October 2018

THE LOCAL GOVERNMENT LIABILITY BEAT

Presented by Local Government Risk Management Services, Inc.
A Service Organization of the Association County Commissioners of Georgia and the Georgia Municipal Association Risk Management Programs

Eleventh Circuit Denies Immunity for Warrantless Seizure of Cell Phone

On April 2, 2018, the Eleventh Circuit Court of Appeals decided *Crocker v. Beatty,*[i] in which the court examined whether a deputy sheriff was entitled to qualified immunity when he seized the cell phone of a bystander who had taken photos of a traffic crash scene. The relevant facts of *Beatty,* taken directly from the case, are as follows:

> On the afternoon of May 20, 2012, Crocker was driving northbound on Interstate 95 in Martin County, Florida when he observed an overturned SUV in the interstate median that had recently been involved in an accident. Crocker pulled over on the left shoulder and ran toward the SUV. About fifteen other motorists also stopped to assist. Soon after, a road ranger arrived and assured the bystanders that emergency personnel were nearby. Upon their arrival, Crocker stepped away to make room, but he remained in the interstate median about fifty feet from the SUV.
>
> Crocker noticed some of the other bystanders were taking photographs and videos of the crash scene with their cell phones. Crocker took out his own cell phone, an iPhone, and proceeded to take photos and videos of the scene. He captured images of empty beer bottles, the overturned vehicle, and firemen, but no images of any persons involved in the accident. About thirty seconds after Crocker had started using his iPhone camera, Beatty walked over toward him, reached out from behind him without

warning or explanation, and took the iPhone out of his hand.

Beatty asked Crocker why he was on the scene. Crocker explained that he stopped to assist before first responders had arrived. Beatty told Crocker to leave. Crocker agreed to do so, but said that he needed his iPhone back. Beatty replied that the photographs and videos on the iPhone were evidence of the state, and Crocker would need to drive to the nearest weigh station to wait for instructions about the return of his phone after the evidence could be obtained from it. Crocker indicated he would leave the scene immediately if Beatty would return his iPhone, and he offered to delete the photographs and videos in an attempt to secure its return. Beatty refused to hand over the phone, and in turn, Crocker refused to leave. Beatty then arrested Crocker for resisting an officer without violence. [ii]

Crocker filed suit for various constitutional violations related to this incident. Deputy Beatty filed a motion for summary judgment to dismiss the claims and the district court dismissed all claims except the Fourth Amendment claim related to the seizure of Crocker's cell phone. The district court reasoned that the deputy violated Crocker's Fourth Amendment rights by seizing the phone and that the law was clearly established such that another reasonable officer would have known the seizure of the phone violated the Fourth Amendment.

The deputy appealed the denial of qualified immunity on the claim regarding the seizure of the cell phone to the Eleventh Circuit Court of Appeals. The court of appeals first noted that they must answer two questions to determine if Beatty was entitled to qualified immunity. The court stated:

> We resolve qualified immunity claims under a two-step sequence: [1] whether the facts as reviewed make out a violation of a constitutional right, and if so, [2] whether the right at issue was clearly established at the time of the defendant's alleged misconduct. *Pearson v. Callahan,* 555 U.S. 223, 232, 129 S. Ct. 808, 815-16 (2009). [iii]

Additionally, the court noted that at this stage of litigation, where a defendant is seeking summary judgment or qualified immunity, the court must view the facts in a light (or perspective) most favorable to the plaintiff. Thus, unless contradicted by basically indisputable evidence, the court must base their decision on the plaintiff's version of events.

With this in mind, the court of appeals first set out to determine if the deputy violated Crocker's rights under the Fourth Amendment when he seized his cell phone. The court described the relevant legal principles as follows:

> The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. A seizure of property occurs when there is a "meaningful interference" with a person's possessory interest in it. *United States v. Virden,* 488 F.3d 1317, 1321 (11th Cir. 2007). Generally, the seizure of personal property is per se unreasonable when not pursuant to a warrant issued upon probable cause. Id. Several exceptions, however, exist to this general rule. One is the exigent circumstances exception.
>
> The exigent circumstances exception permits warrantless seizures of property when certain exigencies exist, including the "imminent destruction of evidence." *Minnesota v. Olson,* 495 U.S. 91, 100, 110 S. Ct. 1684, 1690 (1990) (quoting *State v. Olson,* 436 N.W.2d 92, 97 (Minn. 1989)). Police officers relying on this exception must show an "objectively reasonable basis" for deciding that imminent action was required. *United States v. Young,* 909 F.2d 442, 446 (11th Cir. 1990). Our inquiry is whether the

> facts would have led "a reasonable, experienced agent to believe that evidence might be destroyed before a warrant could be secured." Id. (quoting *United States v. Rivera,* 825 F.2d 152, 156 (7th Cir. 1987)). [emphasis added]

The deputy argued that the photos that Crocker took were "evidence," and that he feared they would be destroyed or deleted if he did not seize the phone. The court assumed, for the purposes of this decision, that the photos Crocker took could reasonably be considered evidence by the police. However, the court opined that "no facts in the record support the conclusion that a reasonable, experienced [deputy] would have thought destruction of the evidence was imminent." [iv] To support this, the court noted that Crocker was only a bystander to the traffic crash. The court stated

> Exigent circumstances sufficient to seize evidence may be found when the evidence is in the possession of a person it could implicate in a crime or someone close to them. Cf. *United States v. Miravalles,* 280 F.3d 1328, 1331 n.4 (11th Cir. 2002) (exigent circumstances allowed seizure of evidence from defendant's apartment); *United States v. Mikell,* 102 F.3d 470, 476 (11th Cir. 1996) (same); *United States v. McGregor,* 31 F.3d 1067, 1069 (11th Cir. 1994) (exigent circumstances allowed seizure of evidence from defendant); *United States v. Tobin,* 923 F.2d 1506, 1511 (11th Cir. 1991) (en banc) (same). But finding that exigent circumstances exist in order to seize property from a bystander is a different thing entirely. For obvious reasons, evidence is more likely to be destroyed when it is in the possession of a person who may be convicted by it. [v] [emphasis added]

The court noted that Crocker had no involvement with the crash scene that he photographed. Furthermore, the deputy, according to the plaintiff's version of events, took Crocker's phone from him without speaking to him first; therefore, the was no indication that he was likely to delete the photos at the time the deputy seized the phone.

Therefore, the since taking the phone from Crocker was a warrantless seizure, and since the court held that the exigent circumstance exception did not apply under the facts of this case, the court held that the deputy did violate Crocker's rights under the Fourth Amendment.

The court next set out to determine if the law was clearly established such that a reasonable officer in the same situation would have known that he was violating the Fourth Amendment. This is the second prong of the test to determine if the deputy was entitled to qualified immunity. If the law was not clearly established, then the deputy would still be entitled to qualified immunity even thought he committed a Fourth Amendment violation. The court stated that

> Rights may be clearly established for qualified immunity purposes by one of three methods: (1) "case law with indistinguishable facts clearly establishing the constitutional right," (2) "a broad statement of principle within the Constitution, statute, or case law that clearly establishes a constitutional right," or (3) "conduct so egregious that a constitutional right was clearly violated, even in the total absence of case law." *Lewis v. City of W. Palm Beach,* 561 F.3d 1288, 1291-92 (11th Cir. 2009). [vi] [emphasis added]

In this case, the court focused on the second method listed above. The court stated that a right can be "clearly established" when the "reasoning of a prior case, though not the holding, sends the same message to reasonable officers in novel factual situations." [vii]

The court then noted that the right to be free from warrantless seizures of personal property, absent an exception to the warrant requirement, has been clearly established as of Crocker's incident. [viii] The court also noted that the exigent circumstance exception to the warrant requirement was also clearly established at the time of Crocker's incident. The court reasoned as follows:

> [The deputy] argument, however, is that the application of this exception to the seizure of cell phones—in particular, Internet-connected smart phones like Crocker's iPhone—was not clearly established in 2012. But this argument asks far too much. The novelty of cutting-edge electronic devices cannot grant police officers carte blanche to seize them under the guise of qualified immunity. This is not how our analysis operates. Even in "novel factual situations," we must deny qualified immunity when clearly established case law sends the "same message" to reasonable officers. *Jones,* 857 F.3d at 852 (quoting *Mercado,* 407 F.3d at 1159). Our case law has sent a

> consistent message, predating 2012, about the warrantless seizure of personal property and how exigent circumstances may arise. The technology of the iPhone simply does not change our analysis. To hold otherwise would deal a devastating blow to the Fourth Amendment in the face of sweeping technological advancement. These advancements do not create ambiguities in Fourth Amendment law; the principles remain as always. [ix] [emphasis added]

Therefore, the court held that the deputy was not entitled to qualified immunity regarding the seizure of Crocker's cell phone.

Citations

i. No. 17-13526 (11th Cir. Decided April 2, 2018)

ii. Id. at 2-4

iii. Id. at 5

iv. Id. at 6

v. Id. at 7

vi. Id. at 9

vii. Id.

viii. Id. at 10 (see See, e.g., *Virden,* 488 F.3d at 1321; see also *United States v. Place,* 462 U.S. 696, 701, 103 S. Ct. 2637, 2641 (1983). ("In the ordinary case, the Court has viewed a seizure of personal property as per se unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant.)

ix. Id. at 10-11

Human Resource Trends

Adapted from an article from HR Today

There are many issues HR departments handle each day. The following are a few key areas that directly affect employer and employee well being. Based on current trends these are a few areas you may need to focus on in 2019.

Harassment

2018 continues to be the year sexual harassment hit the mainstream in a big way. From Time's Up to the #MeToo movement to the SCOTUS hearings, victims everywhere are feeling more empowered to push back and speak up against inappropriate behavior in the workplace and elsewhere. Employers and employees should expect this trend to spill over into the workplace. As we transition from 2018 to 2019, it is the perfect time for HR departments to review sexual harassment policies and ensure everyone – from the CEO to the janitor – understands the consequences of inappropriate behavior and to document the training. Even the smallest companies must have clear procedures for reporting and minimizing sexual harassment to avoid potential lawsuits.

Employee Well-Being

Workplace wellness programs are a rapidly rising trend for HR to monitor. Employees are demanding work-life balance and a culture of caring from their employers. Top candidates want offices with sit-stand desks, on-site gyms and meditation rooms. Plus, organizations are turning to wellness programs to lower long-term costs by keeping employees healthy. HR departments can expect to spend part of 2019 evaluating programs, negotiating costs and choosing the best option for business needs. Some leadership might need to be convinced of the value of an employee wellness plan, which means long hours preparing a persuasive presentation. The desire to attract quality candidates and employee retention will be worth it in the long run.

Workplace Violence

Sadly, workplace violence is on the rise. 2018 has seen a some terrible incidents involving mass casualty shooting. Signs are this trend will not stop anytime soon. Leadership, often relying on HR departments, must be ready for bomb threats, terrorist attacks and domestic violence escalations on site. Clear policies, including background checks and security procedures, must be established. Employees should be drilled on evacuation procedures and how to handle violence in the workplace.

One of the key duties of HR is properly anticipating problems. To put it simply, an ounce of prevention is worth a pound of cure. That's why HR departments must start working immediately to address these pressing human resources issues before they become a concern.

Who is at Greatest Risk for Work-Related Stress Death?

We may accuse each other of exaggerating when we say our jobs are killing us, but it might not be that much of an exaggeration. Dozens of studies over the years have linked job stress to increased incidences of disease and

death. Here are a few statistics based on a twenty-year study of 820 adults. Over the course of the study of adults who were ages 25 to 65 at its start, 53 died, and they were disproportionately likely to have reported a "hostile work environment."

- Middle-aged workers who have poor relationships with their colleagues are 2.4 times more likely to die sooner.
- Surprisingly, relationships with bosses had no ties to increased death, even though it is a top cause of leaving a job.
- 40% of workers say their job is excessively stressful.
- 29% say they feel extremely stressed at work.
- 26% say they quite frequently feel burned out at work.
- One in four workers feel their jobs are the most stressful aspect of their lives.
- Three in four workers believe job stress has increased over the last generation.

Most Common Causes of Work Stress

- Heavy workload.
- Management techniques.
- Restructuring in the workplace.
- Lack of support and relationships with coworkers, such as bad behaviors like insults and poor manners.
- Lack of clarity in job responsibilities.
- Job security/future concerns.
- Environmental issues (lack of space, excessive noise, unclean air, etc.).
- Personal/home problems

Stress has been linked to:

- Heart disease
  - 40% higher incidence for women.
  - 25% increased likelihood of heart attack for men.
- Stroke
  - Nearly 50% increased likelihood for men.
- Depression
- Sleep issues
- Digestive issues
- Obesity – prolonged work stress has been found equal to being forty pounds overweight.
- Memory problems.
- Aggravation of skin conditions.
- The quickened progression of HIV/AIDS.

How Workers Can Reduce Stress

- Eat well.
- Exercise often.
- Get enough sleep.
- Employ relaxation techniques.
- Communicate with friends.
- Remember to laugh and make jokes.
- Seek counseling when necessary.

LGRMS
RISK CONTROL
ACCG | GMA

Local Government
Risk Managment Services
3500 Parkway Lane . Suite 110
Norcross, Georgia 30092

A Service Organization of the Association County Commissioners of Georgia and the Georgia Municipal Association

This Issue . . .

Warrantless Cellphone Seizures

Trending Human Resource Issues

GEORGIA MUNICIPAL ASSOCIATION

ACCG
Advancing Georgia's Counties.