishment
- Ninth Amendment – Constitution does not deny rights retained by the people
- Tenth Amendment – Powers not delegated to U.S. by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people

# Right to Privacy –Penumbra of the Bill of Rights particularly under 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 9<sup>th</sup> Amendments

- Government cannot violate right to privacy but public employees have taken a job that diminishes their privacy in their employment.
- Public Information Act- employee records are subject to public information act unless they are extremely confidential personal information like medical records, beneficiary information and private information of an embarrassing nature – but this does not include work related reprimands.
- Termination for private postings on Facebook?
  - Teachers have been terminated for comments made about parents, students and supervisors.
  - Free Speech considerations
- Searches of employee desks, cell phones, cars, or employee's home?
  - Claim under 4<sup>th</sup> Amendment for illegal search for investigation without a warrant when done for criminal investigation but what about work related investigation that leads to criminal charges?

# Right to Privacy – Search of Employees desk, county car, locker, computer, cell phone, or their home

## U.S. Supreme Court (1987) – O’Conner v. Ortega -

- Ortega was a doctor at a state owned hospital accused of misconduct including sexual harassment. He was put on leave and they searched his desk. He filed suit asserting his right to privacy was violated.
- Two part test – whether there is an expectation of privacy and the inception and scope of the search.
- Majority held no expectation of privacy in his desk.
  - Consider location of desk – open area to co-workers or to public
  - Consider policies

# Right to Privacy – Search of Employees desk, county car, locker, computer, cell phone, or their home

## U.S. Supreme Court (2010) – Quan v. City of Ontario

- Quan was a police officer issued a pager by the City. He was allowed to use the pager for personal use but was required to pay any overage fees that resulted from personal use. City policy stated could check computers and e-mails but did not mention pagers.
- Police Chief ordered audit of Quan and one co-workers text messages. Quan sued for a violation of his right to privacy and illegal search under 4<sup>th</sup> Amendment
  - Appellate Court said Quan had an expectation of privacy.
  - Jury determined search justified in its inception because conducted to ensure the character limit on the text message account was sufficient so that police officers not paying for work – related communications.
  - court held the scope was not reasonable; instead it was overly intrusive. Reading through all of his personal text messages went too far to accomplish the purpose of counting the characters.
- Supreme Court reversed and said it was reasonable in scope.

# Right to Privacy – Search of Employees desk, county car, locker, computer, cell phone, or their home

## Adkisson v. Paxton (Tex.App. – Austin, 2015)

- Bexar County Commissioner declaratory judgment against Paxton, challenges determination that emails from personal email account related to his official capacity constituted public information under the PIA
- argues emails private under *Quan v. City of Ontario*. Court stated Commissioner never articulated the scope of the privacy protection. Here, as in *Quan*, not reasonable for Commissioner to conclude that his emails in all circumstances immune from scrutiny.
- County policies said employees have no right to privacy with regard to email or Internet access except as may be provided by state or federal law. They also stated that employees emails and other communication may be viewed and monitored.
- As public office relinquished some of his privacy expectations. Should have known that information subject to PIA and personal email account doesn't make public information private.



# Right to Privacy – Policies - Search of Employees desk, county car, locker, computer, cell phone, etc

## Policies

- Set Expectations for No Expectation of Privacy
- Computers
- E-mails
- Government owned and issued phones
- Government owned and issued pagers
- Government owned and issued lockers
- Government owned and issued vehicles
- Government owned and issued desks
- Government owned and issued file cabinets
- Public Information Act – government documents can be requested by the public
- Have policies reviewed by attorney

# Drug Testing – 4<sup>th</sup> Amendment Unreasonable Search and Seizure

- “[S]tate-compelled collection and testing of urine ... constitutes a ‘search’ subject to the demands of the Fourth Amendment.” *Vernonia Sch. Dist. 47 v. Acton*, 515 U.S. 646, (1995) citing *Skinner v. Rwy. Labor Execs. Ass’n*, 489 U.S. 602, (1989).
- “To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing.” ***Chandler v. Miller***, 520 U.S. 305, (1997) citing *Vernonia*, 515 U.S. at 652–53.
- “But particularized exceptions to the main rule are sometimes warranted based on ‘special needs, beyond the normal need for law enforcement.’ ” quoting *Skinner*, 489 U.S. at 619, 109 S.Ct. 1402.
- “where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual’s privacy expectations against the Government’s interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.” *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989).

# Drug Testing – Skinner -

FDA required drug testing of RR employees after significant accidents, and authorizing discretionary drug testing after certain specified safety violations. Supreme Court first concluded that public safety is a special, non-law-enforcement need justifying drug testing of safety-sensitive RR employees as a way of enforcing restrictions on workplace drug and alcohol use.

- Exam the reasonableness of the drug testing program by balancing the employees' privacy interests against the government's need to test without individualized suspicion.
  - Privacy side - unobserved urine tests required by the regulations were not a severe privacy intrusion and employee privacy expectations reduced by their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on their health and fitness.
  - Government Interest side – interest in testing without a showing of individualized suspicion is compelling
    - 1). Court reasoned - effective means of deterring employees engaged in safety-sensitive tasks from using controlled substances or alcohol in the first place.
    - 2). the Court reasoned - help RR investigate and respond to accidents by confirming or excluding drug or alcohol use as a factor in both severe accidents as well as lesser incidents which “involve the *potential* for a serious train accident or grave personal injury.”
  - Balancing these interests, the Supreme Court concluded that “the Government’s compelling interests outweigh privacy concerns.” Accordingly, the drug tests were constitutionally reasonable pursuant to the Fourth Amendment.

# Drug Testing – 4<sup>th</sup> Amendment Unreasonable Search and Seizure

- Applying this “special needs” framework, the Supreme Court has
  - 1). upheld rules or regulations authorizing suspicionless drug tests of Customs employees applying for positions requiring them to carry firearms or directly engage in drug interdiction, see *Von Raab*, 489 U.S. 679
  - 2). and student athletes, see *Vernonia*, 515 U.S. at 664–65,
  - 3). but rejected testing of political candidates, *Chandler*, 520 U.S. 321.
- 5<sup>th</sup> Circuit has used the same “special needs” framework to uphold a test of a custodian pursuant to a rule requiring random drug testing of designated safety-sensitive school employees. *Aubrey v. School Board of Lafayette Parish* (5th Cir.1998)
- Sixth Circuit upheld the application of a policy requiring public transportation \*296 drivers to undergo a drug test after “an accident involving a fixed object.” See *Tanks v. Greater Cleveland Regional Transit Auth.*, (6th Cir.1991)

# Drug Testing – Bryant v. City of Monroe (5<sup>th</sup> Cir. 2014)

- Bryant terminated for positive marijuana drug test after suspicionless urine test pursuant to City and departmental drug-testing policies after an on-the-job car accident.
- City policy prohibits drug use and requires suspicionless drug tests after certain accidents
- Court states a suspicionless drug testing policy may be constitutional as applied to some employees but unconstitutional as applied to others.
- Applied the Skinner “Special Needs” analysis. Bryant drove City vehicles, transported co-workers, operated heavy equipment, handled pesticides and worked high risk areas like highway medians. Therefore, it was safety sensitive position and City sufficiently articulated a special, non-law-enforcement need to test safety-sensitive employees for drug use.
- City’s strong interest in applying drug testing policy to safety-sensitive employee after vehicle collision with stationary object outweighed intrusion on employee’s expectation of privacy; employee provided unobserved urine specimen, which was minimally intrusive, employee knew, or should have know, that he was subject to the accident policy that permitted drug testing and drug testing policy had strong deterrent effect

# Drug Testing – 4<sup>th</sup> Amendment Unreasonable Search and Seizure

- If employee is tested under a reasonable suspicion – document the suspicions
- Random testing not permitted unless employee is in safety sensitive position sometimes referred to as “special need” for the drug test
- Safety-Sensitive Positions / Special Need: *Skinner* and *Von Raab* (U.S.S.C.) cases – employment position examples:
  - Drivers w/ passengers (DoT regulations / CDL) (26,000 lbs truck weight or heavy machinery)
  - Law enforcement/ Correctional officers / Jailers / carry firearms
  - Police officers have diminished expectation of privacy compared to other government
  - *Bryant v. City of Monroe* (5<sup>th</sup> Cir. 2014) – policy for suspicionless drug tests after certain accidents.

# Drug Testing – – Job Applicants –

- All applicants -
  - N. Dist. of Georgia struck down across the board testing for all applicants for state jobs in *Georgia Association of Educators v. Harris*. *Georgia Ass'n of Educators v. Harris*, 749 F. Supp. 1110 (N. D. Ga. 1990).
  - Southern District of New York rejected testing of applicants for non-sensitive jobs in *Burka*. *Burka v. New York City Transit Auth.* 739 F. Supp. 814 (S. D. N. Y. 1990).
  - *Chandler v. Miller* (1997) 520 U. S. 305 - Supreme court held that a Georgia law requiring candidates for state office to pass a drug test was unconstitutional because the state could not demonstrate a “special need” that would justify a suspicion-less drug test.
  - *American Federation of State, County and Municipal Employees Council 79 v. Rick Scott*, 717 F. 3d 851 (2013) *cert. denied* - Florida Governor ordered all state employees to be drug tested. Struck down on appeal because not limited to safety sensitive positions.
- Post Job Offer –
  - *Lanier v. City of Woodburn*, 518 F. 3d 1147 (9<sup>th</sup> Cir. 2008) held drug testing on applicant (post job offer) for library worker position was unconstitutional as it applied to that position. Work of a library page was found not comparable to the work of safety-sensitive positions.
- With consent -
  - employees’ submission to drug testing, on pain of termination does not constitute consent “Employees who must submit to a drug test or be fired are hardly acting voluntarily, free of either express or implied duress or coercion. *Scott*, 717 F. 3d. 851.
  - Surrendering to drug testing in order to remain eligible for a government benefit such as employment or welfare, whatever it is, is not the type of consent that automatically renders a search reasonable as a matter of law

# Drug Testing – Policies

- Drug Testing Policies
- Draft polices about when employee can be drug tested (suspicion or special need/ safety position)
- which employees or applicants may be tested
- Designate which positions are considered safety or security sensitive positions
- Minimally intrusive drug testing procedures
- Confidentiality of test results to the great extent possible under the law
- Procedures for testing
- How results will be treated
- Policy for what occurs if results come back positive
- Check ADA before you draft your policies
- Have policies reviewed by an attorney



# 14<sup>th</sup> Amendment – (1868)

- “Incorporation Doctrine”
- Procedural Due Process
- Substantive Due Process
- Equal Protection of the Laws

# 14<sup>th</sup> Amendment – Due Process – Life, Liberty or Property

## Procedural Due Process

- Notice and an opportunity to be heard before depriving an individual of a constitutionally protected interest.
  - At a meaningful time and in a meaningful manner
- Property Interest
  - State statutes, local ordinance, existing rules, contractual provisions, or mutually explicit understandings (policies)
  - Legitimate claim of entitlement to the property interest

## Substantive Due Process

- Protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them.
- Property Interest
- Adverse action against the property interest was arbitrary and capricious

# 14<sup>th</sup> Amendment – Liberty Interest Claim

## Liberty Interest Claim –

- Discharge from public employment under circumstances that put the employee's reputation, honor or integrity at stake gives rise to a liberty interest.
- Must give procedural opportunity to clear one's name
- A hearing providing a public forum or opportunity to clear one's name, not actual review of the decision to discharge the employee

## Elements - *Rosentein v City of Dallas* (5<sup>th</sup> Cir.)

- Discharge
- Defamatory charges were made against him in connection with the discharge
- The charges were false
- No meaningful public hearing was conducted pre-discharge
- Charges were made public
- Requested a hearing to clear his name
- The request was denied

# 14<sup>th</sup> Amendment – Example

## Terminated for Using Government Property for Personal Gain

- Property Interest
- Procedural Due Process - Notice and Opportunity to be heard
- Substantive Due Process – Arbitrary and Capricious
- Liberty Interest - Discharge put the employee's reputation, honor or integrity at stake
  - procedural opportunity to clear one's name
  - A hearing providing a public forum or opportunity to clear one's name, not actual review of the decision to discharge the employee
  - Elements
    - Discharge
    - Defamatory charges were made against him in connection with the discharge
    - The charges were false
    - No meaningful public hearing was conducted pre-discharge
    - Charges were made public
    - Requested a hearing to clear his name
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# 1<sup>st</sup> Amendment – Access to Courts

## First Amendment Right of Access to the Courts

- Right to present a cognizable claim to the appropriate court
- Right to have the court make a determination on the claim
- Claim delayed or blocked
- Restricted or impeded

## Examples

- Threats about the job
- Threats about criminal proceedings
- Threats about damage to the reputation

# 1<sup>st</sup> Amendment Claim – Free Speech Claim

- *Pickering v. Board of Education of Township High School District* – (U.S. Sup Ct 1968) - Government Employees maintain their rights to free speech. Free Speech protected if:
  - Speech is a matter of public concern;
  - under the balancing test, the interest in “commenting on matters of public concern ... outweigh the Defendant's interest in promoting efficiency”; and

# 1<sup>st</sup> Amendment Claim – Free Speech Claim

- That he suffered an adverse employment decision
- that he engaged in speech or associational activity involving a matter of public concern;
- under the balancing test, the interest in “commenting on matters of public concern ... outweigh the Defendant's interest in promoting efficiency”; and
- the speech or associational activity “motivated the adverse employment decision.”

*Defense - If the Plaintiff establishes that the First Amendment activity was a motivating factor in the employment decision, the defendant can then establish the affirmative defense that it “would have come to the same conclusion in the absence of the protected conduct.”*

# Protected Free Speech

## *Matter of Public Concern-*

- content, form, and context of the expression.
- If it is on a matter of political, social, or other concern to the community, then it is regarded as “public” *Connick v. Myers*, 461 U.S. 138, 146 (1983)
- But if it is on a matter of purely personal interest, the First Amendment affords no protection.

## *Citizen not government employee –*

- If employees are engaged in speech as a government employee “pursuant to official job duties” at work, they are not speaking as “citizens” and no First Amendment protection. *Garcetti v. Ceballos*, 547 U.S. 410 (2006)



# Protected Free Speech

## *Mattingly v. Milligan* –

- Mattingly was a full time employee in the county clerk's office. Her boss, the incumbent county clerk, ran for re-election. She supported him in the campaign which he lost.
- New county clerk, Milligan, took office and immediately terminated 3 of the offices' 9 full time employees. He told Mattingly and the others they would be retained.
- Mattingly posted on Facebook (1300 friends) lamenting the terminations. The next day Milligan told her that in light of the FB posts, he did not think they could have a good working relationship and terminated her.
  - Court determined it was as matter of public concern because it was about a public official, local media had followed the election, people commented and called her about her post.
  - Defendant failed to show how it interfered with his ability to effectively operate the office so MSJ denied and went to jury.
  - Court failed to address Garcetti prong – made as citizen or as employee.

# Protected Free Speech

## *Snyder v. Millersville University* –

- Snyder, student teacher, (analyzed as employee)
- posted on her Myspace page she would not apply for job with that school because she disliked her supervising teacher / derogatory statements and pirate pic with beer.
- No pass on student teaching requirement.
- She testified it was personal (not a matter of public concern). Therefore, it was found to be not protected First Amendment speech.

# Matters Public Concern / Government Efficiency

- *Test* – whether the speech is disruptive of workplace harmony or discipline, as well as its effect on employee loyalty, public confidence, and the operation of the workplace in general. (restraints higher for police and fire)
- *Spanierman v Ansonia Highschool* – Spanierman terminated after Myspace page communicating with students with sexual overtones and pictures of naked men. Teaching contract not renewed. Some of speech was protected speech about War in Iraq but court determined the Myspace page was disruptive to school activities and this outweighed the value in the Myspace speech.

# Political Association / Governmental Efficiency

ISD terminated Ricci for violating Employee Handbook policy prohibiting an employee's participation in political activity from causing "pressure" to be placed on staff. On her lunch hour - Ricci, a payroll clerk, encouraged co-worker, Rush, to participate and vote for some particular candidates in the upcoming School Board election. *Ricci v. Cleveland Independent School Dist.* (S.D.Tex., 2012)

- Court found Ricci was speaking as a citizen, rather than pursuant to her official duties as a payroll clerk. Ricci's formal job duties, would not require Ricci to speak on matters such as the school board election.
- Even though it was private conversation between two people it was still a matter of public concern
- Court found the ISD failed to demonstrate how Ricci's private expression of her political preferences upset or impeded the proper functioning of Cleveland ISD or otherwise undermined the role and office of the Superintendent. Court is not persuaded that Defendants' interest in banning all political pressure on its campus outweighed Ricci's rights under the First Amendment.

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