



HURRELL CANTRALL

NEWSLETTER

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RECENT SUCCESSES

Hurrell Cantrall Successfully Argues Motion to Dismiss on Behalf of School District

In October 2010, Hurrell Cantrall succeeded in obtaining a judgment on behalf of a school district when the United States District Court (USDC) granted our client's Motion to Dismiss without leave to amend. This employment case involved the plaintiff's allegations that she was falsely imprisoned by the Interim Principal and Assistant Principal during a meeting in the presence of a School District police officer.

The plaintiff alleged that she felt imprisoned because she thought the officer was there to arrest her. Although the officer purportedly sat in a chair blocking the entrance door, there were no allegations that plaintiff was physically barred from leaving the room, or that she was involuntarily confined due to verbal comments or gestures made by any of the defendants.

In July 2010, on behalf of our client, we filed a Motion to Dismiss on all of plaintiff's claims, which included violations of the Fourth Amendment of the United States Constitution for

false imprisonment; a *Monell* claim against the School District for unconstitutional policies, practices and customs; as well as corresponding state law claims.

The United States District Court granted our client's motion without leave to amend, finding no violations of plaintiff's federal constitutional rights, and further finding that the individual defendants were entitled to qualified immunity. All of plaintiff's state claims were consequently dismissed for lack of supplemental jurisdiction.

Lisa Martinelli and Maria Markova prepared the briefing.

Toxic Tort Case Disposed of on Demurrer

Plaintiffs brought an action alleging that decedent developed heart, kidney and liver disease due to exposure to numerous chemical products in the course of the decedent's employment as a laborer. We filed a Demurrer as to all causes of action on the grounds that plaintiffs' First Amended Complaint failed to assert a sufficient factual connection or causal nexus between our

client's products and the decedent's injuries. The Court agreed and sustained the Demurrer without leave to amend, thereby disposing the entire action as to our client.

Motion for Summary Judgment Granted in Government Tort Liability Action

A plaintiff sued our public entity client for negligence and municipal liability under 42 U.S.C. Section 1983. The plaintiff alleged that the public entity's employees inappropriately and unlawfully pepper sprayed him while he was incarcerated at a local jail. On behalf of our public entity client, we moved for summary judgment on the grounds that the public entity was statutorily immune from the negligence cause of action and that the plaintiff did not have sufficient evidence to raise a triable issue of material fact with respect to the municipal liability claim. The motion was granted in its entirety.

NEWS

New Partners & Associates

Congratulations to our newest partners! In January 2010, **Lisa Martinelli** and **Jill A. Wood** were named equity partners, and **Blair Schlecter** and **Jamie L. Webb-Akasaka** were named partners.

The firm welcomes three new associates: **Maria Markova**, **Jennifer Grady**, and **Erica Bianco**.

Ms. Markova practices in both state and federal courts and specializes in government entity defense and employment law.

Ms. Grady, a graduate of Loyola Law School, specializes in toxic torts, employment litigation, and governmental liability.

Ms. Bianco graduated from Benjamin Cardozo Law School in New York City, and practices general civil liability defense.

LABOR & EMPLOYMENT LAW

Brinker – How One of the Most Important Labor Cases Pending Before the California Supreme Court Today May Affect Employers

By Thomas C. Hurrell, Esq. and Diane Martinez



“Hold employees accountable for missed breaks through written warnings for failure to take breaks that are available.”



On October 22, 2008, the California Supreme Court granted review of *Brinker Restaurant Corp. v. Superior Court* (2008) 165 Cal.App.4th 25 (as well as another similar case, *Brinkley v. Public Storage* (2008) 167 Cal.App.4th 1278, review granted January 14, 2009). In each of those cases, the Court of Appeal held that the employer must only “authorize” and “provide” breaks to employees, but that it need not “ensure” that breaks were actually taken. The Supreme Court granted review to decide whether California law required employers to “ensure” employees take meal breaks, or if the proper standard was that employers need only “provide” employees with the opportunity to take such breaks. As of October 8, 2009, the *Brinker* and *Brinkley* cases have been fully briefed, however, it is unclear when the Supreme Court will decide this issue as oral argument has not yet been scheduled.

The ultimate decision about what “provide” means will have a dramatic impact upon the wage-hour class actions. One source reported that a pro-employee decision (that “provide” means “ensure”) will surely lead to a new, massive wave of meal and rest break class actions, while a pro-employer decision (that “provide” simply means to make “available”) could slow the filing of meal and rest break class actions and reduce their value. The federal courts in California have uniformly issued pro-employer decisions on this issue, holding that employers need only make these breaks “available,” and need not “ensure” that employees actually take the breaks. See *White v. Starbucks Corp.* (2007) 497 F.Supp.2d 1080; and *Brown v. Federal Express Corp.* (2008) 249 F.R.D. 580.

While the *Brinker* and *Brinkley* cases have been depublished during the time the Supreme Court considers them, the only other state court decision addressing this issue was *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal.App.4th 949 (holding that employers must “ensure” meal breaks are taken). However, on October 18, 2010, the Court changed the publication status of *Hernandez v. Chipotle Mexican Grill, Inc.* (Cal. Ct. App. 2010) 2010 Cal.App. LEXIS 1853, from unpublished to published.

The significance of the *Hernandez* decision is that its holding is similar to the holdings in *Brinker* and *Brinkley*. Agreeing with the federal courts and distinguishing *Cicairos*, the *Hernandez* court concluded that breaks need only be made “available,” and as a result, it affirmed the denial of class certification. Therefore, unless and until a petition for review is granted, *Hernandez* remains citable and binding precedent.

Until the California Supreme Court issues a final ruling in *Brinker*, the following tips are recommended:

1. Assume that employers must ensure that breaks are taken;
2. Ensure that breaks occur within the first five hours of an employee's shift;
3. Hold employees accountable for missed breaks through written warnings for failure to take breaks that are available;
4. Supervisors and managers need to understand the importance of policing breaks and should also be accountable;
5. Include in employee handbooks a policy specifying meal and rest break requirements and the policy should contain strong language (i.e. “must” and “shall”) to emphasize the employer is requiring employees to take meal and rest periods;
6. Review internal procedures to determine whether there are impediments to employees taking their required breaks; and
7. Require employees to record the start and stop times of their meal breaks and have the supervisors and/or managers verify these entries are correct. This will help verify that employees were provided the time to take rest periods and actually took their meal periods of at least 30 minutes.

GOVERNMENTAL LIABILITY

Can We Be Punished for Thoughts Alone? A Look at *Skoog v. County of Clackamas*

By Blair Schlechter, Esq.

A well-established principle of the law is that one cannot be punished for thoughts alone. In order for a person to be guilty of a crime, that person must have a guilty mind (*mens rea*) and commit a guilty act (*actus reus*). Therefore, the existence of a guilty mind alone is not sufficient to give rise to criminal liability. Although not widely discussed, this same principle also seems to apply to civil liability cases.

The 9th U.S. Circuit Court of Appeals' decision in *Skoog v. County of Clackamas*, 469 F.3d 1221 (9th Cir. 2006) challenges this principle of the law and holds that a police officer may be held liable for engaging in an otherwise legal act solely because the officer has an improper motive. This holding has the potential to significantly change the law as to what constitutes a proper basis for civil and criminal liability. Therefore, it is important for law enforcement and governmental agencies to consider, as the ruling could result in increased liability for such agencies.

In discussing the importance of the 9th Circuit's ruling in *Skoog*, it is important to understand the nature of claims made by individuals under the 1st and 4th Amendments. The 1st Amendment provides that "Congress shall make no law...abridging the freedom of speech." In support of this right, a citizen can pursue claims against government officials who retaliate against that citizen because of his or her protected speech. Under the 4th Amendment, an officer may not arrest a person or engage in a search unless such search or arrest is supported by probable cause. The existence of probable cause is an objective inquiry as to whether a reasonable officer would have found probable cause based on the facts and circumstances confronting him or her. Therefore, in contrast to the 1st Amendment, an officer's subjective motivations are irrelevant under the 4th Amendment.

The issue of concern for government agencies is whether a government official is liable under the 1st

Amendment because of an improper motive to deprive a person of his or her rights even if there is probable cause for the official's action under the 4th Amendment.

In *Skoog*, several police officers for Clackamas County in Oregon took part in a search of civilian Daniel Skoog's office and seized a digital camera he had used to film police officer Herbert Royster during a sting operation that Skoog happened to witness at a convenience store. Mr. Skoog had previously been arrested the year before for driving under the influence (D.U.I.), and began filming and recording police officers as part of his defense in a lawsuit he filed in relation to that incident.

After the incident at the convenience store, Officer Royster and another officer obtained a warrant to search Mr. Skoog's office in order to obtain the video and still camera that Mr. Skoog used to illegally record Officer Royster without his consent

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Blair Schlechter, Esq.

"The idea that an officer or other individual can be held liable for improper motives conflicts with the legal principle that a person cannot be held liable for thoughts alone."

MEDICARE REPORTING REQUIREMENTS UPDATE

Changes to Medicare

By Mai-Anh T. Nako, Esq.

Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA) imposes new reporting requirements upon all entities that pay settlements or judgments to any personal injury plaintiff who is a Medicare beneficiary. (42 U.S.C. § 1395y(b)(7)& (b)(8).) Section 111 requires that any entity serving as an insurer, including self-insurer, or third party administrator for a group health plan referred to as a "Responsible Reporting Entity" (RRE), maintain specific data related to a Medicare beneficiary plaintiff, including the patient name, social security number, gender, date of birth, litigation information and injury information.

Importantly, once a claim is resolved through a settlement, judgment, award, or other payment, regardless of whether or not there is a determination or admission of liability, a RRE must report this information to the Centers

for Medicare & Medicaid Services (CMS). The reporting of this information is to enable CMS to make an appropriate determination concerning coordination of benefits, including any applicable recovery claim.

Although it was intended to go into effect on January 1, 2010, the dates for implementation of all requirements were delayed in an effort to allow CMS to set in place the infrastructure needed to handle all reporting. Reporting was then set to begin on January 1, 2011, and applied to personal injury settlements or payments made to a Medicare beneficiary on or after October 1, 2010.

However, on November 9, 2010, CMS issued an Alert bulletin revising the implementation timeline for reporting settlements, judgments, awards or other payments. According to the Alert, "the required submission of liability insurance (including self-insurance) claim reports has been changed from the first calendar quarter

of 2011 to the first calendar quarter of 2012 for all liability insurance (including self-insurance) amounts" with no ongoing responsibility for medicals. Accordingly, now only settlements not involving ongoing payment for medical care that occur on or after October 1, 2011 have to be reported. For any settlements that require ongoing medical payments, the reporting deadline has not changed.

Failure to comply with the requirements of Section 111 can result in a civil money penalty of \$1,000 for each day of non-compliance for each individual for which the required information should have been submitted. (42 U.S.C. § 1395y(b)(8)(E)(i).) Given the severe penalties for noncompliance, early written discovery to obtain verified information regarding the Medicare status of a plaintiff is still highly recommended to ensure full compliance with the reporting requirements under Section 111.

*Please be advised that the law in this area changes frequently.



Mai-Anh T. Nako, Esq.

"Failure to comply with the requirements of Section 111 can result in a civil money penalty of \$1,000 for each day of non-compliance for each individual"

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If you have any questions regarding legal matters, please contact Thomas C. Hurrell at thurrell@hurrellcantrall.com.

For newsletter topics or suggestions, please contact Jennifer A. Grady at jgrady@hurrellcantrall.com.



From left to right: Blair Schlechter, Jesus J. Torres, Mai-Anh T. Nako, Joseph P. Johnson, Lisa Martinelli, Rittu Kumar, Jill A. Wood, Maria Z. Markova, Jamie L. Webb-Akasaka, Thomas C. Hurrell, Jennifer A. Grady, Anthony L. Perez, Lisa An, Erica Bianco, Mariam Kaloustian and Charles Phan.

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during the sting operation. After the officers searched Mr. Skoog's officer, Mr. Skoog later amended the complaint in his prior D.U.I. lawsuit against the county and another officer to include claims that Officer Royster and his colleagues illegally searched and seized his recording equipment in violation of the 4th Amendment, and that Officer Royster obtained and executed the search warrant to retaliate against him for filing a previous lawsuit against Clackamas County in violation of his 1st Amendment rights. In response, Officer Royster filed a motion for summary judgment, claiming he was entitled to qualified immunity on plaintiff's claims.

On appeal, the 9th Circuit found that Mr. Skoog failed to establish that his 4th Amendment rights were violated because Officer Royster had probable cause to search Mr. Skoog's office for copies of the unauthorized recordings of police officers. The court next considered whether Mr. Skoog could still pro-

ceed on his 1st Amendment claim that Officer Royster conducted the search in retaliation for Mr. Skoog's prior lawsuit against the county and the police officer who arrested him for a DUI. The 9th Circuit concluded that even though the search and seizure of Mr. Skoog's digital camera was in fact lawful, Mr. Skoog could still proceed with a 1st Amendment retaliation claim. The court reasoned that difficult questions about the relationship between an officer's motive and action did not exist in this case, however, and therefore there was no rationale to require the absence of probable cause. The court ultimately found that Officer Royster was entitled to qualified immunity because Mr. Skoog's 1st Amendment right to be free of police action for which retaliation is a "but-for" cause—even if probable cause exists for that action—was not clearly established at the time of the search. The court admitted

that this right to be free from retaliation regardless of probable cause would be further clarified in the future by the 9th Circuit, but that it did not exist at the time of the search of Mr. Skoog's office.

The rule announced in *Skoog* has the potential to result in a significant amount of "thought punishment." In 1st Amendment retaliation cases where an officer has probable cause to act, a court will now be forced to undertake the difficult and speculative task of determining an officer's mental state as the basis for liability. Neither courts nor society are well equipped to deal with this task. Additionally, the idea that an officer or other individual can be held liable for improper motives conflicts with the legal principle that a person cannot be held liable for thoughts alone. It also conflicts with our understanding as a society of what amounts to a "bad act." No one in society expects to be punished

solely for having "bad thoughts." The ruling in *Skoog* could overturn our understanding of when someone is guilty of a crime or liable for damages.

In the event that a government agency finds itself the subject of a similar First Amendment claim, there are good grounds for the agency to seek to reverse the 9th Circuit Court of Appeals' decision in *Skoog* so that future courts will require that an individual plaintiff must establish the absence of probable cause for the actions of a government official in order to pursue a 1st Amendment claim against the official. In particular, reversing this ruling would allow government officials to perform their duties without fear that their subjective thoughts will make them liable for damages in a court of law. Additionally, a reversal would likely reduce the liability of government agencies. ■

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