

# **WCPA: LEGAL UPDATE**

## ***Garrity* and its Application**

### **(and a Few Other Things)**

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**Kohler, Wisconsin**

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## **I. INTRODUCTION**

### **A. Competing Policies at Stake**

#### **1. Employer Interests**

- a. Increasing demands for public- and private-sector employers to cooperate in criminal investigations.
- b. Effective capability for public- and private sector employers to conduct their own internal investigations.

#### **2. Government's interest in effective prosecutions.**

#### **3. Public's interest in minimizing criminal activity and effectively enforcing criminal prosecutions.**

#### **4. Individual interests in due process.**

### **B. Trying to Balance These Concerns.**

## **II. GARRITY DOCTRINE – The Core of the Case and it's Adoption by the Courts**

A. *Garrity* and *Spevack* (1967). United States Supreme Court found that during an investigation, when an individual is given a choice between incriminating himself or losing his job, the individual's statements are not voluntary, but coerced, and the Fifth Amendment bars the use of the individual's statements in a subsequent criminal proceeding. *Garrity v. New Jersey*, 385 U.S. 493, 496 (1967); *Spevack v. Klein*, 385 U.S. 511 (1967).

B. *Uniformed Sanitation Men and Broderick* (1968). The Supreme Court expanded on *Garrity* (barring use of admissions) to require reinstatement of employees who refused to answer questions without proper warning. *Uniformed Sanitation Men Assn. v. Commissioner of Sanitation*, 392 U.S. 280 (1968); *Gardner v. Broderick*, 392 U.S. 273 (1968).

C. The Seventh Circuit issues *Conlisk* (1973). Further expansion occurs when the Seventh Circuit overturns discharges for pleading the Fifth before a grand jury, even though the employer never specifically directed the officers to testify. "Rule 51" obligated them to answer, and was struck down. *Confederation of Police v. Conlisk*, 489 F.2d 135 (7<sup>th</sup> Cir., 1973).

D. Wisconsin's turn in *Oddsens/Quade* (1982). Although not technically a *Garrity*-style case, the Wisconsin Supreme Court adopts the *Garrity* principle generally. Discipline based on admissions to IA thrown out not because of *Garrity* violations, but because the lack of a *Garrity* warning, among many other factors, rendered the "confession" fundamentally coerced. *Oddsens v. Bd. Of Police and Fire Commrs.*, 108 Wis. 2d 143 (1982).

- E. Fundamental Principle: When the Government uses its power to give a citizen no real choice between silence and waiver, the Constitution is violated.

### III. THE BRANCHES OF THE GARRITY TREE

- A. Can the employee refuse to come to the meeting at all? Probably not.
1. *Riggings v. Walter*, 279 F.3d 422 (7<sup>th</sup> Cir., 1995).
  2. *Atwell v. Lisle Park District*, 286 F.3d 987 (7<sup>th</sup> Cir., 2002).
- B. Does *Garrity* Apply in the Private Sector?
1. *Garrity* doctrine applies to private-sector employers only if the private employer's conduct can constitute state action. *United States ex rel Sanney v. Montayne*, 500 F.2d 411, 415 (2nd Cir. 1974) (finding the "controlling factor is not the public or private status of the person from whom the information is sought but rather the fact that the state has involved itself in the use of substantial economic threats to coerce a person into furnishing an incriminating statement").
  2. *Garrity* applies even if Government's participation in the investigation is secret and indirect. *Motayne*, 500 F.2d at 413–15 ("state's involvement is no less real for having been indirect and no less impermissible for having been concealed."). In *Montayne*, the Second Circuit Court of Appeals found state action when the Sheriff's Department asked polygraph examiner to wear a wire during the individual's polygraph examination prior to entering private employment.
- C. Sanctions Against the Individual: What is no real choice?
1. No rule or policy warranting a sanction is necessary, instead the court reviews the "totality of the circumstances."
  2. Subjective and objective standard: Whether a person claiming to have made statements under the threat of a sanction subjectively believed a sanction existed and whether this belief was objectively reasonable. *United States v. Friederick*, 842 F.2d 382, 395 (D.C. Cir. 1998).
  3. Types of Sanctions.
    - a. Loss of "professional standing, professional reputation, and of livelihood." *Spevack v. Klein*, 385 U.S. 511, 515 (1967).
    - b. Loss of stability to a portion of a contractor's business. *Lefkowitz*, 414 U.S. at 83.

- c. “Personal disgrace” or “exposure to civil liability” not enough. See cases cited in *Friederick*.
  - d. Two-day-old low paying, menial job not enough. *Sanney*.
  - e. Loss of “Due Process.” The employer investigated and questioned an individual regarding his conduct surrounding his arrest for possession of marijuana, without warning him of his right that he would be granted immunity from prosecution based on his answers and that if he refused to answer, his employer could draw negative inferences. The employer relied on its established policy that *Garrity* warnings would not be given unless the employer explicitly required an individual to answer questions under the pain of losing his or her employment. The individual refused to respond to questions regarding his criminal conduct and the employer terminated his employment for possession of illegal drugs. The Court of Appeals found the employer’s policy does not provide an individual an opportunity to tell his or her side of the story without penalty and therefore could constitute a violation of procedural due process. The individual must receive a meaningful opportunity to present his or her side of the story without fear of impairing his or her criminal defense. *Franklin v. City of Evanston*, 384 F.3d 838, 842–43 (7th Cir. 2004).
- D. Negative Inferences: Without *Garrity*, what can I do when the employee takes the Fifth?
- 1. With Probative Evidence: The employer may draw adverse inferences from the individual’s refusal to answer questions when probative evidence is offered against the individual. *Baxter v. Palmigiano*, 425 U.S. 308, 316–19 (1976) (permitting drawing of adverse inferences in a civil proceeding when probative evidence is offered); *LaSalle Bank Lake View v. Seguban*, 54 F.3d 387, 389–90 (7th Cir. 1995).
  - 2. Without Probative Evidence: an employer’s “direct inference of guilt from silence is forbidden.” *Seguban*, 54 F.3d at 390. The employer may not draw adverse inferences based solely upon an individual’s decision to invoke his or her Fifth Amendment privilege. *Nat’l Acceptance Co. of Am. V. Bathalter*, 705 F.2d 924, 932 (7th Cir. 1983).
- E. Heightened Burden of Proof for the Prosecutor when *Garrity* is given by the employer.
- 1. The evidentiary exclusion applies not only to the statements, but also to any information later derived from those statements. *Lefkowitz. v. Turley*, 414 U.S. 70, 84, (1973); *Conlisk*, 489 F.2d at 894 (“... answers [an

individual] gives and the fruits thereof cannot be used against him in criminal proceedings.”).

2. Heightens the government’s burden of proof in a criminal proceeding.
  - a. If the *Garrity* doctrine excludes an individual’s incriminating statements, then the government must show that it can prove its case without reference to either these statements or the evidence that is derived from those statements. *United States v. Koon*, 34 F.3d 1416, 1431 (9th Cir. 1994).
  - b. Government must present an independent and legitimate source in the face of any disputed evidence. This requires the government to prove the evidence was derived from a source that is “wholly independent of the compelled testimony.” *Kastigar v. United States*, 406 U.S. 441, 460 (1972) (implying a criminal defendant raising a coerced-confession defense is in a better position than if the same defendant exercised his or her Fifth Amendment rights at trial).
  - c. One court has added the requirement of showing the case was not “shaped or altered” in any way, directly or indirectly, by post-*Garrity* information. *U.S. v. North*, 920 F.2d 940 (D.C. Cir., 1990). Rejected in *Koon*.

F. Untruthful Statements: Without *Garrity*, Can the Employee Lie?

1. *Garrity* does not provide immunity for false statements when the statements, if true, would have been entitled to immunity. *U.S. v. Devitt*, 499 F.2d at 142 (7th Cir. 1994); *Herek v. Police & Fire Comm’n*, 226 Wis. 2d 504, 514–16 (Ct. App. 1999) (rejecting “a bright-line rule [that] suggests that any statement made, regardless of its truthfulness, ought to be suppressed if the maker of the statement is not given *Garrity* protection”).
2. Giving a false statement can be a separate crime (perjury) for which *Garrity* does not preclude prosecution. See *Friederick*, *supra*.

G. Right to Legal Counsel

1. No Fifth Amendment Right to Legal Counsel During an Investigatory Interview so far. *Berry v. Illinois Dept. of Human Svcs.*, No. 00-C 5538 (N.D. Ill. 2003) (stating that “[n]o case has been found which considers whether a public employee has a Fifth Amendment right to have counsel present during an interview related to an investigation in which criminal misconduct is implicated. However, since no statement that is given may be used against the employee in a criminal prosecution, no Fifth Amendment right to counsel may be implicated. . . . [This rule applies

even with] the presence of the State Police at the interview . . . [Because] Sixth Amendment right to counsel does not attach until a criminal prosecution is commenced).

2. Legal Advice from Employer's Counsel. An employee under investigation for misuse of government funds consulted (albeit briefly and in passing) with the employer's attorney who was retained to conduct the internal investigation. The individual also retained her own legal counsel. The employer's attorney informed the individual that because a grand jury was being convened, the attorney believed that the individual's attorney would advise her to exercise her constitutional right to remain silent during the employer's investigation. During the investigation, the individual refused to answer questions and was terminated for insubordination. The employee filed suit establishing numerous claims for damages. The court of appeals found that a reasonable person represented by an attorney does not rely on the legal advice of an adversary. Reliance on a known adversary's legal advice is not reasonable, especially if the individual has ready access to an attorney of his or her own. *Atwell*, 286 F.3d at 993.
3. In law enforcement setting, Chapter 164, Wis. Stats., does provide certain rights to counsel.

#### IV. PRACTICAL IMPLICATIONS

##### A. Private Sector Employees

1. Danger of cooperation as "state action"
2. Polygraphs, wearing a "wire," or other active use of private actors to further a criminal investigation.
3. Sarbanes – Oxley and financial crimes

##### B. Public Sector Employees

1. Coordinating the criminal process with the internal process of another employer.
  - a. Timing of the *Garrity* interview.
  - b. Loudermill hearings after *Evanston*.
  - c. Political pressure and paid leaves.
  - d. Public hearings and § 19.85(1)(b) Wis. Stats.
2. Dealing with your own subordinates/employees.

- a. Union representation.
- b. Chapter 164 (sworn).
- c. Giving unambiguous direction about use immunity to avoid *U.S. v. Frederick* problems.
- d. Review same timing issues as above.

## V. OTHER LEGAL DEVELOPMENTS

### A. Due Process Hearings

- 1. *Baird v. Bd. Of Ed.*, No. 03-3630 (7<sup>th</sup> Cir., 2004). Discussing trial-type pre-termination hearings.
- 2. Why do you care?
  - a. PFC hearings
  - b. Other terminations (with grievance arbitration)
  - c. Other terminations (with no grievance arbitration)

### B. Random Drug Testing Revisited After *Von Raab*.

- 1. *Petersen v. City of Mesa* (firefighters)
- 2. *UAW Local 600 v. Winters* (various employee classifications)

### C. FLSA Comp Time Issues (undue hardship)

- 1. *DeBraska v. Milwaukee*, 131 F. Supp. 2d 1032 (2000).
- 2. *Mortensen v. Sacramento County*, 368 F.3d 1082 (9<sup>th</sup> Cir., 2004).
- 3. *Marticink v. Houston*, 330 F.3d. 298 (5<sup>th</sup> Cir., 2003).
- 4. *Heaton v. Moore*, 43 F.3d 1176 (8<sup>th</sup> Cir., 1994).
- 5. *Beck v. Cleveland*, No. 02-3669 (6<sup>th</sup> Cir., 2004).
- 6. *Scott v. City of New York*, 2004 U.S. Dist., Lexis 11543 (S.D. N.Y., 2004).

### D. *Brady v. Maryland* Follow Up.

### E. Open Records and “Pending” Investigations.

- 1. *Local 2489 v. Rock Co.*, No. 03-3101 (Ct. App., Oct. 7, 2004).

2. Appealing discipline to arbitration does not stop the release.
  3. Names of employees can be redacted.
- F. ADA and the “Regarded As” Concept. *Williams v. Philadelphia Housing Authority*, 15 AD Cases 1607 (3<sup>rd</sup> Cir., 2004).
- G. “Just One Touch, That’s All it Took...” *Interstate Brands, Inc.*, 120 L.A. 865 (2005).

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