



# *DPS Legal Review*

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## **FIRST AMENDMENT CLAIM FACTUALLY UNSUPPORTED**

The Plaintiff, a former Georgia College & State University police officer, brought a civil rights action alleging that he was fired because of a complaint he made regarding a co-worker. The Plaintiff had complained to management that his co-worker was accessing and viewing pornography on his workplace computer, and the Plaintiff asked that his complaint remain anonymous. Based upon the Plaintiff's complaint, an IT professional evaluated the computer to determine whether it contained pornography. It did. The Plaintiff's co-worker was told that he could either retire or be fired. He retired.

Thereafter, a detective at the University's Department of Public Safety noticed that his computer was running slowly. He asked the same IT professional for assistance. An investigation suggested that the Plaintiff had engaged in unauthorized access of the detective's computer. The IT professional informed the Plaintiff's supervisor of what appeared to be an unauthorized use. However, when confronted, the Plaintiff denied engaging in unauthorized access. The denial prompted further investigation. After further investigation, the supervisor concluded that the Plaintiff had inappropriately accessed the detective's computer. He confronted the Plaintiff with additional evidence, asked him to turn in his badge and gun, and told him that he was terminated. Later, after discussions with the Plaintiff, the University's Chief of Police rescinded the Plaintiff's termination, and, instead, placed him on suspension with pay.

Over the course of the next month, the Chief and the Plaintiff spoke several times, and, during one conversation, the Plaintiff revealed that he had reported in his co-worker's misconduct. Ultimately the Chief reinstated the Plaintiff, told him that the investigation into the unauthorized access of the detective's computer was closed, urged him to drop the

matter, and told him that he could begin to work again in a few days.

He was reinstated but still dissatisfied with the investigation. Accordingly, the Plaintiff went to the Human Resources Department and requested an internal investigation regarding the unauthorized access of the detective's computer. He also filed a complaint with the Milledgeville Police Department regarding the unauthorized access. Thereafter, the Plaintiff was terminated based, in part, upon: 1.) conduct constituting insubordination, 2.) unauthorized access of the investigator's computer, and 3.) reporting the status of an ongoing investigation. The Plaintiff's discharge letter reflected concerns about his integrity as well as his ability to work well with others. The Plaintiff sued claiming that he had been improperly terminated based upon his complaint that his co-worker's computer contained pornography.

**HOLDING:** For a public employee to establish a claim of First Amendment retaliation, he must show: (1) that the speech can be fairly characterized as relating to a matter of public concern; (2) that his interests as a citizen outweigh the interests of the State as an employer; and (3) that the speech played a substantial or motivating role in the government's decision to take an adverse employment action. The Plaintiff failed to put forth evidence that his speech played a substantial or even a motivating factor in his termination. The Defendants established that they would have taken the same actions even in the absence of the protected speech. Dixon v. Board of Regents, Slip Copy 2007 WL 3476926 (N.D. Ga.).

## **SEIZURE EXCEEDED PERMISSIBLE SCOPE**

A Gwinnett County police officer stopped the Defendant after he observed her speeding in a vehicle without a tag. He asked for her license. She began fumbling around to find it in her purse, admitted speeding, and appeared nervous. He allowed her to exit the vehicle to

look for her license in the back seat. While doing so, the officer observed her going through another purse and bag. He saw her quickly cup her hand and then slide her hand into the pocket of her pants and keep it there.

This action made the officer nervous due to safety concerns. He asked her what she had placed in her pocket. She replied that she had not placed anything there. She eventually moved her hand from her pocket, but she kept her finger in the coin pocket of her pants. She refused to remove it. The officer took her by her wrist and conducted a pat-down. He felt a bulge in her pocket that he could not readily identify. He removed a cigarette pack which contained a crystal flaky substance that tested positive for methamphetamine. The Defendant was arrested and searched. The search produced a glass pipe and a syringe. She moved to suppress the evidence.

**HOLDING:** Under certain limited circumstances, a law enforcement officer may, for his own protection and safety, conduct a pat-down search of a suspect to determine if the person is armed. The pat-down was justified. However, suppression of the evidence was necessary since the seizure of the wrapper from the Defendant's pocket exceeded the permissible scope of the pat-down search.

The State presented no testimony to establish that an inventory search would have been conducted. Likewise, there was nothing to show that the Defendant would have been present or whether the inventory search was conducted at the scene or subsequent to the vehicle being removed from the area. Thus, there was nothing to show the Defendant would have been immediately searched. Sudduth v. State, \_\_ S.E.2d \_\_, 2007 WL 4126466 (Ga. App.).

### **A RESIDENTIAL CONSTRUCTION SITE IS AN "OPEN FIELD"**

A Butts County sheriff's officer received a report from a witness who observed a pickup truck at a residential construction site. There had been several thefts from nearby construction sites. The witness provided a tag number which allowed the officer to identify the owner of the truck. The owner admitted being at the site, but he claimed he was taking pictures to get ideas for his own project in Henry County. The officer went to the truck owner's construction site which was fenced with the driveway blocked by a locked gate.

"No Trespassing" and "Beware of Dog" signs were posted at the entrance. The deputy climbed over the locked gate and entered the property which had an unfinished house that was framed but had no sheet rock or doors. No one appeared to be living there. He observed a white trailer and recalled that one had recently been stolen. He verified that it was the one that had been stolen. After contacting the Henry County Police Department for assistance, a search warrant was secured and executed. Various items of stolen property were seized, and the owner moved to suppress the evidence.

**HOLDING:** The Court has adopted a broad definition of the term "open field" expanding it to include any unoccupied or undeveloped area outside of the curtilage. The structure was not a dwelling under the Fourth Amendment nor did it have protected curtilage. The owner's efforts to maintain his privacy through fences and signs did not afford the property protection, and entry was authorized. Morse v. State, \_\_ S.E.2d \_\_, 2007 WL 3202426 (Ga. App.).

### **ALS REMINDERS**

⊗ If you need to have your ALS Hearing continued, **please file a Motion for Continuance as soon as possible**. A copy of the Motion **must be faxed** to the Court, and **a copy must be sent** to the Petitioner's attorney. If the Petitioner does not have an attorney, send a copy directly to the Petitioner. A Motion for Continuance form may be found in Public Folders. The certificate of service **must indicate** whether you served the Petitioner's attorney or the Petitioner.

⊗ The OSAH website ([www.osah.ga.gov](http://www.osah.ga.gov)) is an excellent place to verify your upcoming ALS hearings. To access this information, go to the website and click on "Court Calendar" and then select "My Court Date." Once there, select the court date, the Judge, and submit to view the entire court calendar for that date.

### **PROVERBIAL WISDOM WORKS**

"Success usually comes to those who are too busy to be looking for it." Henry David Thoreau

Published with the approval of Colonel Bill Hitchens. Legal Services: Melissa Rodgers, Director, Lee O'Brien and Jacqueline Bunn, Deputy Directors, and Dee Brophy, ALS Attorney. Send questions/comments to [jbunn@gsp.net](mailto:jbunn@gsp.net).