



LEGAL DEFENSE TRUST TRAINING BULLETIN

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OFFICERS VICTIMIZED BY FALSE COMPLAINTS ARE STRIPPED OF REMEDIES

Civil Code §47.5 has been around for many years now, and provides that peace officers may bring an action for damages for defamation against a person who has filed a false complaint of misconduct with the officer's employer, motivated by spite, hatred or ill-will.

Over the years, we utilized this section as a means of vindicating a defamed officer against complainants who made false complaints with the requisite knowledge of their falsity, or the lack of reasonable grounds for believing them to be true. Damages were difficult to show in most cases, since there are no obvious adverse losses attached to a personnel complaint that is determined to be unfounded. Usually the damages recoverable tended to be more for emotional distress, litigated under a companion cause of action for intentional infliction of emotional distress, rather than for reputational injury under a defamation cause of action. A number of officers were successful bringing suit under §47.5 in small claims court - - no lawyers required or allowed.

More recently, a Long Beach officer who was the subject of an arguably false complaint threatened, through his attorney, to bring a §47.5 lawsuit against a person, if he did not withdraw the complaint. That resulted in an ACLU - backed lawsuit against the officer under 42 *USC* §1983 (Civil Rights Acts) on the basis that §47.5 constituted an unconstitutional infringement of First Amendment rights.

One of the requirements for a § 1983 lawsuit is that the defendant official must have been acting under color of state law. The argument advanced was that a peace officer's resort to a state statute such as §47.5 to redress alleged injury inflicted by an official personnel complaint filed with his agency would constitute action "under color of law."

The federal District Judge who heard the case in Santa Ana, Gary L. Taylor, agreed that §47.5 was unconstitutional. We quickly put out a training bulletin on this case, discouraging peace officers from bringing any §47.5 lawsuits, because it could subject them to a similar lawsuit with damages and attorney's fees awarded against them.¹ Then, the officer in that case appealed to the Ninth Circuit Court of Appeals. The three-judge panel reversed Judge Taylor, finding that the officer's resort to a threatened §47.5 suit (or the filing of such a suit) would not be action "under color of law". Hence, the officer could not be sued under 42 *USC* § 1983. But the appellate court did not decide the bigger question, so to speak: Is §47.5 an unconstitutional infringement of First Amendment rights because the threat of such a lawsuit impermissibly "chills" a person's constitutional right to complain about

¹ See: "Federal Court Rules Cops' Right to Sue Unconstitutional", Vol. II, Issue No. 6, June 1999

official misconduct?² So, it's an open question, but there is another recent development that makes the answer a little more apparent - - at least how an appellate court might rule.

Penal Code §148.6 makes it a misdemeanor crime to knowingly make a false complaint with an officer's employing agency. It requires that persons making a complaint be warned in a specific message in boldface print that false complaints are crimes.

Two people, Stanistreet and Atkinson, made false complaints about an Oxnard police officer accusing him of lewd conduct at a Police Activities League gathering. They were prosecuted and convicted in municipal court. On appeal to the appellate department, the convictions were affirmed by a three-judge panel, 2 to 1. The Court of Appeal, Second Appellate District, Division Six, ordered the case transferred to it for decision.

The Court declared *Penal Code* §148.6 unconstitutional, for, as the Court said in the first paragraph of the opinion:

...It is not a crime to knowingly make such an allegation against a firefighter, a paramedic, a teacher, an elected official, or anyone else. By protecting only peace officers, section 148.6 selectively prohibits expression because of its content. It therefore violates the First Amendment to the United States Constitution. (*People v. Stanistreet*, ___Cal. App. 4th___, 2d Civ. No. B143501, 2001 DAR 11563.)

In other parts of the opinion, the Court explains that because §148.6 (like §47.5) singles out a particular class of public employees (police

officers) who are "victims" of the crime of making a false complaint of misconduct, the statute unconstitutionally discriminates against a particular group of people - - those who complain about *police* misconduct, rather than any other public officials' misconduct. Thus, the statute targets only a particular group of persons who might complain about official misconduct: those who complain about the *police*. Hence, those who do so, are targeted in the statute because of the "content" of their complaint.

The opinion notes that law enforcement officers retain substantial power and authority to enforce the laws of the State:

With that power goes the inconvenience of being subjected to the "slings and arrows" of some members of the public. (*Duran v. City of Douglas, Az.*, 904 F. 2d 1372, 1378 (9th Cir. 1990).)

Thus, *Penal Code* §148.6 is declared unconstitutional. *Civil Code* §47.5 appears to be in the same category. Without §47.5, even demonstrably false personnel complaints are privileged, meaning the persons making them are immune from liability. *Imig v. Ferrar* (1977) 70 Cal. App. 3d 48, 56.

This being the case, neither a criminal prosecution nor a lawsuit for defamation or related torts should be commenced, based upon a false personnel complaint.

Until something further develops, police agencies should *refrain* from permitting any adverse career consequences to flow from a personnel complaint until the truth of it has been established, because as it stands now, the aggrieved officer has no remedy under the law for a false personnel complaint.

² *Gritchen v. Collier* (C.D. Cal. 1999) 73 F. Supp. 2d 1148, 1152, reversed on other grounds by *Gritchen v. Collier*, 254 F. 3d 807 (9th Cir. 2001)