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Tenth Circuit Holds Animals are Property Protected by Fourth Amendment

By Brian Batterton, Attorney, LLRMI and PATC Training

On June 20, 2016, the Tenth Circuit Court of Appeals decided *Mayfield v. Bethards et al.,*[i] which discusses whether animals are considered property protected by the Fourth Amendment. The relevant facts of *Mayfield,* taken directly from the case, are as follows:

> According to the Complaint, the deputies saw the Mayfields' dogs Suka and Majka lying in the front yard of the Mayfields' private residence in Halstead, Kansas, on July 13, 2014.
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> The deputies exited their vehicle and entered the Mayfields' unfenced front yard to approach the dogs. In the Complaint, the Mayfields allege a witness observed that although neither dog acted aggressively, both officers began firing on the dogs once on the Mayfields' property. Deputy Clark fired on Suka, the Mayfields' brown dog, but missed as she fled to the back of the house. Deputy Bethards shot Majka, the Mayfields' white Malamute Husky, three times, killing her on the front porch.
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> The deputies then unsuccessfully searched for Suka behind the house, where she had disappeared into a wooded section of the Mayfields' property. The Complaint further alleges that upon returning to the front yard, the deputies first moved Majka's body in an apparent attempt to obscure that she had been shot on the Mayfields' property and then tried to hide her body in a row of trees.[ii]

The Mayfields sued the deputies for shooting and killing Majka and alleged that it violated their Fourth Amendment rights. The district court denied qualified immunity for Deputy Bethards, the deputy that shot Majka. He appealed to the Tenth Circuit Court of Appeals.

On appeal Deputy Bethards argued that dogs were not "effects" that are subject to protection under the Fourth Amendment. Further, he argued that killing Majka was legal under Kansas law.

At the outset, the Tenth Circuit stated that, at this stage of the case, they must view the facts that are in dispute in a light most favorable to the plaintiff. In other words, they must make their decision based on the plaintiff's version of events and if qualified immunity is not appropriate, then a jury would decide which facts to believe.

Next, the Tenth Circuit examined relevant legal principals. The court noted that:

> The Fourth Amendment protects "[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.[iii] [emphasis added]

Thus, the court set out to decide whether dogs were "effects" under the

Fourth Amendment. In examining the law related to this issue, the court stated:

> Although the Fourth Amendment uses the word "effects," the Supreme Court has long equated that term with personal property. See *United States v. Place,* 462 U.S. 696, 700-01 (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 issued upon probable cause and particularly describing the items to be seized."); see also *Illinois v. McArthur,* 531 U.S 326, 330 (2001) (same). And Kansas has recognized for at least as long that dogs are their owners' personal property. See Kan. Stat. Ann. § 79-1301 ("A dog shall be considered as personal property and have all the rights and privileges and be subject to like lawful restraints as other livestock."); *State v. Fenske,* 61 P.2d 1368, 1369 (Kan. 1936) (upholding larceny conviction for stealing a dog and stating "[w]e have no hesitancy in saying a dog is personal property"). Thus, it is unlawful to seize a dog absent a warrant or circumstances justifying an exception to the warrant requirement. See *G.M. Leasing Corp. v. United States,* 429 U.S. 338, 358 & n.21 (1977) (discussing exceptions to warrant requirement).
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> "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen,* 466 U.S. 109, 113 (1984). Killing a dog meaningfully and permanently interfere with the owner's possessory interest. It therefore constitutes a violation of the owner's Fourth Amendment rights absent a warrant or some exception to the warrant requirement. [iv]

Thus, since dogs are personal property protected by the Fourth Amendment, and since shooting and killing a dog meaningfully interferes with an owner's possessory interest, the shooting and/or killing of a dog, as a Fourth Amendment seizure, must be pursuant to a warrant or an exception to the warrant requirement.

Deputy Bethards further argued that, even if killing Majka was a Fourth Amendment seizure, it was reasonable because it was in accordance with Kansas law. Particularly, the deputy argued that Kansas law allowed the killing of a dog that attacks livestock and the deputy thought Majka attacked livestock. The statute at issue, states, in pertinent part, the following:

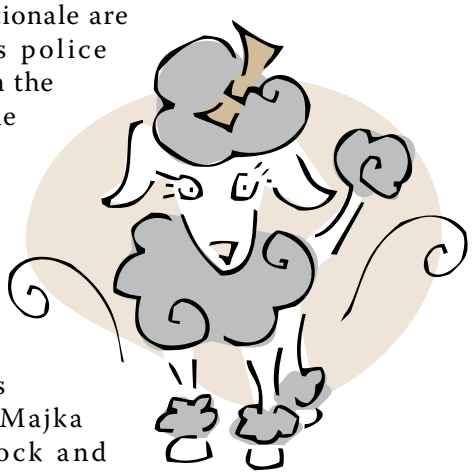
> Section 47-646 of the Kansas Statutes allows "any person at any time to kill any dog which may be found injuring or attempting to injure any livestock." Kan. Stat. Ann. § 47-646. [v]

The court then discussed the Kansas Supreme Court's interpretation of the statute and stated:

> The Kansas Supreme Court affirmed, holding that section 47-646 allows a person to shoot a trespassing dog "which he finds on his premises injuring or attempting to injure" livestock "either at the time the dog is found in the act . . . or within a reasonable time thereafter," which includes "the right within such reasonable time, if necessary, to pursue such dog after it has left his premises, and to shoot . . . such dog off his premises." Id. at 442. In reaching that conclusion, the Kansas Supreme Court identified two prerequisites that make application of the statute a fact-intensive inquiry. First, McDonald places the burden of proof on a defendant seeking to rely on the statute "to show by a preponderance of the evidence that he was justified in shooting the dog." Id. at 443. Second, where the aggrieved livestock owner pursues the dog onto its owner's property and shoots it, the defendant must establish that he entered the dog owner's land "with authority, or under such circumstances that authority to enter such other's land may be implied." Id.

And the Kansas Supreme Court further explained that whether a livestock owner in hot pursuit has entered the dog owner's property with consent or implied consent is a question for the jury. Id. [emphasis added]

Thus, it is incumbent on the deputy to provide facts and evidence that show (1) he was justified in shooting the dog because it was actively attacking or had just attacked livestock, and (2) he was on the dog owner's land with proper legal authority (hot pursuit or consent). However, the details of the deputy's rationale are contained in his police report, rather than the Complaint and the police report is not incorporated by reference into the Complaint. Further, the Complaint alleges that the deputy was mistaken about Majka attacking livestock and



that neither Majka or their other dog was acting aggressively at the time of the shooting and at this stage of litigation (the motion for qualified immunity), the court must view the facts most favorable to the plaintiff. Thus, this question must go to a jury to decide whether the deputy was properly acting within the Kansas statute.

Thus, the court held that the plaintiff's alleged sufficient facts to support a Fourth Amendment violation such that the case should be decided by a jury, rather than by the court at summary judgment.

The Tenth Circuit also held that the law was clearly established that a dog was protected property under the Fourth Amendment and as such, the district court was correct to deny qualified immunity for the deputy.

Therefore, the Tenth Circuit affirmed the denial of qualified immunity.

Note: Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.

Citations

i. No. 15-3074 (10th Cir. Decided June 20, 2016)

ii. Id. at 2-3

iii. Id. at 5

iv. Id.

v. Id. at 8

Title VII Retaliation, FLSA Lawsuits Continue to Soar

By John Bennett, Attorney, Elarbee, Thompson, Sapp & Wilson LLP

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According to statistical figures from the federal courts, civil litigants filed approximately 9,000 Fair Labor Standards Act ("FLSA") cases during calendar year 2015. For comparison purposes, just 4,000 FLSA cases were filed a decade ago in 2005, the first time the FLSA case load ever reached 4,000 cases in a year. The vast majority of FLSA lawsuits focus on alleged uncompensated or miscalculated overtime, uncompensated "off the clock" work, and misclassification of employees. The growth of these lawsuits continues to present challenges, particularly given the FLSA's 1930's- and 1960's-era statutory and regulatory language that is increasingly ill-suited to twenty-first century workplaces.

The number of charges filed with the U.S. Equal Employment Opportunity Commission ("EEOC") also rose during the Commission's last fiscal year. (The fiscal year runs from October 1 to September 30.) According to data released by the EEOC, approximately 90,000 charges of discrimination were received during the government's 2015 fiscal year, up from the 2014 total, which represented a near-decade low. Notably, 44.5% of all charges filed during FY 2014-15 contained an allegation of retaliation, while allegations of race and disability discrimination (up nearly 6% in 2015) were made 34.7% and 30.2% of the time, respectively.

What do these statistics mean for employers? With regard to the EEOC-related data, while employers should continue their efforts to eliminate the conditions that give rise to EEOC charges overall, it is clear that more must be done to cultivate and maintain an atmosphere and culture of non-retaliation in the workplace. Such steps would include, among other things, responding promptly to internal discrimination complaints, assuring the complainant that the matter will be taken seriously, implementing interim measures designed to reduce the likelihood of confrontations or other incidents that may be perceived as retaliatory, ensuring that the respondent and others are reminded that retaliation is strictly prohibited, and keeping lines of communication with the complainant open so that instances of perceived retaliation can be addressed promptly. With regard to the FLSA-related data, employers should regularly audit their pay practices and update job descriptions, and consult periodically with experienced employment counsel to ensure that employees are being properly classified and compensated and that accurate records are being maintained. The new DOL rules regarding the "white collar" exemptions that are expected to take effect later this year afford an excellent for such an audit.

Should you have any questions about your employment policies or practices, please contact your city or county attorney.

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