



## FIFTH CIRCUIT EXPLAINS CONSTITUTIONAL REQUIREMENTS FOR WRONGFUL TERMINATION CASE

July 2018

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On February 1, 2018, the Fifth Circuit Court of Appeals decided *Ristow v. Hansen et al.*<sup>i</sup>, in which the court discussed the constitutional requirements for a plaintiff to establish a wrongful termination case. The relevant facts of *Ristow*, taken directly from the case, are as follows:

Ristow observed the driver of a car commit a traffic violation and stopped the vehicle. During the stop, Ristow asked the two occupants if there were any narcotics in the car. When they did not answer the question, Ristow asked for consent to search the vehicle. The owner of the vehicle consented, and Ristow searched the vehicle. He discovered a backpack and cigarette box both containing methamphetamine, then arrested the driver and passenger for possession of methamphetamine.

Approximately one week later, Chief Hansen told Assistant Chief Bane and Lieutenant Casas to inform Ristow that the September 14, 2015 search and subsequent arrests were illegal, and that—unless Ristow resigned immediately—the district attorney was prepared to file criminal charges against him. Ristow claims that the officers lied in making these threats, as the district attorney had no knowledge of the subject stop and search, and had no intention of filing charges against him. After hearing Bane's and Casas's threats, Ristow resigned."<sup>ii</sup>

Ristow filed suit against Hansen, Bane, and Casas in federal court and alleged that the threats that caused him to resign amounted to “a deprivation of his rights under 42 U.S.C. § 1983. In the complaint, he made several procedural errors. The defendant’s filed motion to dismiss, and Ristow amended his complaint. He then alleged that the officers violated his Fourth, Fifth, and Fourteenth Amendment rights when they threatened him with arrest and deprived him of the profession of his choice. Ultimately, the district court granted the officer’s motions for qualified immunity and the city’s motion for summary judgment. Ristow appealed the dismissal of his case to the Fifth Circuit Court of Appeals.

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On appeal, Ristow first claimed that the officers violated his Fourth Amendment rights when they threatened him with “false arrest and prosecution.” The court of appeals noted

**A 'seizure' triggering the Fourth Amendment's protections occurs only when government actors have, 'by means of physical force or show of authority, in some way restrained the liberty of a citizen.** *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)). **When considering whether a seizure occurred, we ask "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.** *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).<sup>iii</sup> [emphasis added]

Thus, in order for Ristow to have been “seized” within the meaning of the Fourth Amendment, he must allege facts that show he was physically seized or subjected to an environment where a reasonable person would have believed he was not free to leave. The court observed that Ristow did not allege any specific facts that meet the stated criteria. As such, the court of appeals affirmed the district court’s grant of qualified immunity for the officers because Ristow failed to establish a constitutional violation.

Second, Ristow claimed that the officers violated his Fifth Amendment right to Due Process. However, the court noted

**The Fifth Amendment applies only to violations of constitutional rights by the United States or a federal actor.** *Jones v. City of Jackson*, 203 F.3d 875, 880 (5th Cir. 2000).<sup>iv</sup> [emphasis added]

Ristow did not allege that the defendants were federal actors; rather, he conceded that they were city employees. As such, the court of appeals affirmed the district court’s grant of qualified immunity for the officers on this claim.

Third, Ristow claimed that the officers violated his Due Process rights under the Fourteenth Amendment by depriving him of his right to pursue his chosen profession and by failing to comply with Texas law by forcing him to resign before conducting an investigation and providing him with notice of his alleged misconduct. The court of appeals noted that there are two types of Due Process under the Fourteenth Amendment. The first is procedural due process, where a person is guaranteed certain protections when the government seeks to deprive a person of protected liberty or property interests. The second type is substantive due process, which protects a person from “conduct that shocks the conscience.” Ristow alleged violations of both his procedural and substantive due process rights.

The court first examined Ristow’s procedural due process claim in which he alleged that the defendants failed to comply with the Texas law by forcing him to resign prior to a full investigation and a signed complaint stating the allegations against him.

In order to properly state a claim for procedural due process, the court stated that Ristow must show

**(1) [he] has a property interest in [his] employment sufficient to entitle [him] to due process protection, and (2) [he] was terminated without receiving the due process protections to which [he] was entitled.** State law controls the analysis of whether [a

plaintiff] has a property interest in his employment sufficient to entitle him to due process protection. **An employee has a property interest in his employment only when a legitimate right to continued employment exists.**<sup>v</sup> [emphasis added]

The court then noted that, in Texas, "employment is terminable at will absent a contract to the contrary."<sup>vi</sup> Here, Ristow failed to provide any evidence or facts to show that he had an employment contract or any other facts to show that his employment was not at will. As such, the court of appeals affirmed the grant of the motion to dismiss for the defendants.

The court then examined Ristow's substantive due process claim in which he alleged that the defendants prevented him from getting hired by another law enforcement agency by stating that he was unemployable as peace officer. The court stated

...[A]llegations of damage to one's reputation or the impairment of future employment prospects fail to state a claim of denial of a constitutional right." **"However, damage to an individual's reputation as a result of defamatory statements made by a state actor, accompanied by an infringement of some other interest, is actionable under § 1983."** This is known as the "stigma-plus-infringement" test. To recover under this theory, Ristow had to allege that:

**(1) he was discharged; (2) stigmatizing charges were made against him in connection with the discharge; (3) the charges were false; (4) he was not provided notice or an opportunity to be heard prior to the discharge; (5) the charges were made public; (6) he requested a hearing to clear his name; and (7) the employer denied [his] request.**<sup>vii</sup> [emphasis added]

Here, Ristow failed to allege facts that he was not provided notice and not provided an opportunity to be heard. He also does not allege that stigma was made public or that he requested a name clearing hearing, which was denied. As such, he failed to state a proper claim and the court affirmed the grant of the motion to dismiss.

Lastly, the court of appeals examined Ristow's *Monell* claim, which is a claim against the City. Ristow alleged that the officers were the "final policy makers" and that they established a policy to use their positions to threaten illegal arrests and prosecution in order to deny him of his constitutional rights.

The court of appeals stated

[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, **a plaintiff must demonstrate that the municipality acted "pursuant to official municipal policy" when it violated a federally protected right. A plaintiff must identify: '(1) an official policy (or custom), of which (2) a policymaker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose "moving force" is that policy or custom. We have stated time and again that [w]ithout an underlying constitutional violation, an essential element of municipal liability is missing.**<sup>viii</sup> [emphasis added]

The court of appeals observed that Ristow failed to allege an underlying constitutional violation and failed to show a policy that caused an underlying constitutional violation. As such, the court of appeals affirmed the grant of the motion to dismiss this claim.

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<sup>i</sup> No. 17-50121 (5<sup>th</sup> Cir. Decided February 1, 2018)

<sup>ii</sup> Id. at 2-3

<sup>iii</sup> Id. at 6

<sup>iv</sup> Id. at 7

<sup>v</sup> Id. at 8-9 (internal citations omitted)

<sup>vi</sup> Id. at 9

<sup>vii</sup> Id. at 10 (internal citations omitted)

<sup>viii</sup> Id. at 11 (internal citations omitted)

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