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The Liar's List When Is a Cop Not a Cop? The Supreme Court Rules Employers Can Still Search



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This quarter's LEAF Newsletter addresses three issues that should be of concern to top level managers and provides information they can use as a resource to look more deeply into how they can and should address them in their departments. The first issue is exculpatory evidence as it relates to the conduct of police officers. The second topic discusses an officer's role during a medical assist complaint and the third addresses and reaffirms the guidelines for an employer's right to search despite middle management changing the rules.

The Liars List

In the December, 2009 LEAF Newsletter, *Don't Wait Until The Gear Fails When Regular Maintenance Can Prevent It!*, we discussed the consequences of withholding exculpatory evidence as outlined in *Brady v. Maryland*, 373 U.S. 83 S.Ct. (1963), *Gregory v City of Louisville*, 444 F.3rd 725 (6th Circuit, 2006) and *Moldowan v. City of Warren*, 573 F.3d 309, 333 (6th Cir. 2009). As a reminder, exculpatory evidence is any evidence in a case that is withheld by the prosecution that could be favorable to the defendant. It includes evidence relevant to the issue of guilt, evidence relevant to the issue of the appropriate

punishment, and evidence that provides insight as to whether witnesses against the defendant are trustworthy. In that Newsletter, the focus was on the prosecution having an affirmative duty, as a matter of constitutional law, to disclose all known exculpatory evidence to the defendant in criminal cases. If the prosecution holds back evidence favorable to the defendant, it violates the defendant's right to due process as guaranteed by the Fourteenth Amendment to the U.S. Constitution. We did not discuss the issue of an officer's performance or disciplinary history becoming exculpatory evidence.

One of the outcomes of *Brady* was *Giglio v. United States*, 405 U.S. 150 (1972) in which the Supreme Court dealt with the issue of credibility of government witnesses was their ruling that "When the reliability of a given witness may be determinative of guilt or innocence the nondisclosure of evidence affecting credibility falls within this general rule." The case involved a forgery conviction in which one of Giglio's cronies, who participated in the crime, testified against him after having been given a deal. The prosecution failed to disclose the deal, and the prosecutor who presented the case claimed to have no knowledge of the deal.

Then along came *United States v. Bagley*, 473 U.S. 667 (1985). In this case, the Court held that impeachment evidence as well as exculpatory evidence, falls within the Brady rule. Such evidence is "evidence favorable to an accused so that, if disclosed and used effectively, it may make the difference between conviction and acquittal." In *Kyles v. Whitley*, 514 U.S. 419, 433-434 (U.S. 1995), the Court said the prosecutor, who alone can know what is undisclosed, must be assigned the responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. Moreover, that responsibility remains regardless of any failure by the police to bring favorable evidence to the prosecutor's attention.

Therefore, prosecutors must be familiar with officers who have a history of untruthfulness or bad behavior. Top law enforcement executives may be obligated under the law to disclose to the prosecutor any definite knowledge about untruthfulness, bias, and/or crimes committed by an officer who will be a material witness in a prosecution. You can imagine the impact of officers who make the liars' list (Often referred to as the Giglio List to be nice!) can have should they and the department be accused of a civil rights violation or are litigated for any reason. If the defendant is acquitted, the case is dismissed or not authorized due to the officer's lack of credibility there is a high probability that a civil suit will follow.

Audrey Forbush, LEAF's Legal Advisor, when asked what would become of an employee found to be responsible for behavior that is untruthful with malicious and evil intent, said that she believed that this person is one whose behavior is intentional and/or meant to benefit him or her in some way. She went on to say all employers should support the idea that an employee or official who has lied in an official document or official proceeding, has knowingly failed to take action on the intentional wrong doing of other employees or has falsely accused or presented false evidence against another should be terminated and, if appropriate, charged with a crime.

Forbush added that for management to support an employment action in such cases, there needs be a rule or policy condemning the specific behavior or one that requires "promoting the efficiency of the service". She pointed to *LaChance v. Erickson*, 522 U.S. 262 (1998), in which the U. S. Supreme Court said, ". . .we hold that a government agency may take adverse action against an employee because the employee made false statements in response to an underlying charge of misconduct." Forbush added that in *LaChance* the Court expressed the importance of following the steps of discipline and hearing requirements when they said, "The core of due process is the right to notice and a meaningful opportunity to be heard".

When Is A Cop Not A Cop?

Many departments have a policy that officers will respond when EMS is sent on a run in order to render whatever aid they can. This can be a good service to the community as long as the officers remember the reason they are at the call. The U.S. Sixth Circuit Court of Appeals in *McKenna v. Edgell*, 2010 WL 3220018, C.A. 6 (Mich), recently ruled on a case in which officers were dispatched to assist EMS on a 911 call from the daughter of a subject who was having a seizure or choking. According to the Court, when the officers arrived, they spoke to the daughter who led them to the bedroom and told them she thought her father had a seizure. The officers asked her if the father was on drugs or had assaulted her. She replied that he was not and had not. The officers spoke to the father who was lethargic but communicative. The officers tried to get the father to get out of bed so he could get clothing on before EMS arrived. When he refused and said he just wanted to rest and to leave him alone, the officers, who testified the father was combative, rolled him onto his stomach with their knees and handcuffed his arms behind his back and his ankles.

Once Fire and EMS arrived, the father was transported to a hospital. During treatment and after the father had been taken to the hospital, the officers searched a dresser drawer in his bedroom

and the medicine cabinet in the bathroom. In the process, they knocked down everything on top of the dresser and threw out his children's baby teeth collection. One of the officers also ran a check on McKenna's license plate.

The father subsequently filed a lawsuit claiming the officers had violated his search and seizure rights under the Fourth Amendment. At trial, the jury found the officers had violated the father's rights and awarded money for medical expenses and two hundred seventy five thousand dollars for pain and suffering. The defendant officers asked for a new trial that was denied, but the judge did reduce the pain and suffering damages to ten thousand dollars. The officers appealed claiming qualified immunity. The appeal was denied.

Audrey Forbush, LEAF's Legal Advisor, said the Sixth Circuit denied qualified immunity because the officers were sent as medical first responders, once they arrived they acted as police officers and took actions well beyond the scope of their invitation to be in the home. She said government officials performing discretionary functions are entitled to qualified immunity when they can answer affirmatively to two questions: "(1) whether, considering the allegations in a light most favorable to the party injured, a constitutional right has been violated, and (2) whether that right was clearly established." *Everson v. Leis*, 556 F.3d 484, 494 (6th Cir. 2009).

In this case, Forbush said the court looked at whether the officers were entitled to qualified immunity by deciding if they had acted in a law-enforcement capacity or in an emergency medical-response capacity when engaging in the conduct. The court said that the appropriate response to a medical seizure was not to restrain the subject but rather to clear the area and let the episode run its course. Instead of following that procedure, the officers handled the father by repeatedly attempting to get him to put on his pants, and tried to force him to rise despite his request that they stop. They also restrained the father, searched his property doing damage, and checked him in the police computer. In this case, the court ruled the

officers acted as police officers not medical responders and their actions did violate the father's civil rights so they denied the appeal for qualified immunity by affirming the District Court's ruling.

The court said that this view was in line with *Peete v. Metropolitan Government of Nashville and Davidson County*, 486 F.3d 217 (6th Cir. 2007), in which qualified immunity was given to medical responders who were accused of violating a subject's Fourth and Fourteenth Amendment Rights after they restrained him and held him down on his stomach. He subsequently died. The court said there was no law that covered the medical persons and excessive force. They noted, "improper medical treatment by a government employee, standing alone, does not violate the Fourth or Fourteenth Amendments. It was more like a case of medical malpractice claim than an excessive force claim."

The court in *McKenna* ruled the facts undoubtedly supported a finding by the jury that the officers acted in a law-enforcement capacity and said that the fact that the episode began with a 911 call and ended with a hospital visit rather than an arrest were not the most important facts. Those facts are to be expected in a medical emergency involving a patient who has not committed a crime. Moreover, those facts mostly involve the conduct of others, not of the defendant officers: The daughter made the 911 call and the firefighters took the father to the hospital. The meat of the inquiry concerns what happened between the very beginning and the very end—what the officers themselves did.

Forbush cautions officers to remember what their role is when answering a call for service – whether law enforcement, EMS or Fire. A service call that starts as an EMS or Fire incident may become a matter of law enforcement because of an observed illegal activity or the behavior of the person being assisted. However, the search and seizure rules are always intact. The exceptions to a search warrant apply. If it is not plain view or exigent

circumstances do not exist, get a warrant before doing anything but observing. As in this case, it is easy to wander from the strict guidelines of the law. See Chapter 8, Sample Policy on Search and Seizure in the LEAF Manual for Law Enforcement Risk Control found at mml.org.

Supreme Court Said Employers Can Still Search

In the case of *City of Ontario, Calif. v. Quon*, 130 S. Ct. 1011 (2009), the City of Ontario, California provided the police department with paging/texting devices for use by the SWAT team to help mobilize its officers when a response became necessary in emergency situations. Before providing the devices the city issued a computer, internet and e-mail policy that allowed incidental private use but declared logging and monitoring rights without notice and that employees had no expectation of privacy. All officers that received pagers were trained to the policy and signed an acknowledgement of their understanding of the training.

It was not long before abuses started. The SWAT team often exceeded the usage limits, and the chief issued a memo repeating that the text messages were covered under the city's policy. The city decided to audit the usage to determine what the cause of the overage was. They had the vendor provide the text message history for a two-month period. The chief had the person auditing the accounts redact obviously personal messages based on the time officers were working. The audit revealed that the use of the devices was mostly personal. The chief referred the findings to Internal Affairs who deemed the use of the devices was in violation of city policy and used sexually explicit language in further violation of policy. Specifically, Sergeant Quon used the device for personal communications using sexual content while on duty.

Sergeant Quon was disciplined and he took exception to the chief doing the audit. He and other officers who were involved in the texting filed suit saying that the city had violated their Fourth

Amendment Rights by violating their privacy and had violated the federal Stored Communications Act in obtaining and auditing the messages. They sued the provider for violating the Act by giving the city the messages. Quon asserted that when provided the pager he was told by his lieutenant that the devices were for their use as long as they did not go over the allotted minutes. If they did exceed the limit, they could pay for the excess because the lieutenant did not want to have to audit the devices to determine work relatedness. The lieutenant would notify them of their overage each month. Quon went over the limit during the months that he had the device.

Audrey Forbush, LEAF Legal Advisor, said the Supreme Court relied on its ruling in *O'Connor v. Ortega*, 480 U.S. 709 (1987) (See LEAF Newsletter December 2005, *Employer's Right To Search* found at mml.org, under Insurance, Pool or Fund, Risk Resources, Law Enforcement Newsletters). She points to Justice O'Connor's plurality opinion:

Balanced against the substantial government interests in the efficient and proper operation of the workplace are the privacy rights of public employees in the workplace that, while not insubstantial, are far less than those found at home or in some other situations. As with the building inspections in *Camara*, the employer intrusions at issue here "involve a relatively limited invasion" of employee privacy. 387 U.S., at 537. Government employees have offices for the sole purpose of facilitating the work of an agency. The employee may avoid exposing personal belongings at work by simply leaving them at home.

Forbush also points to the opinion written by Justice Scalia, who concurred with Justice Blackman in *New Jersey v. T. L. O.*, 469 U.S. 325, 334-335 (1985), as a good summation of the case.

The government, like any other employer, needs frequent and convenient access to its desks, offices, and file cabinets for work-related purposes. I would hold that

government searches to retrieve work-related materials or to investigate violations of workplace rules - searches of the sort that are regarded as reasonable and normal in the private-employer context - do not violate the Fourth Amendment.

In this case, Forbush remarked, the Court did not rule on Quon's privacy expectations because of what they thought would be far reaching consequences in this age of rapid technological changes in communications and information transmissions. They also felt what society views as proper behavior or workplace norms may also change. They concentrated on the search aspect and said, "The principles applicable to a government employer's search of an employee's physical office apply as well in the electronic sphere."

The Court did say that because the search was motivated by a legitimate work related purpose, and because it was not excessive in scope, the search was reasonable under the approach of the O'Connor plurality. For these same reasons—that the employer had a legitimate reason for the search, and that the search was not excessively intrusive in light of that justification—the Court also concluded that the search would be "regarded as reasonable and normal in the private-employer context" and would satisfy the approach of Justice Scalia's concurrence.

The standard for a public employer's right to search continues to hinge upon a notice of no expectation of employee privacy, a search being reasonable and narrowly tailored to a job related purpose.

Forbush cautions that there is one question not answered in this case. That is, can a mid-level manager or supervisor subvert the intent of management by telling employees that they could have different expectations than those stated by rule or policy? This is an issue LEAF has expressed concern about in many of the Newsletters. As this case reveals, management's failure to control the actions and statements of

mid-level managers and supervisors can have a devastating impact when employees rely on their direction when the employees are doing their jobs. Quon's lieutenant, contrary to all communications from management, set up a privacy expectation with the subordinates by his actions and words. Quon obviously relied upon the comments in how he and others used the issued devices.

Although the Court did not specifically address the issue, it said it wanted to rule on narrow grounds but would accept as true that Quon had an expectation of privacy, there was a Fourth Amendment search, and the employer could search as long as it met valid criteria. The search was valid because the chief was trying to discover the reason for the overage in usage to determine how to manage the devices more cost effectively. The mode of analysis of the information was in keeping with the policy of the city to allow incidental private use.

Forbush believes the Court did not rule on the privacy expectation because the city had an explicit policy on electronic communications and monitoring. In addition to the policy, the chief wrote memos and held training outlining that the texting devices were considered e-mail and would fall under the city policy. Quon also signed a statement acknowledging the policy. Another issue of importance was the reasonable scope of the search and review by the chief.

At the federal level, employers must comply with the Wiretap Act, 18 U.S.C. Section 2510 et seq., which generally prohibits the intentional interception of any wire, oral, or electronic communication. This act was updated by the Electronic Communications Privacy Act, (ECP) 18 U.S.C. Section 2701, et seq., which allows employers that provide electronic communication systems to access messages once they are stored in the employer's computer or telephone systems, without notifying employees of the access. A section of the ECP is the Stored Communications Act, 18 U.S.C. Sections 2701-2712, in brief, states that an Internet Service Provider (ISP) is not

allowed to disclose to any “person or entity” the subject matter of any communication, which is carried or stored on their system. There are exceptions if the ISP does not do business with the public.

In Michigan the issue of workplace privacy is regulated by MCL 750.539d(1)(a) which makes it a crime to place any device to observe, record, transmit, photograph or eavesdrop in a private place without consent. MCL 750.539c states that any person who uses a device to eavesdrop on a private conversation without consent of all parties is guilty of a felony. MCL 539a(2) defines eavesdropping as, “to overhear, record, amplify or transmit any part of the private discourse of others without the permission of all persons engaged in the discourse.” It also defines private place as “a place where one may reasonably expect to be safe from intrusion or surveillance, but not a place where the public has access.”

The key to the statutes is “private place” or “private discourse”. In *Dickerson v. Raphael*, 461 Mich. 851 (1999), the Michigan Supreme Court ruled that a conversation is private when the employee intended and had a reasonable expectation that the conversation was private at the time and under the circumstances involved.

Legal Advisors Advice

Because of the cited statutes and Court ruling, Forbush advises Michigan employers who provide electronic communication equipment and devices for employee use on the job to protect themselves by conducting an annual review of their electronic communications, social networking and authorized equipment utilization policies and rules. The goal is to ensure the employer meets the Court’s test for

establishing no expectation of privacy while giving notice of management’s practice of storage, monitoring and potential review of all, but especially work related, electronic data and communications, no matter what the format or source. Employees must be trained and required to acknowledge, by signature, that they know all communications on the equipment is subject to storage, monitoring and review.

Employers must also establish in clear and concise terms that top management is the only authority to establish, repeal, change or modify any written policy or directive of the department. Employees should be trained and records kept of training and acknowledgement. Mid-level managers and supervisors who abuse their position or fail to uphold the department’s rules, policies, directives or their intent should be disciplined and/or removed from their position.

LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the Michigan Municipal League’s, Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

While compliance to the loss prevention techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our reader’s are encouraged to consult with their attorneys for specific legal advice.

LAW ENFORCEMENT ACTION FORUM (LEAF) is a group of Michigan law enforcement executives convened for the purpose of assisting loss control with the development of law enforcement model policy and procedure language for the Manual of Law Enforcement Risk Reduction. Members of the LEAF Committee include chiefs, sheriffs, and public safety directors from agencies of all sizes from around the State.

The LEAF Committee meets several times yearly to exchange information and ideas relating to law enforcement issues and, specifically, to address risk reduction efforts that affect losses from employee accidents and incidents resulting from officers' participation in high-risk police activities.

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