

	<p style="text-align: center;"><b>Compulsion as the Triggering Mechanism</b></p> <p style="text-align: center;">Article 3 of 6 on Garrity by Jack Ryan</p>	
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### **Employees have Rights against Compelled, Incriminating Statements but No Right to *Garrity* Immunity**

The right of government employees against self-incrimination requires compulsion as a triggering mechanism for immunity against the use/derivative use of their statements in a criminal prosecution.<sup>1</sup> As with any statement implicating the Fifth Amendment privilege against self-incrimination, statements must also be incriminating and testimonial.

In *Harrison*, the plaintiff, a deputy who had been terminated sued the county sheriff's department from which he had been fired. Deputy Michael Harrison had become the subject of an investigation into property that had been missing from the sheriff's department property room. The internal investigation ran concurrently with a criminal investigation into the missing items. On three occasions, Deputy Harrison and other officers were called in to give statements to the deputies investigating the thefts. Prior to each statement Deputy Harrison was afforded his "*Garrity* rights."

After the three statements, Deputy Harrison was notified that a pre-disciplinary conference would take place. "At this conference, Plaintiff was given a form explaining his *Garrity* rights but was informed that no statements were being compelled—he need not say anything." Harrison's attorney informed him that since no statements were being compelled, *Garrity* immunity did not exist. Deputy Harrison exercised his Fifth Amendment privilege and remained silent. Following the conference, Deputy Harrison was suspended without pay. A second conference was held at which time Deputy Harrison again remained silent due to a lack of *Garrity*

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<sup>1</sup> See e.g., *Harrison v. Wille*, 132 F.3d 679 (11<sup>th</sup> Cir. 1998).

protection. Although the criminal investigation concluded with no criminal charges brought against Harrison, he was terminated.

On appeal, Deputy Harrison claimed that his Fifth Amendment right against self-incrimination had been violated by the department's refusal to provide *Garrity* protection at every stage of the administrative process. In its review of the cases, the United States Court of Appeals for the 11<sup>th</sup> Circuit concluded, "*Garrity* only prohibits the compulsion of testimony that has not been immunized... In other words, the employee may not be both compelled to testify (or make a statement) and be required to waive his Fifth Amendment privilege.... An 'employee's rights are imperiled only by the combined risks of both compelling the employee to answer incriminating questions and compelling the employee to waive immunity from the use of those answers,'" in a criminal prosecution. "The result of these prohibitions is that a public employee cannot be terminated solely for the exercise of his Fifth Amendment privilege." Conversely, a public employee's statement, compelled under the threat of the loss of their job, cannot be used against that employee in a subsequent criminal trial.

### **Not Every Consequence of Invoking the Fifth Amendment Privilege is Sufficiently Severe to Amount to Coercion**

A disciplinary action, short of termination may not be viewed as coercion to waive the Fifth Amendment privilege against self-incrimination.<sup>2</sup> In the *Chan* case, an officer won a judgment against the Chicago Police Department after he was transferred from a prestigious assignment following his refusal to answer questions before a grand jury based upon his Fifth Amendment privilege against self-incrimination. Prior to his transfer Officer Chan was assigned to the Intelligence Division of the Chicago Police Department and was detailed to a multi-jurisdictional task force on terrorists. In that assignment, Officer Chan had a take-home car and received significant overtime pay. He lost these two benefits after his transfer.

In overturning the judgment for Officer Chan the United States Court of Appeals for the 7<sup>th</sup> Circuit concluded that the "jurisprudence of the Supreme Court and this court also makes clear that not every consequence of invoking

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<sup>2</sup> See *Chan v. Wodnicki*, 123 F.3d 1005 (7<sup>th</sup> Cir. 1997); cert. denied 522 U.S. 1117 (1998).

the Fifth Amendment is considered sufficiently severe to amount to coercion to waive the right. Rather, the effect must be sufficiently severe to be 'capable of forcing the self-incrimination which the amendment forbids' (cite omitted).” The court noted that Chan only lost the two incidental benefits, overtime and take-home car that went with his previous position and concluded that Deputy Superintendent Wodnicki was entitled to qualified immunity with respect to his transfer of Chan.

### **Refusing To Answer Following a Grant of Immunity**

***“If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, Garrity v. New Jersey, supra, the privilege against self-incrimination would not have been a bar to his dismissal.” Gardner v. Broderick, 392 U.S. 273 (1968).***

In an administrative interview, where an officer has been afforded use immunity under *Garrity*, the officer has no right to refuse to answer questions related to his or her duties as a police officer and may be subject to discipline for the failure to answer.<sup>3</sup> The *Hill* case provides a good example. *Hill* revolved around a photograph of a beaten detainee that disappeared after being placed on the desk of supervising officer, J.D. Hill. A fellow officer reported that he had placed the photograph on Hill's desk in Hill's presence. During the investigation Hill refused to answer questions about the incident and refused to take a polygraph exam. Hill was subsequently terminated from his position. Hill sued the Sheriff alleging, among other things, that his Fifth Amendment rights had been violated. In its review of the case the United States Court of Appeal for the 11<sup>th</sup> Circuit observed: “As long as a public employer does not demand that the public employee relinquish the employee's constitutional immunity from prosecution, however, the employee can be required to testify about performance of official duties or to forfeit employment. (Cites omitted.) Given ‘the important public interest in securing from public employees an accounting of their public trust, public employees

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<sup>3</sup> See, E.G., *Hill v. Johnson*, 160 F. 3d 469 ( 8<sup>th</sup> Cir. 1998).

may be constitutionally discharged for refusing to answer potentially incriminating questions concerning their official duties if they have not been required to surrender their constitutional immunity' The Fifth Amendment is violated only by the combined risks of both compelling the employee to answer incriminating questions and compelling the employee to waive immunity from the use of those answers."<sup>4</sup>

After reviewing a transcript of Hill's last interview, the court concluded that it was made clear that the matter was administrative. As a result, the court dismissed the lawsuit.

### **Is *Garrity* Immunity Self-Executing?**

When does the protection under the *Garrity* case apply? Some courts have found that immunity under *Garrity* is self-executing any time an officer is asked to answer questions that may be incriminating.<sup>5</sup> Yet the determination as to whether immunity attaches may very well depend on who is asking the questions.<sup>6</sup> In *Benjamin v. Montgomery*, two officers were terminated following their refusal to testify in court after being subpoenaed by the defendants in a case involving the shooting of a police officer. Upon being called to the witness stand, the two officers refused to testify concerning their investigation, citing their Fifth Amendment privilege against self-incrimination. Following this refusal, the mayor ordered the officers to return to court and "divulge all information relevant to the case." The officers were subsequently recalled to the stand at which time they agreed to testify, but only because the mayor had ordered them to do so. The court refused to take the officers' testimony.

On appeal, the United States Court of Appeal for the 11<sup>th</sup> Circuit distinguished this case from their previous decisions in *Hester v. City of Midgeville*, and *Erwin v. Price*.<sup>7</sup> The *Erwin* case involved an officer who was terminated following his refusal to answer questions about an off-duty gun-

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<sup>4</sup> See Also, *Jones v. Franklin County Sheriff*, 555 N.E. 2d 940 (Ohio 1990) (Deputy's discharge upheld after she refused to answer questions during internal investigation); *Martinez v. Safir*, 251 A.D. 2d 62 (S.Ct. N.Y. 1998).

<sup>5</sup> See, *Hester v. City of Midgeville*, 777 F. 2d 1492 (11<sup>th</sup> Cir. 1985).

<sup>6</sup> See, *Benjamin v. Montgomery*, 785 F.2d 959 (11<sup>th</sup> Cir. 1986).

<sup>7</sup> *Erwin v. Price*, 778 F.2d 668 (11<sup>th</sup> Cir. 1985).

pointing incident. When Erwin was called in for questioning, he was informed that his answers would be used for departmental purposes only and would not be used in any criminal proceeding. Erwin demanded that he be read his Miranda warnings. The investigating officer responded that Miranda did not apply and assured Erwin at least three times that his answers could not be used in a criminal prosecution. Erwin refused to answer questions and was terminated. On appeal, he argued that he never received a statutory grant of immunity and thus was entitled to refuse to answer. The court, citing their previous decision *in Hester*, asserted: “We have held that the privilege against self-incrimination thus ‘affords a form of use immunity which, absent a waiver, automatically attaches to compelled incriminating statements as a matter of law.’”

In the *Benjamin* case, the officers were being questioned by defense counsel not by public authorities conducting an internal investigation. Following their termination for refusing to testify, the officers filed suit alleging a deprivation of rights. The city of Memphis defended the suit arguing that the officers had no right to refuse to testify because the officers would have automatically obtained immunity since they were in the same situation as the officer in *Erwin*. The United States Court of Appeal for the 11<sup>th</sup> Circuit rejected the City’s argument concluding that agreement with the city’s position would shift the ability to grant immunity to defendants anytime they called a police officer as a witness. Thus, the first time the two officers were called to testify, they were not subjects of an investigation, they had not been directed to answer by a police authority, and therefore their answers could have been used against them in a criminal proceeding. As a result, the officers had a privilege to refuse to give testimony. The court went on to hold that once the “mayor ordered the officers to testify, the situation changed.” The court concluded that the officers were terminated “solely because they conditioned their testimony on retention of their Fifth Amendment privilege” in violation of their Constitutional rights.