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THE CHANGING LANDSCAPE OF POLICE REFORM LEGISLATION

By: Megan A. McDonald

The death of George Floyd on May 25th, 2020 prompted a response from both lawmakers and the Supreme Court on police reform. Lawmakers responded on both the federal and state level with police reform bills calling for law enforcement oversight, bans on chokeholds, and increased crisis intervention and mental health training, to name a few. Meanwhile the Supreme Court responded by, in a sense, not responding.

The Supreme Court's Response

On June 15th, 2020, the Supreme Court denied nine petitions involving qualified immunity and ten petitions involving guns, thereby sending a clear message to lawmakers that the Court is willing to wait for lawmakers to respond to the issue before the Court does. Qualified immunity was established by the Supreme Court in 1982 and generally grants government officials performing discretionary functions immunity from civil suits unless the plaintiff shows the official violated "clearly established statutory or constitutional rights of which a reasonable person would have known." In a dissent from the Court's decision not to hear one of the qualified immunity cases it was considering in June, Justice Clarence Thomas reiterated his opposition to the doctrine by stating: "there likely is no basis for the objective inquiry into clearly established law that our modern cases proscribe." In further support of his argument, Justice Thomas went on to state "leading treatises from the second half of 19th century case law until the 1980's contain no support for this 'clearly established' test." Justice Sotomayor has also been known to criticize the doctrine, stating that qualified immunity "tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished." While the Supreme Court decided not to hear any cases addressing law enforcement liability immediately, Justice Thomas' dissenting opinion demonstrates the possibility for the court to take on such cases in the near future.

Federal Lawmaker's Response

In June 2020, the U.S. House passed H.R. 7120, the "Justice in Policing Act," which is a police reform bill that addressed a wide range of policies and issues regarding policing practices and law enforcement accountability. The bill included measures to increase accountability for law enforcement misconduct, to enhance transparency and data collection, and to eliminate discriminatory policing practices. The bill facilitated federal enforcement of constitutional violations by state and local law enforcement by lowering the criminal intent standard from willful to knowing or reckless. The bill also limited qualified immunity as a defense to liability in a private civil action against a law enforcement officer or state correctional officer and authorized the Department of Justice to issue subpoenas in investigations of police departments for a pattern or practice of discrimination. Lawmakers also called for the creation of a national registry (the National Police Misconduct Registry) to compile data on complaints and records of police misconduct. Additionally, the bill established a framework to prohibit racial profiling at the

Congratulations

Congratulations to JLO attorneys **Joseph Flynn** and **Pat Collins** who successfully obtained qualified and official immunity from the 8th Circuit Court of Appeals for two Roseville Police Officers and the City of Roseville in *Birkeland as Trustee for Birkeland v. Jorgensen,* 971 F.3d 787 (8th Cir. 2020).

The 8th Circuit Court of Appeals held the use of deadly force was justified, and the doctrines of qualified and official immunity applied, because the Officers were confronted in close proximity by an individual hiding in a closet with a knife who refused repeated orders to drop the knife, stabbed a police dog with the knife, and then turned toward the Officers with the knife.

federal, state, and local levels. To achieve this the bill created new requirements for law enforcement officers and agencies to report data on use-of-force incidents, to obtain training on implicit bias and racial profiling, and to wear body cameras. This very comprehensive bill passed by the U.S. House did not pass the Senate. However, some state legislatures have introduced and passed comprehensive reform packages, including Minnesota.

Minnesota Lawmaker's Response

During Minnesota's second special session, the Legislature passed a comprehensive reform package in response to the killing of George Floyd. The package was a compromise between House Democrats' and Senate Republicans' previous proposals and included more than two-dozen sections. Notably, the package included a ban on police using neck restraints and chokeholds – except as deadly force – and prohibited departments from offering controversial "warrior-style" training and the Police Officer Standards and Training Board (POST Board) from recognizing such training as a proper education course. The bill also included mandatory training for officers to learn best practices when dealing with people who have autism as well as called for increased mental health, crisis intervention, and cultural bias training. In addition, the bill provided new resources to help law enforcement deal with stress and trauma from the job.

Through this bill lawmakers also shifted the prosecution authority over officer-involved deaths to the attorney general who may, on their own, request another county attorney to appear for the state. Lawmakers also amended previous legislation to allow any action to recover damages for a death caused by a peace officer to be commenced at any time. In addition, lawmakers made their intent clear that "the use of deadly force by a peace officer in the line of duty is justified only when the officer reasonably believes, based on the totality of the circumstances, that such force is necessary," which is consistent with case law surrounding use of force, most commonly cited in *Graham v. Connor*, 490 U.S. 386 (1989).

The bill also established an independent unit of the Bureau of Criminal Apprehension to investigate officer involved shootings and allegations of officer sexual misconduct. In addition, the legislature voted to add two more citizen members to the 15-member POST board, which is made up mostly of law enforcement. The bill further called for the creation of a POST board database of public peace officer data, which would require a report to be published every year to the public. Lawmakers also ordered the POST board to write new model policies that require officers to intervene if they see improper use of force by their colleagues, as well as created a new citizen council to advise the board on police policy. The bill gives police departments until December 15th, 2020 to align their rules with the new regulations. Additionally, the bill provided incentives for officers to live within the communities they serve, relaxing the ban on residency requirements from 1999.

Lastly, the bill made changes to the arbitration system for police officers, making the process more accountable to the public through a panel of six appointed community members whose terms expire. Under the previous system, a union and an employer were given a roster of independent arbitrators and were allowed to eliminate the arbitrators they did not agree with on a grievance case. The new provision will randomly assign arbitrators to cases so that neither a union or an employer can veto who oversees a case. Additionally, the bill requires arbitrators to go through six hours of cultural competency, implicit bias, and racism training. However, these changes are only applicable to law enforcement and do not apply to other public employees.

Conclusion

To date, 32 states have introduced police reform packages, however not all are being passed. Most recently, California failed to pass a comprehensive police reform bill that would have made it possible to strip badges of officers convicted of certain crimes or hit with misconduct charges, including excessive force. According to the Policing Project researchers, of 341 pieces of state-level legislation, only 25 have officially been signed into law. Police reform legislation is still evolving and will likely continue to change as lawmakers start to respond to the cries for reform across the nation.

Minnesota Supreme Court Bars Medical Provider from Claiming Reimbursement following Award on Stipulation Due to Intervenor's Failure to File a Timely Intervention Claim

By: Joseph S. Koe

In *Scott Koehnen v. Flagship Marine Co.,* 947 N.W2d 448 (Minn. August 12, 2020), the Minnesota Supreme Court upheld a provision from a Stipulation for Settlement, which in effect barred a medical provider from filing a subsequent claim for payment due to the medical provider's failure to timely file a motion to intervene.

The employee, Scott Koehnen, received chiropractic treatment at Johnson Chiropractic Clinic. The bills incurred were unpaid as the employer and insurer (collectively, employer) had denied liability of the employee's alleged work-related back injury. The employee filed a claim petition seeking various workers' compensation benefits, including the payment of outstanding bills at Johnson Chiropractic Clinic. On the same day, a Notice to Potential Intervenors letter was sent to the chiropractor to inform him of his right to intervene under Minn. Stat. §176.361 (2018). Although, the chiropractor received timely and adequate notice, he chose not to intervene. No other attempts were made by either the employee or employer to resolve the chiropractor's interest in the matter.

The employee eventually reached a settlement agreement with the employer. The executed Stipulation for Settlement contained specific language extinguishing the interest of Johnson Chiropractic Clinic and prohibiting it from attempting to collect from the "Employee, Employer, Insurers, or any government program." A compensation judge approved the Stipulation for Settlement and issued an Award on Stipulation on April 23, 2018. The Office of Administrative Hearings (OAH) mailed a copy of the Award to the chiropractor on April 25, 2018. More than eight months later, the chiropractor filed a Petition for Payment of Medical Expenses with OAH pursuant to Minn. Stat. §§176. 271, 176.291 (2018)[1], and Minn. R. 1420.1850, subp. 3B (2019)[2].

Specifically, the Petition asserted that the employee and employer failed to comply with the criteria for a valid settlement in Minn. Stat. §176.521 (2018)[3]. It also asserted that the chiropractor was automatically entitled to full payment with statutory interest because he was "completely excluded from all settlement negotiations." Lastly, it asserted that the compensation judge lacked authority to extinguish the chiropractor's interest, and alternatively, any statute giving the compensation judge this authority is invalid and unenforceable.

In response, the employee and employer moved to dismiss the chiropractor's Petition. The compensation judge granted their motions, holding that the chiropractor's interest was properly extinguished under Minn. Stat. §176.361, subd. 2, and that the chiropractor lacked standing to assert an independent claim for payment in the absence of a pending claim asserted by the employee. The chiropractor appealed, and the Workers' Compensation Court of Appeals affirmed the compensation judge's dismissal.

The chiropractor then appealed to the Minnesota Supreme Court and the Supreme Court also affirmed.

First, the Minnesota Supreme Court found that the chiropractor's argument that a right to intervene also comes with a right to initiate a proceeding is "fundamentally" flawed. To reach this conclusion, the Court analyzed their past decisions involving insurers seeking reimbursement for benefits paid to employees in connection with their claimed work injuries. In these previous cases, the Court had consistently ruled that insurers can assert their right of reimbursement only within the context of an existing proceeding. Absent a compelling reason, the Court refused to overrule the longstanding precedent that "the right to intervene is not accompanied by the right to initiate a claim." To leave no room for ambiguity, the Court clarified that these past decisions apply to all potential intervenors as the Workers' Compensation Act does not distinguish between categories of potential intervenors.

Next, the Court analyzed the workers' compensation scheme as a whole and found that the legislature intended to omit any specific provisions by which the chiropractor can file a petition. The Court recognized that there are specific provisions in the Workers' Compensation Act that establish proper mechanisms for potential intervenors to not only receive prompt payments but also to protect their interests and pursue payment, even when an employee settles a claim. The Court especially found compelling the language in Minn. Stat. §176.135, subd. 7 (2018), in which the legislature referenced specific alternative remedies that may be available to healthcare providers,

but noticeably excluded any references to filing a petition. Similarly, in reviewing the plain language of Minn. R. 1420.1850, subp. 3, the Court further found that the procedural protections provided by Minn. R. 1420.1850, subp. 3B simply did not apply to the case as the chiropractor chose not to be an intervenor.

It is important to note that, although the ruling is favorable to both employers and employees, a potential intervenor may still be successful in challenging an award on stipulation if the potential intervenor does not receive timely and adequate notice of the right to intervene. As such, it is important to make sure that a Notice of Right to Intervene letter or form complies with Minn. R. 1415.1100.

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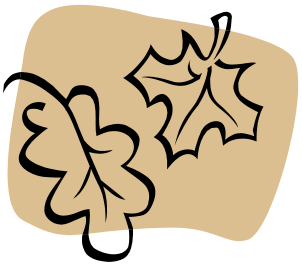
[1] These statutes address the initiation of a workers' compensation claim by petition.

[2] This rule addresses the remedies available to intervenors.

[3] Minn. Stat. § 176.521 provides that a settlement is valid where it has "been executed in writing and signed by the parties and intervenors in the matter."



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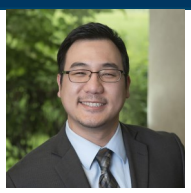

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About the Firm

Jardine, Logan & O'Brien, P.L.L.P., is a mid-sized civil litigation law firm that has handled some of the region's largest and most difficult disputes with outstanding results for clients. Litigation has always been our primary focus. With trial attorneys admitted in Minnesota, Wisconsin, North Dakota, South Dakota, and Iowa our firm has the ability and expertise to manage cases of any size or complexity. We are trial lawyers dedicated to finding litigation solutions for our clients. View our website at www.jlolaw.com to obtain additional information. Please call us to discuss a specific topic.

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