PROTECT EVERYONE'S CONSTITUTIONAL RIGHTS ACT

FREQUENTLY ASKED QUESTIONS

WHY DO VICTIMS OF GOVERNMENT MISCONDUCT NEED PECRA? WHAT NEW CLAIMS WOULD PECRA ALLOW THEM TO BRING?

The ability to bring claims against state and local governments varies from state to state. However, where states permit individuals to sue governments in state court for monetary damages, liability is limited to cases involving negligence. So, if the sheriff accidentally dings your car, you have a remedy. But if he violates your constitutional rights, you are out of luck.

It is no easier to obtain relief in federal court. That's because the federal remedy for constitutional violations committed by state actors–42 U.S.C. § 1983 ("Section 1983")–requires overcoming the judge-made doctrine of qualified immunity. This means a victim must show that the violated right was "clearly established," which requires finding an *identical* case from the same jurisdiction in which an appellate court held that a violation occurred. In practice, this is nearly impossible.[1]

PECRA simplifies the process of holding the government accountable for the actions of its employees by using a legal concept that is familiar in the private sector called respondeat superior (sometimes referred to as vicarious liability). When a pizza delivery driver knocks over your mailbox, you do not sue the delivery driver–you sue the pizza restaurant. And courts hold the restaurant responsible, regardless of whether the driver's error was caused by company policy. That is because the doctrine of respondeat superior says that an employer is responsible for the actions of its employees while they are working within the scope of their employment. PECRA says that governments should be responsible for their employees in the same way.

DOESN'T CURRENT FEDERAL LAW ALLOW VICTIMS TO SUE LOCAL AND STATE GOVERNMENTS?

Section 1983 permits victims of government misconduct to bypass qualified immunity when suing cities and municipalities directly, but it requires the victim to prove that the violation occurred because of a governmental custom or policy. Sometimes called *Monell* liability,[2] it is particularly challenging to establish because proving that an individual constitutional violation resulted from a government-wide policy rather than a few "bad apples" within the department is extremely difficult, leaving many victims without a remedy unless they can sue the individual officer and defeat qualified immunity.

WON'T PECRA OPEN THE FLOODGATES FOR ALL KINDS OF MINOR, NEGLIGENT CONSTITUTIONAL VIOLATIONS?

No. As a historical matter, qualified immunity is a recent invention by the United States Supreme Court. In its current form, it dates only to 1982. For the century or two prior to its invention, counties, towns, and states operated without qualified immunity and without strict liability for negligent government conduct.

This is because mere negligence is not sufficient to give rise to a constitutional violation.[3] In terms of traditional torts, constitutional violations are more like intentional torts such as assault, battery, and trespass rather than negligence. Indeed, during much of early American history, suits seeking to vindicate constitutional rights were brought as intentional tort claims.[4]

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WILL WE SEE MULTIMILLION DOLLAR CLASS ACTION LAWSUITS FOR CIVIL RIGHTS VIOLATIONS UNDER PECRA?

No. The distinction between intentional torts and negligence torts is the same reason that a cause of action under PECRA cannot give rise to a class action lawsuit. Class action lawsuits exist to facilitate large numbers of claims with overlapping factual or legal questions. Negligence claims, such as product-liability claims, are well suited for class action litigation because all the class members share the same underlying legal question: was the product defective?

Intentional torts and constitutional torts, by contrast, involve highly specific and individualized questions of law and fact. Whether an officer's warrantless search of a suspect violated his Fourth Amendment rights, for example, turns on an array of facts that are extremely specific to that individual suspect and that individual search. Consequently, it is not possible to "package" these sorts of claims as part of a broader class action.

WHY ISN'T THERE AN EXCEPTION FOR OFFICERS WHO ACTED IN "GOOD FAITH" OR WHO BELIEVED THEY WERE ACTING REASONABLY? WHY SHOULD THOSE OFFICERS BE PUNISHED?

First, officers who behave reasonably would not be punished, even if qualified immunity did not exist. Those acting in good faith and reasonably have built-in protections through requirements imposed on plaintiffs to establish certain elements to prove constitutional violations. Take the Fourth Amendment, for example, which prohibits "unreasonable searches and seizures." As the plain text indicates, only unreasonable conduct violates the Fourth Amendment, and the Supreme Court has previously held in a case called *Graham v. Connor*[5] that the test for reasonableness takes into account the split-second decisions that officials must often take. In other words, governments do not need qualified immunity to defend against objectively *reasonable* conduct. The Constitution already does that.

To layer an additional defense of reasonableness on top of that substantive constitutional test would allow an officer to argue, "Yes, I acted unreasonably, but I reasonably believed I could violate the Constitution." Reasonableness is always a defense to constitutional claims based on unreasonable searches, seizures, or uses of force.

DOES PECRA HOLD THE GOVERNMENT EMPLOYEE FINANCIALLY LIABLE FOR HIS CONSTITUTIONAL VIOLATIONS?

No. PECRA does not require individual officers to pay damages for violations of constitutional rights. PECRA holds the *government* responsible for the actions of its *employees*–just as the law does private employers–because the government decided to hire and train them. Individual employees are held financially harmless. Although PECRA permits governments to fire the employees who commit constitutional violations, it only does so (1) after a court has determined that a constitutional violation did, in fact, occur, and (2) at the complete discretion of the government employer.

WHY DOES PECRA REQUIRE GOVERNMENTS TO PAY A PLAINTIFF'S ATTORNEY FEES? WON'T THIS ENCOURAGE FRIVOLOUS LAWSUITS?

The attorney fees provision is important both because (1) civil rights cases are challenging to litigate, and (2) we should ensure that people are able to vindicate their constitutional rights, even if they cannot afford to hire a lawyer.

That provision will not encourage frivolous or meritless lawsuits. It is far more difficult for a plaintiff to pursue a meritless case than a defendant. The plaintiff must hope to find a lawyer who would work on a case, without ultimate compensation. This is not easy to do. And the courts have many tools to deal with frivolous cases, which is why there are very few. A lawyer can be sanctioned in terms of her license, and both clients and lawyers can be ordered to pay costs of the other side. In other words, qualified immunity is not needed for governments to defend themselves against frivolous lawsuits. There is already a slew of other protections built into our legal system that prevent frivolous lawsuits against everyone, not just the government.

WOULD PECRA GIVE THE GOVERNMENT THE RIGHT TO COLLECT ATTORNEY FEES OR DAMAGES FROM THE BAD-ACTING EMPLOYEE WHO VIOLATED A PERSON'S CONSTITUTIONAL RIGHTS?

No, it would not. PECRA is silent on the issue of whether a government employer can collect from an employee, and a government employer's ability to do so would depend on specific employment terms or contracts between the government and its employee. Combined with the language in PECRA that expressly holds government employees financially harmless, it is highly unlikely that a state court would interpret the statute to permit a government to collect anything from the bad-acting employee.

This is consistent with how other states allow government employers to collect damage judgments from bad-acting employees. In other words, where the government can go after the employee, it is usually spelled out explicitly in the statute. One consideration to keep in mind is when you want that right to collect against the employee to kick in. If it is in every case, it starts to look like individual officers are still on the hook, with governments acting as the go-between. But if it is only in particularly egregious cases, we have to wrestle with line-drawing problems (e.g., Only where the officer exhibits bad faith? Only where the right was "clearly established?"). It can get messy quickly.

HOW DOES PECRA HOLD GOVERNMENT EMPLOYEES ACCOUNTABLE?

The same way private employees hold their employees accountable. PECRA permits the government to *fire* the bad actor. So, if nothing else, a government will not be left on the hook in perpetuity for a bad actor who continually violates constitutional rights. And governments could mitigate liability exposure on the front end by establishing more rigorous hiring practices, better training, etc. Moreover, by leaving the government to pay out claims, it will be encouraged to ensure that it hires, fires, and trains with the same incentives faced by all private employers.

ENDNOTES

[1] For example, in *Sampson v. County of Los Angeles*, 974 F.3d 1012 (9th Cir. 2020), the court applied qualified immunity in a case involving a minor who was sexually harassed by the social worker assigned to her case. Although the court recognized that the right "to be free from sexual harassment by public officials *in the workplace and school contexts* is clearly established by our prior case law," id. at 1024 (emphasis added), it nonetheless denied relief because the Ninth Circuit had never previously recognized a constitutional violation for "*private individuals* who suffer sexual harassment *at the hands of public officials providing them with social services*," id. (emphasis added).

[2] *See Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978).

[3] *See, e.g., Daniels v. Williams*, 474 U.S. 327 (1986) (holding that the due process clause is not implicated by a state official's negligent act causing unintended loss of or injury to life, liberty, or property).

[4] Under this procedural posture, government defendants would raise the alleged constitutionality of their conduct as a defense. The passage of the Ku Klux Klan Act of 1871 (today known as Section 1983) together with subsequent developments in the law of federal jurisdiction, enabled plaintiffs to allege claims directly under the Constitution. This led courts to begin thinking of the constitutional violation itself as giving rise to an independent cause of action.

[5] 490 U.S. 386 (1989).

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