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Christian County, Missouri—The "CC9"
Curtis, et al v. Brad Cole, et al (2020)
Burns, et al v. Brad Cole, et al (2021)

Nine Deputies claimed First Amendment Retaliation after they were terminated when a new sheriff was elected.

- Political Affiliation/Patronage
- Candidacy
- Speech

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Facts

- **May 2015:**
 - Christian County Sheriff Joey Kyle resigns in office, pleads guilty to federal felonies involving public corruption
 - Brad Cole, Christian County Coroner, becomes Sheriff by operation of Missouri Statute
- **June:**
 - County Commission appoints an interim Sheriff and scheduled a special election for August 4, 2015
 - Christian County Republican Committee overwhelmingly chooses Brad Cole as the Republican nominee.
 - Some Unsuccessful republican contestants launch "independent" candidacies.

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Facts cont...

- When McNiel came into the Sheriff's Office, he told all staff, it was a "crime scene."
- During the campaign, there were media reports implying Keith Mills was potentially involved in Kyle's criminal activity.
- Keith Mills Quotes:
 - "nucleus" of the Sheriff's Office was good, and
 - that that he did not want to see a change in direction.
- McNiel suspended Mills in July 2015
- **Pushback**
 - Interim staff felt pushback from rank and file to their efforts at reform and change
 - Felt the rank and file were "waiting out!" the interim staff in hopes Keith Mills would win and things would go back to "normal."
- Mills: Do not need to cooperate with federal investigators

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Photo Finish: Brad Cole Wins

- August 4: Election
- August 5, 6, & 7: Interim Staff Briefing
- August 7: Swearing In
- Same day, after being sworn in, Cole Terminates/Demotes 10 deputies.




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Types of Deputies Terminated/Demoted

- 1 Chief Deputy (did not sue)
- 1 Captain (terminated)
- 2 Sergeants
 - 1 demoted
 - 1 terminated
- 1 detective
- 1 Information technology/\patrol
- 4 patrol

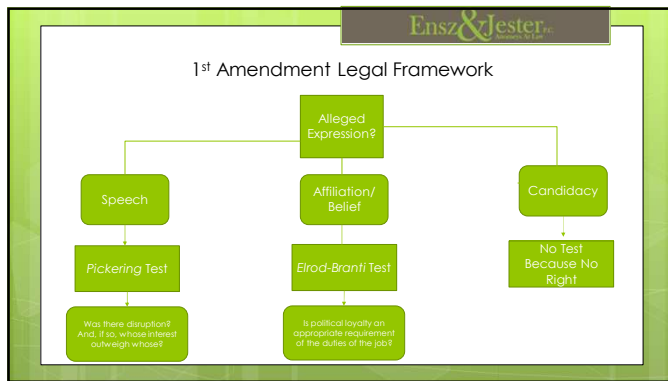
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The Suits—Three Sets

<ul style="list-style-type: none"> • First set of 3 Plaintiffs filed in March 2017 in federal court 	<ul style="list-style-type: none"> • Second set of 7 (one later dismissed) filed in August 2018 in federal court 	<ul style="list-style-type: none"> • Third set (all 9 plaintiffs) August 2020 in state court <i>after</i> they lost in federal court.
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First Set (Curtis Case) Arguments

Cole's Arguments	Plaintiffs' Arguments
<ul style="list-style-type: none"> Political Loyalty is required: <ul style="list-style-type: none"> Deputies are "at-will" Sheriff appoints his deputies Serve at pleasure of sheriff Deputies are "Agents"/Alter Egos Deputies have all powers of Sheriff Sheriff is liable to deputy Deputies make policy in their decisions 	<ul style="list-style-type: none"> Political Loyalty is not required: <ul style="list-style-type: none"> 67.145—the "first responder statute"—prohibits termination for political activities Deputies duties are not policymaking or confidential

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First Set Holding


"Because Curtis and Bruce, in their role as Missouri deputy sheriffs, held "policymaking positions for which political loyalty is **necessary to an effective job performance**," Cole was permitted to "take adverse employment actions against [them]" and did not violate their constitutional rights."

Curtis v. Christian Cty., Missouri, 963 F.3d 777, 789 (8th Cir. 2020).

Key Factors:

- Sheriff's are elected and deputies play key role in implementing his policies.
- Deputies assist sheriff in performing his duties (a deputies duties are the sheriff's duties)
- Sheriff's are liable for their deputies conduct.
- At-Will employees, serving at the pleasure of the sheriff
- Plaintiffs were **deputies sworn to engage in law enforcement activities**


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Second Set(Burns)Arguments

Cole's Arguments	Plaintiffs' Arguments
<ul style="list-style-type: none"> ▪ Political Loyalty is required: <ul style="list-style-type: none"> ▪ See Curtis (we already won) 	<ul style="list-style-type: none"> ▪ Political Loyalty is not required: <ul style="list-style-type: none"> ▪ 67.145—the "first responder statute"—prohibits termination for political activities ▪ Deputies duties are not policymaking or confidential ▪ 130.028 (can't discriminate or discharge by reason of political beliefs or opinions) ▪ 115.637 (making preventing or enforcing prohibits on campaigning a crime)

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Second Set Holding

- This Court already examined Missouri law in *Curtis* when reviewing the role of a Missouri deputy sheriff and determining that political loyalty is a requirement for effective performance of the role.. We see no need to replicate that review one year later.

Burns v. Cole, 18 F.4th 1003, 1009 (8th Cir. 2021)


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Take-a-ways from Curtis/Burns

- As of 2015, a Missouri sheriff could demand political loyalty from his/her deputies.
- Likely cannot demand such loyalty from non-sworn deputies (jailers, rank-and-file staff, etc & may not apply to non-first class counties)
- If "speech," rather than affiliation is involved, a different test may apply, but likely the same result
 - But hold on....
 - 105.055 RSMo
 - 590.502 RSMo

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Impact on Curtis/Burns

- **105.055**
 - Public Entity Whistleblower
 - Basically any "concern" an employee has, and reports it, he is protected.
 - Any report would be "speech" and likely analyzed under a different analysis than Curtis/Burns

- **590.502**
 - Creates mandatory processes for investigations/discipline of officers
 - Aside from process, *shouldn't* change underlying ability of Sheriff


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Public Employee Whistleblower Statute—§ 105.055 RSMo

- Makes it unlawful for a "public employer" to discipline or prohibit a "public employee" for discussing the employer's operations, and disclosing "prohibited or suspected prohibited activity"
- Grants an employee the ability to have administrative review of a action taken against her, potentially obtain equitable relief, and punish the violator; and
- Also grants an employee the ability to sue for money damages

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- Prior to Aug. 2018, only included the state and state agencies, now it includes "any unit or political subdivision of the state, or any instrumentality of the state"
- That means **you!**

"Public Employer"

Defined

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▪ "Public Employee" is not limited to actual employees, it also includes:

- Volunteers;
- Interns; and
- Any other individual performing work or services for a public employer.

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"Public Employee"

Defined

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• Supervisors and "Appointing Authorities" cannot **prohibit** discussion of employer's operations with:

- Legislators;
- State Auditor
- Attorney General;
- Other prosecutors;
- Law enforcement;
- News media;
- The public;
- Any state official or body responsible for investigating misconduct

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General Prohibitions

(The general prohibits are arguably not actionable in a civil suit)

§ 105.055.2 RSMo

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Supervisors and "Appointing Authorities" cannot prohibit or discipline employee for:

- Disclosing any alleged "prohibited activity under investigation or related activity;"
- Disclosing information which the "employee reasonably believes" evidences:
 - A violation of a law, rule, or regulation;
 - **Mismanagement** ;
 - Monetary Waste;
 - Abuse of authority;
 - Policy violation; or
 - Danger to public safety.

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Actionable Prohibitions

These are, without question, actionable in a civil suit.

§ 105.055.3 RSMo

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...cont.
Cannot:

- Require public employee to give notice prior to disclosing;
- Prevent a public employee from testifying about alleged prohibited activity or disclosure of information

Actionable Prohibitions Cont.
These are, without question, actionable in a civil suit.
§ 105.055.3 RSMo

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The civil action—key points

- Venue
- Burden of Proof
- Damages
 - Where the alleged violation occurred;
 - Where the "complainant" resides (can it be someone other than the employee?);
 - Where the person—alleged violator—resides (individual liability?).
- Burden of Proof on Public Employee (or not)

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The civil action—key points
Venue

- Where the alleged violation occurred;
- Where the "complainant" resides
 - Begs the question: can someone other than the public employee bring a lawsuit for a violation?
- Where the "person against whom the civil complaint is filed"
 - Does the reference to "person" create individual liability?

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The civil action—key points
Burden of Proof

- Initial Burden is on the "Public Employee"
 - "A public employee shall show by clear and convincing evidence that he or she, [or someone] acting on his or her behalf ... reported or was about to report ... a prohibited activity or a suspected prohibited activity.
- If the public employee meets her burden, the public employer must demonstrate that any disciplinary action was taken because of the report.

BOTTOM LINE: Employee only must show they did or were about to report what they believed to be a prohibited activity.

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The civil action—key points
Damages

- Who Decides?
 - A jury determines liability
 - "A Court, in rendering a judgment in an action ..." can order
 - "actual damages, and
 - may also award" costs and attorney fees.
 - Arguably a jury does not get to decide the amount of damages.
- Unavailable damages:
 - Equitable relief (reinstatement)

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SECTION 590.502 RSMO
OVERVIEW

- What is it
- When does it apply
- Who benefits
- What is the process
- Remedies for violations
- The unknowns

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What is it?

- Mandates a "minimum" level of process for law enforcement officers being investigated by their employer.
- Creates protections for a law enforcement officer being investigated.
- If these processes and protections are violated, creates a cause of action against the employer

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WHEN DOES IT APPLY?

2. Whenever a law enforcement officer is under administrative investigation or is subjected to administrative questioning that the officer reasonably believes could lead to disciplinary action, demotion, dismissal, transfer, or placement on a status that could lead to economic loss, the investigation or questioning shall be conducted under the following conditions:

Note: Whether an action could lead to discipline or economic loss is based upon the **subjective belief** the person **being** questioned, not the questioner.

- So, err on the side caution **all the time!!** Use it for:
 - Citizen Complaints
 - Internal Complaints
 - Before issuing discipline

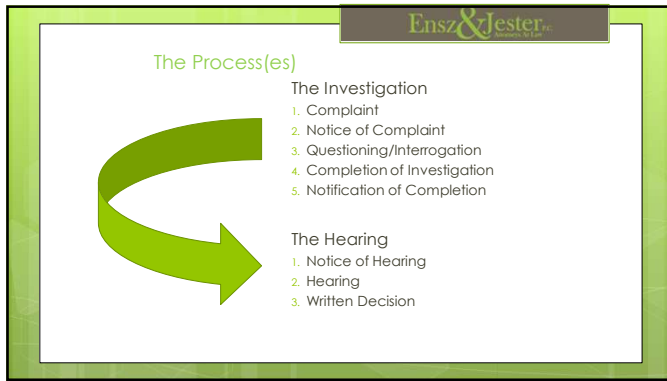
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WHO BENEFITS?

- All police officers, and sheriff deputies.

(5) "Law enforcement officer", any commissioned peace officer with the power to arrest for a violation of the criminal code who is employed by any unit of the state or any county, charter county, city, charter city, municipality, district, college, university, or any other political subdivision or is employed by the board of police commissioners as defined in chapter 84. Law enforcement officer shall not include any officer who is the highest ranking officer in the law enforcement agency.

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The Investigation—the "Complaint"

- Must include:
 - A statement outlining the Complaint
 - Identify the personal information of the complaint

(2) Any person, including members of the same agency or department as the officer under investigation, filing a complaint against a law enforcement officer shall have the complaint supported by a written statement outlining the complaint that includes the personal identifying information of the person filing the complaint. All personal identifying information shall be held confidential by the investigating agency;

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The Investigation—Notice of Investigation

- Given in writing;
- At least 24 hours before any questioning
- Explain alleged "violation"
- Identify investigators (cannot be investigating criminal aspect)
- Include a copy of the complaint
- Identify the personal information of the complaining party

(1) The law enforcement officer who is the subject of the investigation shall be informed, in writing, of the existence and nature of the alleged violation and the individuals who will be conducting the investigation. Notice shall be provided to the officer along with a copy of the complaint at least twenty-four hours prior to any interrogation or interview of the officer;

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The Investigation—Questioning

- Give Garrity warnings *prior* to questioning
- Must take place while officer is on duty (unless otherwise agreed)
- Occur in a secure location or officers ordinary place of work
- No threats
- Right to attorney or authorized representative
- "Reasonable" length of time
- Allow rest/necessities
- Opportunity for officer/representative to review complaint
- Investigators cannot be investigating criminal aspect

See 590.502.2(3)-(10) RSMo

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The Investigation—Completion & Notification

- Complete investigation in 90 days or less
(11) The law enforcement agency conducting the investigation shall have ninety days from receipt of a citizens complaint to complete such investigation. The agency shall
- Must keep all documents and investigatory materials
(12) A complete record of the administrative investigation shall be kept by the law enforcement agency conducting such investigation. Upon completion of the investigation, a copy of the entire record, including, but not limited to, audio, video, and transcribed statements, shall be provided to the officer or the officer's representative within five business days of the officer's written request. The agency may request a protective order to redact all personal identifying witness information, and
- Must notify officer of findings, recommendations and discipline with 5 days of completion
- If requested, provide a complete investigative file within 5 days of request.
investigation, a copy of the entire record, including, but not limited to, audio, video, and transcribed statements, shall be provided to the officer or the officer's representative within five business days of the officer's written request. The agency may request a protective order to redact all personal identifying witness information, and

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The Investigation—Notice of Hearing

- Written
- Given at least 7 days before hearing
- Notify officer of right to attorney/representative
- Notify officer of access/view investigation files 7 days in advance of hearing.
- Notify officer of right to refuse to testify if facing criminal charges.

See 590.502.3 RSMo

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The Investigation—The Hearing Itself

- The statute does not explain the level of process required!
- But, generally, a full due process hearing requires the following:
 - Notice of the charge/potential outcome
 - Right to counsel/representation
 - Opportunity to hear and rebut allegations
 - Opportunity to present evidence
 - Opportunity make argument
 - A record must be kept

See 590.502.3 RSMo

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The Investigation—Written Decision

- A written decision must be issued
- It must be delivered/mailed "promptly"
- It must include:
 - Findings of Fact
 - Conclusions
 - Accompanying Decision:
 - **If there is a finding of no "misconduct" the officer is entitled to compensation for economic loss during the process.**
- Right to Appeal information, if any
- Notice of ability to place document in response in personnel file

4. Any decision, order, or action taken following the hearing shall be in writing and shall be accompanied by findings of fact. The findings shall consist of a concise statement upon each issue in the case. A copy of the decision or order accompanying findings and conclusions along with the written action and right of appeal, if any, shall be delivered or mailed promptly to the law enforcement officer or to the officer's attorney or representative of record.

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Remedies

- New Cause of Action to Enforce Statement
- Must be brought within 1 year
- Any aggrieved law enforcement officer, or their representative may seek judicial enforcement of the statute
- Brought in Court in county where Law Enforcement Agency sits.
- Court has the power to:
 - Void the agency action;
 - Award costs to officer/representative
 - Award attorney fees to officer/representative

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Big Unknowns

- What constitutes administrative investigation/questioning
 - Does this really apply to all "investigations" that are not criminal in nature?
 - Statute uses inconsistent language
 - "citizen complaint" vs. "any person ... filing a complaint"
 - Routine performance coaching, PIPs, et.
- What standard does the hearing apply?
 - Employer's policies or "misconduct"
- Who is the "administering authority?"

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FAQs

Are investigatory records public under the Sunshine Law?
No, they protected from disclosure under the Sunshine Law.

What records must be made of the hearing?
Section 502 does not state what type of record must be made. However, we advise either making a stenographic, audio, or video record.

Is the "Administering Agency" decision reviewable?
It depends. If there are appeal rights under the law enforcement agency's policies, regulations, or related laws, then yes. If not, then yes. If not, then it should not be reviewable. However there is a chance that some attorneys representing employees will try to will try to argue that the provisions of § 502 requiring a hearing will make the process a "contested case" that is reviewable under reviewable under the Missouri Administrative Procedures Act.

Does § 802 modify Missouri's Employment-at-will status?
While a definitive answer to this is unknown, § 502 does not clearly express an intent to change the employment at-will doctrine. For that reason, our current belief is that § 502 does not modify the employment-at-will doctrine.

That being said, there are aspects of § 502 that an employee-friendly Court may interpret as placing substantive limitations on a law enforcement agency's ability to discipline an officer. And, because of that, this statute is ripe for statute is ripe for Plaintiffs' attorneys to try to take advantage of and argue that it does modify the employment-at-will doctrine. Further, as explained above, if officers are able to successfully argue it creates a "contested case" under the Missouri the Missouri Administrative Procedures Act.

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