

The Law of Immunity + Alabama's New "Back the Blue" Law

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Agenda

- Overview of immunity doctrines
- Overview of existing immunities applicable to state, county, and municipal governments and their employees.
- Review of newly-enacted legislation, *i.e.* “**Back the Blue**” (**HB202**), which will affect all claims against law enforcement officers that occur on or after October 1, 2025.

What is “Immunity”?

- Black’s Law Dictionary defines “immunity” as “an exemption from a duty, liability, service of process, or possibility of prosecution.”
- There are different forms of immunity. Most apply exclusively to **civil** controversies:
 - Absolute (complete exemption from civil liability, usually afforded to officials performing particularly important functions such as judges)
 - Sovereign immunity (a government’s immunity from being sued in its own courts without its consent, a form of absolute immunity)
 - Qualified / discretionary (immunity from civil liability for a public official performing a discretionary function)

Sovereign Immunity

- Historically, all “sovereign” governments have immunity from being sued in their own courts.
 - “The King can do no wrong” (“*rex non potest peccare*”)
- However, the United States of America has waived most of its sovereign immunity through enactment of the Federal Tort Claims Act, which allows suits against the government under certain conditions.
- Sovereign immunity is considered “pre-constitutional,” i.e., inherent in the very concept of the sovereign.
- The Eleventh Amendment to the United States Constitution also recognizes that each of the states has a form of sovereign immunity, protecting the states from being sued in federal court by citizens of a different state or citizens of a foreign state.
- Because of our federal constitutional structure, no state enjoys sovereign immunity as to certain limited types of federal laws that were enacted specifically to override state sovereign immunity.

Qualified Immunity

- Judge-made doctrine (sometimes called “common law”) designed to protect federal, state, and local employees who are sued for allegedly violating **federal** law.
- The U.S. Supreme Court developed it to strike a balance: on one hand, holding public officials accountable when they abuse power, and on the other, protecting them from constant lawsuits when they are just trying to do their jobs in good faith.
- The basic rubric for applying qualified immunity is a three-part test:
 - Was the government official generally acting pursuant to their official duties, *i.e.*, in a “discretionary capacity”?
 - Did the official violate someone’s constitutional or statutory rights?
 - Was the law pre-existing the employee’s conduct so “clearly established” that it would have been clear to any reasonable government official in the same position that the conduct they engaged in was unlawful?

Qualified Immunity (cont.)

- Again, qualified immunity is a doctrine applied by the federal courts.
- Only applied for alleged violations of **federal** law.
- **Any** government employee (federal, state, local) is eligible for protection for any job-related activity.
- The courts do not apply qualified immunity for alleged violations of **state law**.

Overview of Pertinent State Law Immunities



“State” Immunity

Art. I, § 14, Alabama Constitution of 1901 (now 2022):

“The State of Alabama shall never be made a defendant in any court of law or equity.”

- The State’s immunity is not subject to waiver and is a “jurisdictional bar – it strips courts of all power to adjudicate claims against the State, even if the State has not raised immunity as a defense.” Ex parte Pinkard, 33 So. 3d 192, 198-99 (Ala. 2022).

Art. V, § 112, Alabama Constitution of 1901 (now 2022):

“The executive department shall consist of a governor, lieutenant governor, attorney general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, and a sheriff for each county.”

- The state’s sovereign immunity also extends to all state officials and officers. Ex parte Troy University, 961 So. 2d 105, 108 (Ala. 2006).

Sovereign Immunity vs. Qualified Immunity

- Why is it called “qualified” immunity? Because there are qualifications (read: limitations, exceptions).
- Sovereign immunity, on the other hand, is a form of “absolute” immunity. There are no exceptions.
- Why does the State get absolute immunity and employees only get a form of qualified immunity?
 - Remember the origin of the doctrine.
 - But, as you will see, there are a few occasions in which employees have something close to absolute immunity too.
 - And in the American tradition, there are situations in which entities with sovereign immunity have waived some of that immunity. (This happened in Great Britain, too).

State Immunity Extended to Sheriffs and their Deputies

- Because a county sheriff is an **executive officer** of the State of Alabama, he is entitled to “unwaivable, absolute immunity from suit in any court.” Ex parte Burnell, 90 So. 2d 708, 710 (Ala. 2012).
- Absolute immunity extends to actions against a sheriff in his individual capacity for acts performed in the line and scope of his duty. Suttles v. Roy, 75 So. 3d 90, 94 (Ala. 2010).
- State sheriff’s immunity extends to a **deputy sheriff** because he operates as the sheriff’s “alter ego”. Gaines v. Smith, 379 So.3d 411, 418 (Ala. 2022); see also Wright v. Bailey, 611 So. 2d 300, 303 (Ala. 1992) (because the sheriff was immune for alleged failure to arrest the deputies were immune as well).
- “Because a sheriff is a state officer and thus immune from suit,” any statute or decree making “a sheriff civilly liable for acts of his jailer” would be unconstitutional. Parker v. Amerson, 519 So. 2d 442, 446 (Ala. 1987).

State Employee Immunity

- While state sovereign immunity protects the State itself from civil liability, and also prevents suits against State officers in their official capacities as such, there are ways to sue State employees in their individual (personal) capacities.
- Ala. Code 36-1-12 applies some of the constitutional immunity protections for the State of Alabama to state employees, but with caveats and limitations.
- Generally, state employees are entitled to immunity, but not **absolute** immunity. Their immunity depends on a showing that they were engaged in certain types of **discretionary functions**.

State Employee Immunity (cont.)

- Those discretionary functions include:
 - Formulating plans, policies, or designs
 - Exercising judgment in administration of a department or agency including things like making administrative adjudications, allocating resources, negotiating contracts, hiring/firing/supervising employees
 - Discharging statutory duties as the statute directs
 - Exercising judgment in the enforcing of criminal laws, educating students, or overseeing individuals of “unsound mind”

When is State Employee Immunity Lost?

- By statute, immunity is lost where the Constitution requires otherwise, or
- Where the employee acts willfully, maliciously, fraudulently, in bad faith, beyond their authority, or under a mistaken interpretation of the law.
- **Where did we get these exceptions?**
 - An Alabama Supreme Court case called Cranman, which we will discuss momentarily.

“Municipal” Immunity

- Ala. Code 11-47-190
- Enacted in its current form in 1994 (with roots back many years prior).
- Not widely recognized as an “immunity” per se until Ex parte City of Muscle Shoals, 257 So. 3d 850, 855 (Ala. 2018).
- In fact, in its early years, 11-47-190 was recognized as the *abolition* of another, purer form of “municipal immunity,” which was more akin to **sovereign immunity**.
- Now, the understanding of 11-47-190 is entrenched in the case law.
 - Ex parte City of Muscle Shoals, No. SC-2024-0524, 2025 WL 939487, at *8 (Ala. Mar. 28, 2025)
 - Ex parte City of Huntsville, 399 So. 3d 1020, 1031 (Ala. 2024)
 - Ex parte City of Tuskegee, 295 So. 3d 625, 627 (Ala. 2019)

“Municipal” Immunity (cont.)

In Ex parte City of Huntsville, 399 So. 3d 1020, 1026 (Ala. 2024), we recently stated:

“This Court explained in Ex parte City of Muscle Shoals[, 257 So. 3d 850 (Ala. 2018),] that this statute has long been held to limit municipal liability to two situations. 257 So. 3d at 855. **First**, municipalities may be liable for injuries caused by the wrongful conduct of their agents performed in the line of duty. **Second**, municipalities may be liable for injuries caused by their failure, upon notice, to remedy defects in public streets or buildings. Id.”

Therefore, under § 11-47-190, the City may not be liable for the plaintiffs’ injuries unless their claims fall within one of these two situations.

Ex parte City of Muscle Shoals, No. SC-2024-0524, 2025 WL 939487, at *8 (Ala. Mar. 28, 2025)

County Immunity

- **Nope, sorry!**

- “There is no county counterpart statute to § 11-47-190 which limits the liability of counties to negligence-based claims. Accordingly, unlike municipalities, Alabama counties may have liability for intentional, as well as negligence based, claims of county employees.”

George W. Royer, Jr., **State Law Local Governmental Liability A Primer**, 61 Ala. Law. 256, 257 (2000)

- However, County **AND** municipal employees do benefit from another form of immunity, called “discretionary function” immunity.

Other Limitations on County and Municipal Liability

- While not forms of immunity *per se*, both counties and municipalities benefit from statutes that limit the dollar amount of their tort liability to generally \$100,000 per claimant, or \$300,000 per occurrence.
 - However, there are exceptions, such as claims for breach of contract and other specific situations in which the courts hold that these limits do not apply.
 - Furthermore, our Supreme Court has held that the damages caps do not apply to **employees sued in their individual capacities** (see Suttles v. Roy, Morrow v. Caldwell, and Ex parte Pinkard)
- Cities and counties are also the beneficiaries of **notice of claim statutes** which effectively require that claimants give them a “head’s up” of a potential claim together with the ability to potentially resolve the claim before litigation ensues.
 - Generally, these notice of claim statutes require that claims be filed sooner than the statutes of limitation for other types of claims.
 - The notice of claim statutes also do not protect individual employees who may be sued.
- Finally, counties and cities benefit from their own employees’ immunity.
 - It is generally recognized that an employer cannot be held liable when the employee is immune.

“State-Agent” / Discretionary Function Immunity

- State-agent immunity is often referred to as “discretionary function” immunity.
- “Discretionary function immunity is just what its label implies: immunity from tort liability afforded to public officials acting within the general scope of their authority in performing functions that involve a degree of discretion.”

Ex parte Estate of Reynolds, 946 So. 2d 450, 454 (Ala. 2006).

“State-Agent” Immunity (cont.)

- Historically, under Alabama law, “discretionary function’ immunity from tort liability is afforded to public officials acting within the general scope of their authority in performing functions that involve a degree of discretion. The source of this doctrine of discretionary function immunity is § 895D *Restatement (Second) of Torts* which governs immunity from tort liability of public officers.”

George W. Royer, Jr., State Law Local Governmental Liability A Primer, 61 Ala. Law. 256, 259 (2000)

Cranman Immunity

- In 2000, the Supreme Court decided Ex parte Cranman, 792 So. 2d 392 (Ala. 2000). The decision re-affirmed state-agent / discretionary function immunity and attempted to summarize the doctrine into an almost-statute-like series of rules.
- Because Cranman was a plurality decision, the Supreme Court adopted its new rubric in Ex parte Butts, 775 So. 2d 173, 177-78 (Ala. 2000).
- The Supreme Court has further held that “[t]he restatement of State-agent immunity as set out by this Court in Ex parte Cranman ... governs the determination of whether a **peace officer** is entitled to immunity under § 6-5-338(a).” Ex parte City of Montgomery, 99 So.3d 282, 292 (Ala. 2012).

Cranman Immunity (cont.)

A State agent *shall* be immune from civil liability in his or her personal capacity when the conduct made the basis of the claim against the agent is based upon the agent's

- (1) formulating plans, policies, or designs; or
- (2) exercising his or her judgment in the administration of a department or agency of government, including, but not limited to, examples such as:
 - (a) making administrative adjudications;
 - (b) allocating resources;
 - (c) negotiating contracts;
 - (d) hiring, firing, transferring, assigning, or supervising personnel; or
- (3) discharging duties imposed on a department or agency by statute, rule, or regulation, insofar as the statute, rule, or regulation prescribes the manner for performing the duties and the State agent performs the duties in that manner; or
- (4) exercising judgment in the enforcement of the criminal laws of the State, including, but not limited to, law-enforcement officers' arresting or attempting to arrest persons; or
- (5) exercising judgment in the discharge of duties imposed by statute, rule, or regulation in releasing prisoners, counseling or releasing persons of unsound mind, or educating students.

Ex parte Cranman, 792 So. 2d 392, 405 (Ala. 2000), holding modified by Hollis v. City of Brighton, 950 So. 2d 300 (Ala. 2006)

Cranman Immunity (cont.)

Notwithstanding anything to the contrary in the foregoing statement of the rule, a State agent *shall not* be immune from civil liability in his or her personal capacity

(1) when the Constitution or laws of the United States, or the Constitution of this State, or laws, rules, or regulations of this State enacted or promulgated for the purpose of regulating the activities of a governmental agency require otherwise; or

(2) when the State agent acts willfully, maliciously, fraudulently, in bad faith, beyond his or her authority, or under a mistaken interpretation of the law.

Ex parte Cranman, 792 So. 2d 392, 405 (Ala. 2000), holding modified by Hollis v. City of Brighton, 950 So. 2d 300 (Ala. 2006)

Cranman Immunity (cont.)

- In theory, the so-called Cranman categories are flexible and encompass a broad suite of enumerated and unenumerated discretionary actions.” Garcia v. Casey, 75 F.4th 1176, 1191 (11th Cir. 2023).
 - Side note: I’ve written separately in the ADLA Journal about my issues with Cranman. More here - <https://lanierford.com/images/NewsPDFs/Beyond-Authority-Exception-to-Cranman-Immunity.pdf>

Cranman Immunity (cont.)

“ ‘This Court has established a “burden-shifting” process when a party raises the defense of State-agent immunity.’ Ex parte Estate of Reynolds, 946 So. 2d 450, 452 (Ala. 2006).

A State agent asserting State-agent immunity ‘bears the burden of demonstrating that the plaintiff's claims arise from a function that would entitle the State agent to immunity.’ 946 So. 2d at 452.

Should the State agent make such a showing, the burden then shifts to the plaintiff to show that one of the two categories of exceptions to State-agent immunity recognized in Cranman is applicable.”

Ex parte Kennedy, 992 So. 2d 1276, 1282 (Ala. 2008).

Cranman Immunity (cont.)

- Cranman litigation has for the past 25 years centered on two basic requirements:
 - Is the function one that arises from some level of **discretion** granted to the employee as a part of their job?
 - Did the employee violate some sort of **policy, procedure, or rule** imposed by their employer?
 - Did the employee act “**beyond their authority**” or **willfully/intentionally** in violation of the law?

Cranman Immunity (cont.)

- A few basic premises have emerged from that litigation:
 - An employee is unlikely to receive immunity for non-discretionary activities such as driving an automobile.
 - Ex parte City of Huntsville (“Because Lewis has cited no authority indicating that, by obeying traffic laws, a municipal bus driver is properly considered a State agent performing her duties in the manner prescribed by statutes, rules, or regulations imposed on a State department or agency, we conclude that she has not” established entitlement to immunity)
 - But see Ex parte City of Montgomery (police officers entitled to immunity in connection with discretionary decisions as to how to utilize the emergency vehicle driving privileges conferred by Ala. Code 32-5A-7)
 - The commission of an ***intentional*** tort such as defamation will likely result in denial of immunity.
 - Ex parte Pinkard, Gary v. Crouch, Garcia v. Casey

Cranman Immunity (cont.)

- **Mere negligence or wantonness** will not deprive a state-agent of immunity.
 - “This Court has previously held that poor judgment or wanton misconduct, an aggravated form of negligence, does not rise to the level of willfulness and maliciousness necessary to put the State agent beyond the immunity recognized in Cranman. See Giambrone [v. Douglas], 874 So.2d [1046,] 1057 [(Ala. 2003)](holding that State-agent immunity ‘is not abrogated for negligent and wanton behavior; instead, immunity is withheld only upon a showing that the State agent acted willfully, maliciously, fraudulently, in bad faith, or beyond his or her authority’).”
Ex parte Randall, 971 So.2d 652, 664 (Ala. 2007).
- Likewise, even **recklessness** will not deprive a state-agent of Cranman immunity.
 - Ex parte Pinkard, 373 So.3d 192, 202 (Ala. 2022) (holding that the “malice exception to State-agent immunity cannot be triggered merely because the agent acted negligently or even recklessly; instead, the agent must have acted ‘with a design or purpose of inflict injury without reasonable justification’”).

Critiques of Cranman

- While mere negligence or even recklessness or wantonness will not erase entitlement to state-agent immunity, the “beyond authority” exception removes immunity any time a departmental rule is violated, even if innocently or negligently.
 - Ex parte Watson, 37 So. 3d 752, 761 (Ala. 2009) (denying immunity to DHR child abuse investigator who failed to conduct home visit but argued that she checked on child in other ways, where rule required home visit)
 - Compare to qualified immunity, in which the federal courts recognize that “arguable” probable cause is enough for immunity – meaning “close enough” applies, and a measure of grace is given to officers.

Critiques of Cranman (cont.)

- While Cranman purports to be flexible in terms of what acts are discretionary, it doesn't always seem that way in practice.
 - Ex parte City of Huntsville, 399 So.3d 1020 (Ala. 2024) (rejecting bus driver's argument that she had discretion conferred by *advisory* speed sign and confining analysis to "the applicability of the third Cranman category")
- Cranman seems to place much more emphasis on whether an act is "discretionary" than does the law of qualified immunity.
 - Under federal law, "[t]he inquiry is not whether it was within the defendant's authority to commit the allegedly illegal act. Framed that way, the inquiry is no more than an 'untenable' tautology. Instead, a court must ask whether the act complained of, if done for a proper purpose, would be within, or reasonably related to, the outer perimeter of an official's discretionary duties." Harbert Int'l, Inc. v. James, 157 F.3d 1271, 1282 (11th Cir. 1998)
 - Alabama's greater emphasis on the existence of discretion on the specific task in question calls into question the Eleventh Circuit's pronouncement that "[t]he Alabama Supreme Court has largely equated qualified immunity with discretionary-function immunity." Hunter v. City of Leeds, 941 F.3d 1265, 1284 (11th Cir. 2019).

Critiques of Cranman (cont.)

- The Eleventh Circuit has held that: “Under both Alabama law and federal law, the core issue is whether a defendant violated clearly established law.” Cantu v. City of Dothan, 974 F.3d 1217, 1236 (11th Cir. 2020) –
 - But Alabama cases rarely focus on “clearly established law.”
 - Instead the analysis often looks only to whether a departmental rule was violated, or whether the state agent acted willfully or in “bad faith,” which is much more subjective than looking to whether on point case law ruled the specific type of conduct unlawful in the situation at hand.
 - Compare Spencer v. Benison, 5 F.4th 1222, 1230 (11th Cir. 2021) (“After a government official establishes that he was acting within the scope of his discretionary authority, the burden shifts to the plaintiff to show that the official’s conduct (1) violated federal law (2) that was clearly established at the relevant time.”)

Critiques of Cranman (cont.)

- Under federal law, the “clearly established” inquiry is much more objective –

A right may be clearly established for qualified immunity purposes in one of three ways: (1) case law with indistinguishable facts clearly establishing the constitutional right; (2) a broad statement of principle within the Constitution, statute, or case law that clearly establishes a constitutional right, or (3) conduct so egregious that a constitutional right was clearly violated, even in the total absence of case law.

***Lewis v. City of West Palm Beach*, 561 F.3d 1288, 1291-92 (11th Cir. 2009)**

Critiques of Cranman (cont.)

- And under federal law, immunity is resolved at the beginning of a case, BEFORE discovery.
 - “Facial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief, should . . . be resolved *before* discovery begins.” Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1367 (11th Cir. 1997) (emphasis added).
 - “[I]f the defendant does plead the immunity defense, the district court should resolve that threshold question before permitting discovery.” Crawford-El v. Britton, 523 U.S. 574, 598 (1998).
- But many plaintiffs’ lawyers attempt to circumvent Cranman immunity by stating that they need discovery into relevant internal policies or procedures, or by simply alleging the conduct was “in bad faith.”
 - The Alabama Supreme Court has held that “it is the rare case involving the defense of State-agent immunity that would be properly disposed of by a dismissal pursuant to Rule 12(b)(6).” Ex parte Gilland, 274 So. 3d 976, 985 (Ala. 2018).

“Back the Blue”

HB 202



Gov. Ivey's "Safe Alabama" Package

- Announced by Gov. Ivey at the February 2025 State of the State Address as a part of her "Safe Alabama" package of bills.
- Introduced by Representative Rex Reynolds, former Chief of Police for the City of Huntsville.
- Supplements the Cranman judicial doctrine with a statutory framework specific to law enforcement officers, and repeals and replaces Ala. Code 6-5-338 (the peace officer immunity statute), but also apparently retains common law immunity protections.
- Does NOT affect Cranman as it applies to **non-law enforcement** personnel.
- As summarized by the Governor's Office, the Back the Blue bill –
 - Repeals the existing peace-officer immunity law and replace it with expanded civil liability protections for law enforcement officers performing their official duties, including detention officers and public safety dispatchers.
 - Under this new protection, a law enforcement officer will be shielded from a lawsuit unless he or she was acting "recklessly without law enforcement justification" or he or she was violating a person's clearly established rights.
 - Immunizes a police officer from criminal prosecution for on-the-job use of force unless his or her conduct violates a person's constitutional rights against excessive force.
 - Establishes civil and criminal procedures designed to stay legal proceedings while the officer seeks to establish the protections afforded under the new law.

Overview of Back the Blue

- Repeals Ala. Code 6-5-338 and replaces it with four code sections:
 - 6-5-338.1 – definitions
 - 6-5-338.2 – immunity protections
 - 6-5-338.3 – appellate remedies
 - 6-5-338.4 – limitations on immunity, and reservation of common law immunity preserved
- Re-writes criminal immunity protections from Stand Your Ground law in sections 13A-3-20, 13A-3-27, and 13A-3-28.
- Modifies 14-6-1 and 36-22-6 (both relating to Sheriffs' Jailers and Deputies) to improve constitutional and statutory immunity protections.

Section 6-5-338.1 – More Inclusive

- Updates the definition of “peace officer” to the broader “law enforcement officer” and specifically includes:
 - **Detention facility officers**
 - Any peace officer, guard, or detention or jail officer employed in a facility used for the confinement, pursuant to law.
 - Whether sworn or NOT, correcting a previous gap in the law for municipal jailers.
 - **Public safety dispatchers**
 - Undefined, but included in the definition of law enforcement, correcting a previous gap in the law for unsworn dispatchers.

Section 6-5-338.2 – the Heart of Back the Blue

- (a) Except as provided in subsection (b), a **law enforcement officer** shall be immune from any claim that seeks to impose civil liability on the law enforcement officer for conduct performed within a law enforcement officer's discretionary authority.
- (b) A law enforcement officer shall **not** be immune in either of the following circumstances:
- (1) The conduct constitutes a **tort** against the plaintiff that is actionable under the laws of this State and the law enforcement officer **acted recklessly without law enforcement justification**.
 - (2) The conduct constitutes a **tort** against the plaintiff that is actionable under the laws of this State and the **conduct violated a clearly established state statutory or constitutional right of the plaintiff of which every reasonable law enforcement officer would have known** at the time of the law enforcement officer's conduct.
- (c) Notwithstanding the exceptions to immunity provided in subsection (b), the immunity provided in Section 36-1-12(c) remains available to a law enforcement officer subject to the exceptions set forth in Section 36-1-12(d) and subject to the provisions of this section, Section 6-5-338.3, and Section 6-5-338.4. A law enforcement officer is an officer, agent, or employee of the state for purposes of Section 36-1-12.

Discretionary Authority

- Section 6-5-338.1(2) finally brings us in line with federal case law, clarifying that “government conduct by a law enforcement officer performing a legitimate job-related function or pursuing a legitimate job-related goal through means that were within the law enforcement officer’s plausible power to utilize” are discretionary acts.
- Tells courts that in applying the test, they “must temporarily put aside that the conduct may have been committed for an improper or unconstitutional purpose, in an improper or unconstitutional manner, to an improper or unconstitutional extent, or under improper or constitutionally inappropriate circumstances.”
- All that matters is whether the conduct, assuming “done for a proper purpose,” would fall “within, or reasonably related to, the outer perimeter of the law enforcement officer’s government discretion in performing his official duties.”

Recklessly without law enforcement justification

- Per the definitions in Section 6-5-338.1:
 - A law enforcement officer acts **recklessly without law enforcement justification** if he or she is aware of, and consciously disregards, a risk of death or substantial bodily injury without reasonable law enforcement justification.
 - A law enforcement officer who creates a risk of death or substantial bodily injury in the absence of reasonable law enforcement justification but is unaware of that risk by reason of voluntary intoxication, as defined in subdivision (e)(2) of Section 13A-3-2, acts recklessly with respect thereto.
 - Whether a law enforcement officer acts recklessly without law enforcement justification is a **question of law to be decided by the court**, taking into account the wide range of a law enforcement officer's duties.
 - A law enforcement officer acts without law enforcement justification when the law enforcement officer **harms** the plaintiff by failing, **in an objectively unreasonable manner, to comply with written policies of the law enforcement officer's employer or appointing authority** or when the law enforcement officer **harms** the plaintiff through conduct premised on the law enforcement officer's **objectively unreasonable interpretation of such a policy**.

Recklessly without law enforcement justification (cont.)

- Defines “written policy” as follows:
 - A written rule, regulation, instruction, or directive issued by a law enforcement officer's employer or appointing authority, and **applicable to conduct within a law enforcement officer's discretionary authority**, specifying the **particular manner in which a law enforcement officer should exercise discretion** in specific situations or scenarios.
 - The written rule, regulation, instruction, or directive must have been issued before the occurrence of the relevant conduct, and must have been made available to the law enforcement officer.
 - Whether the law enforcement officer actually read the written rule, regulation, instruction, or directive is **not** determinative.

Clearly Established Law

- Second exception to immunity, borrowed from federal law.
- The right may be clearly established by “state statutory **or constitutional law**”
- Per 6-5-338.1(1), a right may be clear from –
 - A materially similar case decided by the SCOTUS, Ala. S.Ct., or Eleventh Circuit decided before the occurrence at issue
 - A broad statement of principle established with “obvious clarity” by one of those courts such that “every objectively reasonable law enforcement officer” would have known of the violation
 - Text of some state constitutional provision or statute existing before the relevant event that reveals a right “so obvious that . . . no objectively reasonable law enforcement officer would have required case law to be put on notice that the relevant conduct violated the right”

Burden-Shifting

- Under 6-5-338.2(h)(1), a law enforcement officer carries the initial burden of showing that the claim is premised upon conduct performed in the officer's discretionary authority.
- Under 6-5-338(h)(2), the burden then shifts to the plaintiff to establish that the officer committed a tort against the plaintiff that is actionable and that the officer is not immune.
- This is largely the same method as endorsed by Cranman.

Immunity Also Applies to Employer

- Section 6-5-338.4 continues to provide immunity to the law enforcement officer's employer or appointing authority.
- Does not provide immunity to any private non-governmental employer.
 - This includes off-duty assignments.

Heightened Pleading Requirement

- Section 6-5-338.2 introduces what should be a very welcome heightened pleading rule, which brings this aspect of Alabama practice in line with federal practice.
- Section (d) provides that in complaints against law enforcement officers in their individual capacity for discretionary conduct, “the complaint must identify with particularity, for each defendant and for each claim”
 - The legal authority that creates the claim
 - Specific factual allegations to satisfy each element of the claim
 - Specific factual allegations demonstrating the lack of immunity

Discovery Requests (cont.)

- The filing of a motion to dismiss automatically **stays** any other discovery per 6-5-338(f)(1) unless:
 - The motion to dismiss is frivolous
 - A response to the discovery request is “necessary to preserve evidence”
 - An exception is “necessary to prevent undue prejudice to prevent a failure or delay of justice within the meaning of Alabama Rule of Civil Procedure 27(a)(3).”

Mandamus and Stays

- Allows for immediate appeals of denials of immunity in the trial courts.
- Filing of mandamus shall **automatically** stay trial court proceedings unless “the court validly finds upon motion of any party that further proceedings are necessary to prevent irreparable harm to the plaintiff.”

Notable Omissions in Back the Blue

- No changes to damages caps or their inapplicability to individual capacity claims.
- No changes for non-law enforcement personnel
 - Cranman will live on for any state-agent who is not a dispatcher, detention officer, jailer, or peace officer.
- HB 202 includes no recognition that body cam can be utilized at motion to dismiss stage.
- Still stuck with **written policies**, but we do get clarification that only policies explaining how to use discretion are relevant – and, even then, only where the policies govern some “specific situations or scenarios”
 - Will departments will simply find it more advantageous not to have any policies at all, as some do now (which is certainly not in the public interest)?

Admissibility of Video Evidence?

- The Back the Blue bill specifically contemplates motions to dismiss, which are an earlier way to challenge lawsuits before discovery begins and time is wasted.
- The new law seems to contemplate videos being turned over to the other side early.
 - If videos are to be disclosed, there needs to be a clear recognition that videos depicting the incidents set forth in the complaint may ALWAYS be considered, as they now are in federal court, without conversion of the MTD. **Johnson v. City of Atlanta**, 107 F.4th 1292, 1300 (11th Cir. 2024).
 - Currently, Alabama’s incorporation by reference doctrine requires the “document” be referred to in the complaint explicitly in order to be considered without conversion. **Bell v. Smith**, 281 So. 3d 1247, 1252 (Ala. 2019) (“[I]f a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff's claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss.”).
 - ***If*** Alabama will allow consideration of videos at the MTD stage, the law is already clear that the video trumps conflicting testimony or allegations. **Ex parte City of Vestavia Hills**, 372 So. 3d 1143, 1147–48 (Ala. 2022) (citing Scott v. Harris); **Ex parte City of Huntsville**, 399 So. 3d 1020, 1029 (Ala. 2024) (same).

Questions?

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