

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

BRANDON POTTS,PLAINTIFF AND
APPELLANT,

vs.

CITY OF DEVILS LAKE AND DEVILS
LAKE POLICE DEPARTMENT,DEFENDANTS AND
APPELLEES.

SUPREME COURT NO. 20200144

Civil No. 2019-CV-293

ON APPEAL FROM JUDGMENT ENTERED APRIL 20, 2020,
AND THE DISTRICT COURT'S MEMORANDUM OPINION
AND ORDER GRANTING SUMMARY JUDGMENT DATED
APRIL 17, 2020STATE OF NORTH DAKOTA
RAMSEY COUNTY DISTRICT COURT
NORTHEAST JUDICIAL DISTRICT
THE HONORABLE ANTHONY SWAIN BENSON

**AMICUS CURIAE BRIEF OF NORTH DAKOTA FRATERNAL ORDER OF
POLICE IN SUPPORT OF REVERSAL**

ORAL ARGUMENT NOT REQUESTED

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AMICUS CURIAE STATEMENT OF IDENTITY AND INTEREST

[¶1] The Fraternal Order of Police (FOP) is the world's largest organization of sworn law enforcement officers, with more than 351,000 members and more than 2,200 lodges. The FOP is committed to improving working conditions of law enforcement officers, and improving the safety of those served. Founded in 1993, the North Dakota Fraternal Order of Police (NDFOP) is a non-profit organization dedicated to the advancement of North Dakota law enforcement. The NDFOP consists of approximately 1,050 members, all fulltime appointed or elected law enforcement officers, serving at the Federal, State, County, and local level throughout the State of North Dakota.

[¶2] Appellant asks this Court to extend the public policy exception to the employment-at-will doctrine, protecting law enforcement officers from termination of their employment for acting in self-defense. Daily, NDFOP members are tasked with using force to effectuate arrests, to defend themselves, and to defend others. The implications of the decision of this Court will directly and potentially profoundly affect NDFOP and its members.

STATEMENT OF AUTHORSHIP AND CONTRIBUTIONS

[¶3] Counsel for the parties authored no portion of this brief. The parties to this proceeding and their attorneys did not contribute money to fund preparation or submission of this brief.

INTRODUCTION

[¶4] Generally, while at-will employment may be terminated at any time, with or without cause, exceptions preclude retaliatory termination for an employee complying with a clear public policy. Because clear and compelling North Dakota public policy obligates arrest, use of force to make the arrest, and use of force in an officer's self-defense, this

Court should conclude a police officer's lawful use of force in self-defense during the course of a lawful arrest of a resisting felon is an exception to employment at-will.

AMICUS CURIAE STATEMENT OF THE ISSUE

[¶5] Retaliatory discharge of a law enforcement officer for acting in self-defense during the course of a lawful felony arrest violates public policy.

LAW AND ARGUMENT

[¶6] While judicial policymaking is disfavored, judicially-created public policy exceptions to the employment-at-will doctrine have “emerged to ameliorate the sometimes harsh consequences of the employment at-will rule.” Ressler v. Humane Society of Grand Forks, 480 N.W.2d 429, 431 (N.D. 1992) (citations omitted). This Court has recognized two—retaliatory discharge for: 1.) honoring a subpoena and testifying truthfully; and 2.) seeking workers compensation benefits. Ressler, 480 N.W.2d at 432; Krein v. Marian Manor Nursing Home, 415 N.W.2d 793 (N.D. 1987). In each, to avoid termination, the at-will employee faced competing statutory obligations, or forfeiture of a legal right. Termination of a police officer for use of force in self-defense creates similar conflicts.

A. Competing Statutory Obligations

[¶7] A determination of whether termination of at-will employment violates public policy is made by evaluating constitutional and statutory provisions. Ressler, 480 N.W.2d at 431 (citation omitted). In Ressler, this Court held termination of at-will employment for honoring a subpoena and testifying truthfully violated public policy expressed by the Legislature through “criminal statutes prohibiting the failure to obey a subpoena, the refusal to testify, and the making of a false statement.” Id. at 431, n. 2. Stated differently, Ressler faced the competing choice of violating criminal law or risking termination. The same is true for police officers charged with the obligation to arrest. Officers should not

be faced with the choice of violating the legal obligation to arrest out of fear that lawful use of force during that arrest will result in termination of their employment.

[¶8] North Dakota law has long recognized a peace officer has a duty to arrest and take before the nearest magistrate all persons who had committed a public offense. Schell v. Collis, 83 N.W.2d 422, 424 (N.D. 1957) (citing North Dakota Revised Code of 1943, § 11-1503). The duty to arrest for known violations remains true today. See e.g. N.D.C.C. § 11-15-03 (noting sheriffs “shall . . . [a]rrest and take before the nearest magistrate . . . all persons who attempt to commit or who have committed a public offense”) (emphasis added).

[¶9] At the “very heart of our judicial system” is the expectation that police will comply with judicial orders. Ressler, 480 N.W.2d at 432. An arrest warrant is a judicial command for a peace officer to arrest a person and bring the person before a magistrate. N.D.R.Crim. P. 4(b)(1)(F). Arrest warrants are directed “to all peace officers of this State,” may be executed only by police officers, and are executed by arrest of the defendant. N.D.R.Crim. P. 4(c)(1); see also N.D.C.C. § 29-26-10 (when a bench warrant has been issued, an officer “shall arrest the defendant and bring the defendant before the court”) (emphasis added). Arrest is defined as actual restraint of the defendant, or the defendant’s submission to custody. N.D.C.C. § 29-06-09. Accordingly, the law commands peace officers to arrest upon a warrant, and directs officers to do so by actual restraint unless the subject submits.

[¶10] Officers have no choice: the law requires officers obedience to an arrest warrant. See N.D.C.C. § 29-06-12. Furthermore, like the criminal statutes requiring obedience to a subpoena and testifying, it is a crime to disobey a judicial order. See N.D.C.C. § 12.1-10-05 (disobeying a final order of a court, other than an order to pay money, is a class A

misdemeanor); see also N.D.C.C. § 12.1-11-06 (a public servant who knowingly refuses to perform a duty imposed by law is guilty of a class A misdemeanor).

[¶11] Police officers are also required to arrest without warrants in a number of instances. Whether or not committed in the officer's presence, an officer "shall arrest" a person for violating a protection order or order prohibiting contact. N.D.C.C. § 14-07.1-11; N.D.C.C. § 12.1-31.2-02(5). Statute also requires police to presume warrantless arrest for domestic assault crimes. N.D.C.C. § 14-07.1-10(1). While the Legislature has prescribed warrantless arrest in only certain instances, warrantless arrest remain generally permissive. See N.D.C.C. § 29-06-15 (an officer "may arrest" without a warrant for felonies or specified misdemeanors). But if requested to arrest by other officers, the law directs arrest. N.D.C.C. §§ 29-05-26, 29-05-27. Statute specifically directs officers to aid in making arrests. See N.D.C.C. § 29-06-04 ("Every person, when required, shall aid an officer in the making of an arrest.").

[¶12] Whether arrest is mandated or permissive, police should not be forced to abandon their obligation to arrest out of fear that if forced to use force in the process, their employment will terminate. Express statutory and constitutional policy provides otherwise. See N.D.Const. Art. I, § 7 (every citizen is entitled to obtain and maintain employment); N.D.C.C. § 34-01-06 (maliciously interfering with or hindering employment is a class A misdemeanor). And, like the competing choice in Ressler—obeying a subpoena and testifying truthfully—police officers should not face the competing choice of complying with a judicial order or statute requiring arrest out of fear of termination.

B. Forfeiture of a constitutional right

[¶13] More importantly, North Dakota peace officers should not be forced to forfeit their constitutional right to self-defense out of fear losing their job. "There are rights of

constitutional stature whose exercise a State may not condition by the exaction of a price.” Garrity v. State of N.J., 385 U.S. 493, 500 (1967). Further, “policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights.” While Garrity was decided in the context compelled statements under protections of the Fourteenth Amendment, its rationale and refusal to relegate police officers to diminished constitutional protection is particularly fitting here.

[¶14] The right of self-defense in North Dakota is constitutional. See N.D.Const. Art. I, § 1 (“All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty. . . .”) (emphasis added). Analyzing this provision, the district court focused largely on the remainder of Section 1, which protects the right “to keep and bear arms for defense.” See Appendix (App.) at 23, ¶¶ 18-20. The district court further recognized but did not decide a distinction regarding the protections of the constitution for a police officer versus an ordinary citizen. Id. at ¶¶ 20-22. Ultimately, the district court concluded there exists “a large leap from the right to keep and bear arms to being insulated from losing employment after exercising said right.” App. at 24, ¶ 22. The district court regrettably addressed the wrong portion of the Constitution, and as a result, reached the wrong result. Furthermore, intimating a police officer is afforded a lesser constitutional right to bear arms and act in self-defense ignores the reality that the officer’s duties mandate it, and that “[a]ll individuals” equally possess “inalienable rights” under Article I, § 1, including “defending life.”

[¶15] Addressing a similar provision in Article I, § 1 of the Utah Constitution (noting all men have “the inherent and inalienable right to enjoy and defend their lives and liberties”),

the Utah Supreme Court concluded “this provision evidences a public policy favoring the right of self-defense.” Ray v. Wal-Mart Stores, Inc., 359 P.3d 614, 622-23 (Utah 2015). Evaluating this constitutional right in conjunction with statute and decisional law, the court concluded “Utah law recognizes a policy favoring the right of self-defense, and that policy is the kind of clear and substantial public policy that qualifies as an exception to the at-will employment doctrine.” Id. at 636. North Dakota’s law enforcement officers deserve no less under North Dakota’s Constitution.

C. Forfeiture of statutory rights

[¶16] In Krein v. Marian Manor Nursing Home, 415 N.W.2d 793, 795 (N.D. 1987), this Court held an employee may sue an employer for wrongful termination in retaliation for seeking worker’s compensation benefits. Recognizing workers compensation relief “would be largely illusory . . . if the price were loss of his immediate livelihood,” this Court resolved the resulting “dilemma” by concluding employees should not be forced to forfeit their legal rights provided by statute in order to avoid employment termination. Id. at 794-95 (citations omitted). Even more importantly, police officers should not be forced to forfeit their right to self-defense during the course of an arrest in order to avoid termination of their employment. See e.g., Ray v. Wal-Mart Stores, Inc., 359 P.3d 614, 617 (Utah 2015) (public policy favoring the right of self-defense is of sufficient clarity to qualify as an exception to the employment at-will doctrine). Like Utah, North Dakota’s law of self-defense, particularly when coupled with specific provisions for law enforcement, evidence clear and compelling public policy for which an at-will employment doctrine exception is particularly appropriate.

[¶17] In the context of self-defense used by a public servant in the course of effecting an arrest, North Dakota law boldly declares: “Conduct engaged in by a public servant in the

course of the person's official duties is justified when it is required or authorized by law.” N.D.C.C. § 12.1-05-02(1) (emphasis added). Accordingly, whether based upon a warrant commanding it or a statute requiring or permitting it, an arrest is justified conduct.

[¶18] North Dakota law permits police officers to use reasonable force in making an arrest. N.D.C.C. § 29-06-10. In fact, in instances in which the defendant resists arrest, an “officer may use all necessary means to effect the arrest.” N.D.C.C. § 29-06-13 (emphasis added). Unlike ordinary citizens, the duty to retreat or avoid deadly force does not apply to a “public servant justified in using force in the performance of the public servant’s duties . . . because of resistance or threatened resistance by or on behalf of the other individual against whom the public servant’s . . . action is directed.” N.D.C.C. § 12.1-05-07(2)(b)(1).

[¶19] All persons, including police officers, are justified in using force to defend against bodily injury, sexual assault, or detention. N.D.C.C. § 12.1-05-03. But a person resisting arrest or performance of a duty by a public servant is not justified in using force. N.D.C.C. § 12.1-05-03(1). Accordingly, in instances involving the lawful arrest of a person resisting arrest, force is justified only by the public servant, unless excessive. Id. Use of force to defend others is justified if the person defended would be justified in defending himself. N.D.C.C. § 12.1-05-04. A policy requiring police to abandon statutory authorization to use force out of fear of termination would have the de-facto effect of completely undermining existing law. This Court should not permit a policy requiring police to forfeit their right of self-defense in order to maintain their livelihood.

D. Scope of Public Policy Exception

[¶20] In evaluating whether public policy provides exception to employment at will, this Court has addressed the question broadly, relying upon constitutional or statutory provisions. See Jose v. Norwest Bank North Dakota, N.A., 1999 ND 175, ¶ 17, 599

N.W.2d 293. Other states have more narrowly defined exceptions. For example, Arkansas recognizes four: 1.) discharge for refusing to violate a criminal statute; 2.) discharge for exercising a statutory right; 3.) discharge for complying with a statutory duty; and 4.) discharge in violation of general public policy of the state. See City of Green Forest v. Morse, 873 S.W.2d 155, 158 (Ark. 1994) (citations omitted). This Court’s existing test requires recognition of a public policy exception for police who are forced to exercise self-defense while making an arrest. But broader public policy further compels an exception.

[¶21] In Stephenson v. Litton Systems, Inc., 646 N.E.2d 259 (Ohio App. 1994), an employee was fired for reporting to police that her boss was preparing to drive drunk. Noting the state’s significant interest in abating drunk driving, the court recognized an exception to the employment-at-will doctrine for making the report. Id. at 260. Similarly, North Dakota public policy should not encourage forceful resistance to lawful discharge of police authority. See e.g., Schell v. Collis, 83 N.W.2d 422, 427 (N.D. 1957) (“The law protects an officer who is trying to do his duty as long as he does not use more force than is necessary.”)

[¶22] A policy which permits terminating a police officer for exercising the right of self-defense in the course of making an arrest is inimical to existing public policy: charged with knowledge that police will not defend themselves out of fear of loss of their jobs, offenders would resist and attempt to avoid arrest. This would undermine clear public policy by subjecting police to danger, encouraging lawlessness by offenders, and contravening legislative policy to the contrary, See N.D.C.C. § 12.1-08-01 (prohibiting physical obstruction of a government function); N.D.C.C. § 12.1-08-02 (prohibiting arrest or discharge of duties); and N.D.C.C. § 12.1-08-03 (prohibiting hindering law enforcement).

CONCLUSION

[¶23] The Court today is not asked to answer the underlying dispute regarding the termination of Detective Brandon Potts. Instead, the Court is asked to declare that public policy precludes termination of North Dakota police officers who are forced by others to exercise their right of self-defense in the course of a lawful arrest. Stated differently, the Court is simply asked to permit a jury to resolve the underlying dispute.

[¶24] Like protecting the employee fired for honoring a subpoena and testifying truthfully, Ressler v. Humane Society of Grand Forks, 480 N.W.2d 429 (N.D. 1992), or like protecting the employee fired for seeking workers compensation benefits, Krein v. Marian Manor Nursing Home, 415 N.W.2d 793 (N.D. 1987), this Court should protect North Dakota's police officers from termination of employment for being forced to exercise the constitutional and statutory right of self-defense during the course of an arrest. Further, this Court should protect police officers and citizens from the danger of a contrary conclusion—de facto encouragement for offenders to assail police and resist arrest. The public policy of North Dakota protects officers trying to do their duty. North Dakota peace officers deserve no less. The Court should declare public policy precludes termination.

Respectfully submitted this 18th day of June, 2020.

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FRATERNAL ORDER OF POLICE

CERTIFICATE OF COMPLIANCE

[¶25] Consistent with N.D.R.App. P. 32(e), I certify this 13-page brief complies with the 19-page length limitation as provided by N.D.R.App. P. 29(a)(5), establishing an amicus brief page limitation of one-half the maximum length of a principal party brief.

Dated this 18th day of June, 2020.

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LAKE POLICE DEPARTMENT,

DEFENDANTS AND
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SUPREME COURT NO. 20200144
Civil No. 2019-CV-293

CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2020, the following documents:

**MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND AMICUS CURIAE BRIEF OF
NORTH DAKOTA FRATERNAL ORDER OF POLICE IN SUPPORT OF REVERSAL**

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Dated this 18th day of June, 2020.

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