AELE Monthly Law Journal

Cite as: **2008 (4) AELE Mo. L. J. 201**
ISSN 1935-0007
Employment Law Section - April, 2008

Investigative Detention of Employees - I

Part One: Criminal Interviews
- Scope of Article
- Milwaukee Police – adultery (1982)
- New York State Police – cover-up (2001)
- Milwaukee Police – use of force and IA sting (2002)
- Los Angeles County Sheriff – use of force (2007)
- References

Part Two: Non-testimonial Evidence (*appears next month*)

Part One - Criminal Interviews

Scope of Article

This is a two-part article that reviews cases involving investigatory ***detentions*** of law enforcement or correctional employees, whether the purpose is administrative or criminal. In the former, management representatives investigate an employee for misconduct or unfitness. In the latter, an employee is investigated by other peace officers for possibly unlawful conduct, while on or off duty.

Only a few cases have been published where an officer or civilian employee has challenged an investigative detention. Such detentions have arisen both in administrative and criminal settings.

A 2004 article by this author addresses the issue of what *warnings* should be given to an officer who is interviewed (a) as an employee, in an administrative investigation, or (b) as a suspect, in a criminal investigation. See *Interviews and Interrogations of Public Employees: Beckwith, Garrity, Miranda and Weingarten Rights*, 4 (1) Law Enforcement Executive Forum 01-17 (Nov. 2004), viewable at: http://www.aele.org/interviews.pdf

Unless an employee is under arrest, the "Garrity warning" is technically unneeded if the employee is cooperative. It is necessary if the employee is uncooperative and disciplinary action for insubordination follows.

The best practice, however, is to give the Garrity warning before interviewing an employee in an administrative setting, or to give the "Beckwith warning" if the interview is for criminal prosecution purposes. In some jurisdictions, a bargaining agreement or MOU requires the recitation of an advisory warning. A version of the Beckwith warning follows:

Employee Criminal Interview – Advice of Rights

This interview is part of a criminal investigation.

1. You have the right to remain silent if your answer might incriminate you.

2. Anything you say can be used against you as evidence in a disciplinary or civil proceeding or any future criminal prosecution involving you.

3. If you refuse to answer a question because the answer may incriminate you, you cannot be disciplined solely for remaining silent

4. You do not have the right to remain silent about another person's commission of a crime, unless that information also implicates your involvement in a criminal offense.

5. You have the right to consult an attorney of your choosing, and to have that attorney present to advise you during the interview.

Beckwith v. United States, 425 U.S. 341 (1976).
http://laws.findlaw.com/us/425/341.html

Warnings clarify the purpose of the interview and delineate the employee's rights. If an employee is subjected to both kinds of investigations, the interviewers must be different individuals and identify their purpose. As a federal appeals judge recently wrote:

> "Whether the employer is wearing one hat or the other (or both) is often unclear, which can put the employee in a precarious situation by forcing

> him to choose between disobeying an order from his employer and giving up the constitutional privilege against self-incrimination.
>
> "In such situations, the employer must not play on this ambiguity to the disadvantage of the employee; rather, it must clarify whether it is questioning the employee in its capacity as an employer or as a law enforcer. Where the employer fails to do this, the employee is entitled to act on the assumption that he is dealing with a law enforcement agency, if a reasonable person in his position would have so believed."

Chief Judge Alex Kozinski, writing in Aguilera v. Baca, #05-56617, 510 F.3d 1161, 2007 U.S. App. Lexis 29804 (9th Cir.) Slip opin. at 16809.

Milwaukee Police – adultery (1982)

A man found his estranged wife, a police officer, in bed with another officer. He called the police dispatcher and reported that an officer needed assistance. Twenty or more officers arrived.

Both of the off-duty officers were taken to a police station and were interviewed by senior officers about possible adulterous behavior. The entire detention process lasted 14 hours. The woman officer was ill and vomited blood. She was denied the opportunity to obtain medical assistance.

She admitted to having intercourse on three occasions with the unmarried male officer. A lieutenant asked her if she used contraceptives and whether she might become pregnant.

The male officer contended that during the 13 hours that he was detained at police headquarters he was not offered any food. He claimed that, before each statement was requested of him, he asked for counsel, but he was denied the right to make any phone calls.

The District Attorney declined to prosecute the adultery charge, but both officers were fired. An appeal followed, and the Wisconsin Supreme Court set aside the terminations.

The justices wrote that the failure to afford counsel was "a coercive factor and contributed to the production of involuntary and coerced statements" from both officers. Both of them were fatigued, and the woman was ill.

Although informed that when she finished her statement she would be released,

she was "cruelly" kept in custody for approximately another three hours. The justices wrote:

> "Clearly, the detention and interrogation of [the woman officer] was offensive to canons of decency and fairness. It is shocking to the conscience of this court, and it is shocking and almost inconceivable that a police department would assume that it could maltreat its own employees in a manner which it knows would not be tolerated or approved by the courts, even were the object of the interrogation a person accused of a heinous crime.
>
> "Due process, of course, is required, not merely for the protection of the unfortunate victim of coercive police tactics, but it is necessary to the integrity of the judicial process. Due process is violated by coerced confessions, because they are unreliable, and should not be allowed to contribute to a finding of guilt in a court of law which attempts to base its judgments on trustworthy and reliable evidence.
>
> "Moreover, where the tactics used are offensive and outrage the public's sense of decency, it is society and society's standards of fundamental fairness that are offended."

The Supreme Court concluded that both of the terminations must be set aside, because the statements were coerced and involuntary as a matter of law. Police officers may not be subjected to "inquisitorial tactics" that bypass the elementary constitutional rights that are afforded to other citizens. They added:

> "If truth can only be obtained by the denial of rights, then our entire judicial system, which is based upon affording due process and a panoply of constitutional rights, is based upon a premise doomed to failure."

Oddsen v. Bd. of Fire & Police Cmsnrs. for Milwaukee; Quade v. Bd. of Fire & Police Cmsnrs. for Milwaukee, #81-684 & #80-1726, 108 Wis.2d 143, 321 N.W.2d 161 (1982).

New York State Police – cover-up (2001)

Using an unmarked police car, the defendants stopped a state trooper, placed him in the felony position, took him in the back of an unmarked police car to a hotel room, read him his Miranda rights, and informed him that he was the target of a criminal investigation relating to a cover-up of a hit-and-run accident.

After approximately six hours of questioning, he was told he could leave after he

agreed to take a polygraph examination, which he took the next day. He was never charged with a crime.

The trooper sued, alleging that other officers held him for questioning, without probable cause, during a criminal investigation. As a defense, the defendants claimed that the law was not clearly established (in 1995) that the Fourth and Fourteenth Amendments prohibited police seizures of other police officers without probable cause. The District Court disagreed and denied qualified immunity; the Second Circuit affirmed that holding. The panel wrote:

> "We are not persuaded by appellants' argument, as it would erode the principle that a criminal suspect who is a policeman enjoys the same rights as other suspects. See Garrity, 385 U.S. at 500. The crucial question is not whether the investigation involves actions arising out of a police officer's duties, but whether the investigation's objective is to discipline the officer within the department or to seek criminal prosecution."

The panel held that the law in 1995 was clearly established that seizure of a police officer in the context of a criminal investigation required probable cause on the part of the seizing officers, but added that the officers might be entitled to qualified immunity if they had arguable probable cause for the seizure, thus rendering their conduct objectively reasonable. Cerrone v. Brown, #00-7177, 246 F.3d 194 (2nd Cir. 2001).

Milwaukee Police – use of force and IA sting (2002)

In another appeal taken by three Milwaukee police officers, the Seventh Circuit noted that "nothing in the Fourth Amendment endows public employees with greater workplace rights than those enjoyed by their counterparts in the private sector." That requires courts to identify whether incident complaint investigators are acting as agents of an employer or as agents of the law enforcement arm of the state.

In different factual settings the officers were detained, while earning overtime, to be interviewed for possible unlawful acts. The appellate panel noted that "certain command officers within the MPD seem to engage in a systematic pattern of making officers feel unnecessarily uncomfortable when the Department sets about to conduct internal criminal investigations," but cautioned that courts "must not act as super-personnel boards."

The panel wrote:

> "We hold that the Department has the authority to direct its officers to remain on duty or to accompany detectives to the Department's headquarters and either answer questions from supervisory officers as part of a criminal investigation about their alleged misconduct or invoke their Fifth Amendment rights against self-incrimination.
>
> "We reject the appellant officers' argument that a patrolman is seized, within the meaning of the Fourth Amendment, at the time that he is ordered to report for questioning at a designated, centralized area, such as the headquarters for the internal affairs department (wherever it may be located) or some other suitable location determined by the superior officer."

The panel went on, however, to emphasize that public employees are entitled to equal protection of their rights under the law. They wrote:

> "Thus, we reject the Department's argument that it may seize an officer without probable cause who refuses to obey a command to remain on duty or report to a particular location in order to answer questions as part of a criminal investigation. Rather, the Department's options are somewhat limited when dealing with an officer who has disobeyed a lawful order from his superior officers.
>
> "First, the Department may institute investigative proceedings that may very well result in the dismissal, suspension, or discipline of the officer. * * *
>
> "Second, the Department may briefly stop, frisk, and question the officer consistently with the holding of Terry v. Ohio, 392 U.S. 1 (1968), provided that the Department adheres to the well-settled rule of law that if a Terry stop continues too long or becomes unreasonably intrusive, it ripens into a de facto arrest that must be based on probable cause. * * *
>
> "Third, the Department may seize, arrest, and detain the officer for custodial interrogation, provided that the arrest is supported by probable cause."

Analyzing the claims of each plaintiff, the Seventh Circuit concluded:

1. There was probable cause to arrest officer "D" for battery. He had thrown a radio at a fleeing youth, striking his head and causing lacerations. His seizure was consistent with the Fourth Amendment.

2. Officer "P" was interviewed after a half-hour wait, and was given the Miranda warnings. He declined to answer questions and was directed to return to his regular duties. The panel concluded that no seizure took place.

3. Officer “H” was snared in a sting operation and was taken to an I-A interview location. The panel said the officer “failed to produce anything but unsupported assertions -- rather than objective evidence -- to support an allegation that he was seized during his initial encounter with the IAD.”

4. Officer “S” was partnered with officer “H” on the day in question. The investigating officers lacked probable cause -- or even arguable probable cause -- to order the seizure and detention of Officer “S” for misconduct.

The panel reiterated, “It is unconstitutional to seize a police officer, as part of a criminal investigation, on anything less than a determination of probable cause.” It concluded that the trial judge erroneously granted summary judgment on the merits of the claim of officer “S”. Driebel v. City of Milwaukee, #01-1689, 298 F.3d 622 (7th Cir. 2002).

Los Angeles County Sheriff – use of force (2007)

After a citizen claimed that he was struck on the head with a flashlight by a deputy sheriff, five officers were required to go a captain’s office. They claimed that the captain told them in a “harsh, accusatory tone” that:

(1) he knew one of them had assaulted the civilian,

(2) the others were covering it up,

(3) one or more of them would be going to prison and would lose their jobs, and

(4) the only way to avoid going to jail was to “come forward” by giving a statement to [criminal] investigators.

The captain ordered the officers not to leave the station and to wait in an office until they gave a statement to investigators. Later, the officers declined to respond to questions and were told they could leave.

The deputies filed suit in federal court. The outcome of the civil case depended, in part, on whether the officers were “seized” within a Fourth Amendment context and whether their Fifth Amendment rights had been violated.

The District Judge concluded that they were not seized. Aguilera v. Baca, #CV-03-6328, 394 F.Supp.2d 1203 (C.D. Cal. 2005).

A three-judge appellate panel affirmed, 2-to-1. The panel noted that the officers

were paid overtime, were allowed to contact counsel and "were not treated like criminal suspects." The majority wrote, concerning the Fourth Amendment:

> "A law enforcement officer is not seized for purposes of the Fourth Amendment simply because a supervisor orders him to remain at work after the termination of his shift or to come into the station to submit to questioning about the discharge of his duties as a peace officer."

The majority then addressed the officers' Fifth Amendment rights:

> "We hold that the supervisors did not violate the deputies' Fifth Amendment rights when they were questioned about possible misconduct, given that the deputies were not compelled to answer the investigator's questions or to waive their immunity from self-incrimination. Indeed, it appears that the deputies were never even asked to waive their immunity.
>
> "In these circumstances, it is clear that the deputies' Fifth Amendment right against self-incrimination was not implicated by the supervisors' conduct."

The majority also rejected retaliation claims asserted because of post-interview transfers. The majority wrote:

> "It is of no moment that refusing to answer the investigator's questions could have resulted (and, in fact, did result) in reassignment: We do not consider re-assignment from field to desk duty as equivalent to losing one's job …"

The majority noted that the Sheriff's Department had a legitimate need to determine whether an officer or officers had engaged in criminal behavior and, until the criminal investigation was resolved, it had a duty to protect the public from the potential for further assaults by the unknown by reassigning all of those involved in the incident to station duty. Moreover,

> "Even assuming that the deputies were assigned to less favorable shifts and given 'degrading' employment positions, we agree with the district court that the reassignment did not transform the questioning into a coercive police investigation ..."

The Chief Judge dissented, noting that the deputies "weren't told they were free to leave, and they weren't told they didn't have to answer questions." He wrote that when a superior officer brings in criminal investigators, yells at his subordinates, accuses them of crimes, and threatens them with criminal punishment — a reasonable jury could find that the employees were seized.

He added that the mere fact that one member of a group may have committed a crime does not establish probable cause to arrest everyone in that group. Aguilera v. Baca, #05-56617, 510 F.3d 1161, 2007 U.S. App. Lexis 29804 (9th Cir.).

References

Investigation of Employee Misconduct, Model Policy and Concepts and Issues Paper, IACP National Law Enforcement Policy Center (1990, Revised Oct. 2001 and Jan. 2007).

AELE Monthly Law Journal
Wayne W. Schmidt
Employment Law Editor
841 W. Touhy Ave.
Park Ridge IL 60068-3351 USA
E-mail: wws@aele.org
Tel. 1-800-763-2802

AELE Home Page --- **Publications Menu** --- **Seminar Information**