

THE FIFTH AMENDMENT DISCLOSURE OBLIGATIONS OF GOVERNMENT EMPLOYERS WHEN INTERROGATING PUBLIC EMPLOYEES

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INTRODUCTION

Imagine you are a police officer working for your local police department. One night, while you are on patrol with your partner, you stop at the local doughnut shop. There, you witness your partner not only engage in conversation with a well-known drug dealer in the area named Smokey, but also accept an unmarked envelope from him. When your partner returns, he hands you the envelope and asks if you can keep it in your locker for a few days. Despite the suspicious circumstances, you agree and store the envelope.

A few days later, you begin to hear rumors that a few of your fellow officers have been taking bribes from local drug dealers in return for allowing those dealers to pass freely through the city. In response to these allegations, your department opens an investigation and interrogates officers one at a time. When it is your turn to be interrogated, you fear that you will be disciplined because you are still holding the envelope for your partner. Upon entering the interrogation room, the only statement your employer makes is that you must talk or be fired. Unaware that this situation grants you automatic immunity from any self-incriminating statements, you fear criminal prosecution and instinctively tell your employer that you are going to exercise your right to remain silent. You are fired on the spot.

Although the Supreme Court has held that public employees must be granted immunity from self-incriminating statements when presented with a choice between answering the employer's questions or facing disciplinary action,¹ the Court has failed to clarify whether the employer must also give the employees notice of their Fifth Amendment rights and immunities before asking them potentially incriminating questions. On this issue, the federal circuit courts are split. The United States Court of Appeals for the Fifth,² Eighth,³ and Eleventh⁴ Circuits have adopted the

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¹ *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967).

² *Gulden v. McCorkle*, 680 F.2d 1070 (5th Cir. 1982).

³ *Hill v. Johnson*, 160 F.3d 469 (8th Cir. 1998).

⁴ *Hester v. Milledgeville*, 777 F.2d 1492 (11th Cir. 1985).

“no affirmative tender” approach, holding that the government is under no affirmative duty to disclose to employees their rights and immunities prior to questioning. Conversely, the Second,⁵ Seventh,⁶ and Federal⁷ Circuits have adopted the “duty to advise” approach, holding that a government employer is under a duty to advise its employees of their rights and immunities under the Fifth Amendment prior to asking them potentially incriminating questions.

This Article argues that courts should adopt the “duty to advise” approach to a government employer’s disclosure obligations. Part I describes the evolution of the Supreme Court’s decisions regarding the rights and immunities of public employees under the Fifth Amendment. Part II presents the circuit split on the issue of whether the government must give employees notice of their rights and immunities under the Fifth Amendment before asking them potentially incriminating questions. Part III analyzes the arguments on both sides of the issue and argues that the “duty to advise” approach is preferable for four reasons. First, it eliminates the potential for public employees to unknowingly subject themselves to discipline while exercising their constitutional privilege against self-incrimination. Second, it eliminates the potential that the government will use its position of power to manipulate or exploit public employees. Third, the duty imposed on the government in comparison to the protection afforded to the employees would be inherently low. Fourth, this approach facilitates the government’s fact-finding process by giving the employees an incentive for honesty.

I. BACKGROUND: PUBLIC EMPLOYEE RIGHTS AND IMMUNITIES

A. *The Fifth Amendment Privilege Against Self-Incrimination*

The Fifth Amendment of the United States Constitution states in pertinent part that “[n]o person . . . shall be compelled . . . to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.”⁸ The broad scope of the Fifth Amendment affords a United States citizen two important rights.⁹ First, it “protects the individual against being involuntarily called as a witness against himself in a criminal prosecution.”¹⁰ Second, it privileges the individual “not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate

⁵ *Uniformed Sanitation Men Ass’n v. Comm’r of Sanitation of New York*, 426 F.2d 619 (2d Cir. 1970).

⁶ *Atwell v. Lisle Park Dist.*, 286 F.3d 987 (7th Cir. 2002).

⁷ *Modrowski v. Dep’t of Veterans Affairs*, 252 F.3d 1344 (Fed. Cir. 2001).

⁸ U.S. CONST. amend. V.

⁹ *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).

¹⁰ *Id.*

him in future criminal proceedings.”¹¹ Basically, the Fifth Amendment affords a United States citizen protection from being compelled to make self-incriminating statements unless first granted immunity from further prosecution.¹² Thus, any potentially self-incriminating statement may be used against a citizen only if it is made voluntarily, or without the improper pressures of coercion.

In the 1966 case *Miranda v. Arizona*, the Supreme Court reinforced this concept and held that “the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.”¹³ More specifically, any persons subject to custodial interrogation must first be given a *Miranda* warning, which includes being advised that they have a right to remain silent, that their statements can be used as evidence against them, and that they have a right to an attorney.¹⁴ The Court further held that these rights may be waived only if the waiver is made “voluntarily, knowingly and intelligently.”¹⁵ Prior to custodial interrogation, law enforcement officers must first give a *Miranda* warning to ensure that citizens are informed of their rights and immunities under the Fifth Amendment.

B. The Basic Privilege Against Self-Incrimination in the Public Employment Context Under Garrity v. New Jersey and Spavek v. Klein

Although the Supreme Court clarified the scope of the Fifth Amendment in the typical criminal law context in *Miranda*, the extent of the Fifth Amendment rights and immunities of public employees when asked potentially incriminating questions remained unclear. In 1967, however, the Supreme Court passed down two opinions on the issue of whether the government may use the threat of discharge to secure incriminatory evidence against an employee.

The Supreme Court first addressed this issue in *Garrity v. New Jersey*.¹⁶ In *Garrity*, the police department coerced officers into answering self-incriminating questions by threatening to fire them for refusal to answer.¹⁷ Consequently, the officers answered the questions, and some of the answers were used in subsequent prosecutions against

¹¹ *Id.*

¹² *See Kastigar v. United States*, 406 U.S. 441 (1972).

¹³ 384 U.S. 436, 444 (1966).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 385 U.S. 493 (1967).

¹⁷ *Id.* at 494.

them.¹⁸ As such, the officers were presented with the choice between self-incrimination and termination from employment.

The Court stated that the choice presented to the employees amounted to coercion because “[t]he option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent.”¹⁹ Like the circumstances in *Miranda*, the practice of offering the option of either losing one’s job or making self-incriminating statements is “likely to exert such pressure upon an individual as to disable him from making a free and rational choice.”²⁰ Thus, the *Garrity* decision protects public employees from self-incrimination by prohibiting, in subsequent criminal proceedings, the use of statements obtained under threat of removal from employment.²¹

On the same day the Supreme Court decided *Garrity*, it also decided *Spevack v. Klein*, in which Justice Fortas’s concurring opinion noted that the Court has never adhered to the proposition that public employees were immune from being discharged for refusal to testify on conduct relative to their employment.²² Instead, he stated that the decision in *Garrity* only rendered the dismissal of a public employee for refusal to testify improper when the government sought to use the testimony in subsequent criminal proceedings.²³ Thus, where public employees are forced to answer potentially incriminating questions under the threat of being fired, such statements cannot lawfully be used against them in subsequent criminal proceedings.

C. Gardner v. Broderick: *The Ban on Requiring Waiver of Immunity*

Just over a year later in 1968, the Supreme Court decided *Gardner v. Broderick*, which confronted whether public employees could be fired for refusing to waive their Fifth Amendment privilege against self-incrimination.²⁴ The Court reviewed the *Garrity* and *Spevack* decisions and held that if public employees refuse to answer questions “specifically, directly, and narrowly relating to the performance of [their] official duties, without being required to waive [their] immunity” in subsequent criminal proceedings, then the privilege against self-incrimination would not bar dismissal from employment.²⁵ Alternatively, where public employees are discharged from office not for failure to

¹⁸ *Id.* at 495.

¹⁹ *Id.* at 497.

²⁰ *Id.* (quoting *Miranda v. Arizona*, 384 U.S. 436, 464–65 (1966)).

²¹ *Id.* at 500.

²² 385 U.S. 511, 519–20 (1967) (Fortas, J., concurring).

²³ *Id.*

²⁴ 392 U.S. 273 (1968).

²⁵ *Id.* at 278 (footnote omitted).

answer relevant questions about their duties as employees, but for refusing to waive a constitutional right, such discharge is improper because it violates the rights and immunities afforded to citizens under the Fifth Amendment.²⁶ Therefore, forcing public employees to choose between job loss and self-incrimination is unconstitutional, regardless of its effectiveness.²⁷

D. Lefkowitz v. Turley and Lefkowitz v. Cunningham: The Limited Expansion of Public Employee Rights and Immunities

Finally, the two most recent Supreme Court cases relating to public employee Fifth Amendment rights and immunities were decided in the 1970s. The first case, *Lefkowitz v. Turley*, addressed the issue of whether a public contractor is afforded the same rights and immunities as a public employee when presented with the choice between either waiving Fifth Amendment rights against self-incrimination or losing contracts with the government.²⁸ The Court held that such a choice is indeed unconstitutional and reasoned that there was no difference between the threat of job loss to a public employee and the threat of lost contracts to a contractor engaged in business with the government.²⁹ Essentially, the Court found that such a threat amounted to coercion because the choice presented to the contractors threatened their livelihood.³⁰ As a result, any incriminating statements elicited as a result of that coercion could not be used against the contractors in any subsequent criminal proceeding, regardless of any governmental need for such statements.³¹

The Supreme Court further expanded the concept of public employee immunity in *Lefkowitz v. Cunningham* when it addressed the issue of whether government employers may sanction or discipline public employees for refusing to waive their constitutional privilege against self-incrimination as long as the sanctions do not have economic ramifications.³² The Court specifically addressed whether a political party officer could be sanctioned and prevented from holding further office for refusing to waive the Fifth Amendment protection against self-incrimination.³³ The Court reiterated that its precedent settled that when public employees are sanctioned or disciplined for refusing to waive their privilege against compelled self-incrimination without being

²⁶ *Id.* at 278–79.

²⁷ *Id.*

²⁸ 414 U.S. 70 (1973).

²⁹ *Id.* at 83.

³⁰ *Id.*

³¹ *Id.* at 85.

³² 431 U.S. 801 (1977).

³³ *Id.* at 802.

tendered immunity from those statements, such practices amount to coercion and violate the Fifth Amendment.³⁴ Therefore, unless public employees are immunized from subsequent criminal prosecution, any statements procured through threats of discipline, sanction, or loss of employment for failure to waive the right of self-incrimination, amount to coercion and are unconstitutional.

II. THE NOTICE PROBLEM

Although the Supreme Court made it clear that public employees cannot be constitutionally coerced to waive their privilege against self-incrimination without being granted immunity from subsequent criminal prosecution, the Court has been less clear as to whether a government employer has a duty to provide employees with notice of their rights and immunities. To date, six federal circuit courts have addressed the issue of whether a government employer must give public employees notice of their rights and immunities prior to asking potentially incriminating questions. The United States Court of Appeals for the Fifth,³⁵ Eighth,³⁶ and Eleventh³⁷ Circuits have adopted the “no affirmative tender” approach and held that there is no notice requirement because the right to immunity attaches automatically when public employees are compelled to waive their right to silence.³⁸ This approach emphasizes that it is the threat of discipline or job loss that creates the constitutional protection of immunity and bars the answers from being used in subsequent proceedings, not the affirmative notice of immunity.³⁹

Conversely, the United States Court of Appeals for the Second,⁴⁰ Seventh,⁴¹ and Federal⁴² Circuits have adopted the “duty to advise” approach and held that before asking potentially incriminating questions, government employers must advise public employees that they may not refuse to answer the questions under the guise that the questions may be incriminating because they are entitled to immunity from subsequent prosecution.⁴³ This approach emphasizes that the disclosure obligation is essential because it protects public employees

³⁴ *Id.* at 806.

³⁵ *Gulden v. McCorkle*, 680 F.2d 1070 (5th Cir. 1982).

³⁶ *Hill v. Johnson*, 160 F.3d 469 (8th Cir. 1998).

³⁷ *Hester v. Milledgeville*, 777 F.2d 1492 (11th Cir. 1985).

³⁸ *See, e.g., id.* at 1496.

³⁹ *Gulden*, 680 F.2d at 1075.

⁴⁰ *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation of New York*, 426 F.2d 619 (2d Cir. 1970).

⁴¹ *Atwell v. Lisle Park Dist.*, 286 F.3d 987 (7th Cir. 2002).

⁴² *Modrowski v. Dep't of Veterans Affairs*, 252 F.3d 1344 (Fed. Cir. 2001).

⁴³ *See, e.g., Atwell*, 286 F.3d at 990.

who may not be well versed with the complex exceptions to the *Garrity* decision.⁴⁴

A. The “No Affirmative Tender” Approach

As stated above, the Fifth, Eighth, and Eleventh Circuits adopt the “no affirmative tender” approach, which rejects a requirement for an affirmative tender of immunity to public employees prior to requiring them to answer potentially incriminating questions. In the Fifth Circuit case *Gulden v. McCorkle*, the Dallas Public Works Department ordered its employees, including Charles Gulden and Richard Sage, to take polygraph examinations in connection with an investigation about a bomb threat.⁴⁵ In the process of conducting the mandatory polygraph tests, the Department required employees to sign two waivers, one of which stated that the employees were not being promised immunity in an effort to induce them to consent to the examination.⁴⁶ When brought in for the examination, however, Gulden and Sage refused to either sign the waiver or submit to the polygraph; as a result they were fired.⁴⁷

Gulden and Sage sued in the District Court for the Northern District of Texas.⁴⁸ After a bench trial, the district court found for the Department and held that Gulden and Sage’s Fifth Amendment rights against self-incrimination were not violated because the “polygraph exam[inations] were purely job-related” and the waiver sought only to obtain consent to take the polygraph.⁴⁹ The court explained that the Fifth Amendment does not require an affirmative tender of immunity, but only requires that employees be advised that evidence obtained as a result of the polygraph may be used against them, and that they may not be dismissed for refusing to waive their right against self-incrimination.⁵⁰

The Court of Appeals for the Fifth Circuit affirmed the district court’s decision and held that government employers violate the Fifth Amendment rights of public employees only when the employees are coerced to answer potentially incriminating questions and required to waive their right to immunity.⁵¹ As such, a government employer’s actions are unconstitutional if an employee’s discharge is predicated on his or her refusal to waive immunity.⁵² According to the Fifth Circuit,

⁴⁴ *Id.*

⁴⁵ 680 F.2d 1070, 1071 (5th Cir. 1982).

⁴⁶ *Id.* at 1072 n.4.

⁴⁷ *Id.*

⁴⁸ *Id.* at 1071–72.

⁴⁹ *Id.* at 1073.

⁵⁰ *Id.*

⁵¹ *Id.* at 1074.

⁵² *Id.*

there is no constitutional violation where an employee's discharge is based on his refusal to answer where there is no demand by the employer to relinquish the constitutional right to immunity.⁵³ The court further held that there was no requirement for an affirmative tender of immunity because an explicit coercive demand by the employer that employees waive immunity or lose their jobs is what creates the constitutional problem, not the fact that the employees were never warned.⁵⁴ Thus, the Fifth Circuit rejected the notion that government employers should be required to give an affirmative tender of immunity to public employees when asking potentially incriminating questions because immunity attaches automatically as a result of the compulsion, not because the employees were notified of their rights.⁵⁵

Like the Fifth Circuit, the Eighth Circuit has also adopted the "no affirmative tender" approach, which supports automatic attachment of immunity to the public employee. The plaintiff in *Hill v. Johnson, J.D. Hill*, was a supervising officer at the Pulaski County Sheriff's office.⁵⁶ After discovering that a photograph of a beaten detainee was missing, the sheriff tried to question Hill about the incident and subject him to a polygraph examination.⁵⁷ Hill refused to answer the questions and failed to appear for the polygraph examination.⁵⁸ Subsequently, the sheriff terminated Hill's employment, which prompted Hill to file suit in the District Court for the Eastern District of Arkansas against the sheriff and other office members for violating his Fifth Amendment rights.⁵⁹ Ultimately, the district court denied the sheriff's motion for summary judgment, which had alleged that no constitutional or statutory right was violated.⁶⁰

On appeal, the Eighth Circuit reversed the district court's denial of summary judgment, holding that Hill failed to allege a "violation of clearly established Fifth Amendment rights of which a reasonable person would have known."⁶¹ The court reasoned that because there is a substantial "public interest in securing from public employees an accounting of their public trust," a government employer does not violate a public employee's constitutional rights as long as the employer does not demand that the employee relinquish his constitutional

⁵³ *Id.*

⁵⁴ *Id.* at 1075.

⁵⁵ *Id.*

⁵⁶ 160 F.3d 469, 470 (8th Cir. 1998).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 471.

immunity from prosecution.⁶² Thus, so long as the employer does not require the employee to waive immunity, it can compel the employee to either testify about the performance of official duties or forfeit employment.⁶³

The Eighth Circuit specifically rejected an employer's affirmative duty to offer immunity. Citing *Gulden*, the court found that even if employees are not specifically informed that their answers cannot be used against them in subsequent criminal prosecution, "the mere failure affirmatively to offer immunity is not an impermissible attempt to compel a waiver of immunity."⁶⁴ According to the Eighth Circuit, regardless of whether public employees are given notice of their rights and immunities, a government employer's actions are constitutional as long as the employees are not expressly asked to waive immunity rights on penalty of job loss and any statements procured are not used in subsequent prosecution.

Like the Fifth and Eighth Circuits, the Eleventh Circuit has also adopted the "no affirmative tender" approach. In *Hester v. Milledgeville*, Freddie Hester brought an action in the United States District Court for the Middle District of Georgia against the City of Milledgeville, challenging the constitutionality of the City's practice of requiring firefighters to submit to polygraph examinations.⁶⁵ When the polygraph testing was implemented, the firefighters were required to sign one of four forms prior to taking the examination.⁶⁶ In the first form, the employee consented to the use of the result in a subsequent judicial proceeding or administrative hearing.⁶⁷ In the second form, the employee waived all state and federal constitutional rights in connection with the polygraph examination.⁶⁸ In the third form, the employee retained all constitutional rights and granted the employee permission to object to incriminating questions.⁶⁹ In the fourth form, the employee refused to submit to the polygraph examination.⁷⁰ Although Hester was never tested because the City agreed to postpone testing until the legality of the procedure was determined in court, he filed suit challenging the constitutionality of the requirement.⁷¹ The district court ruled in Hester's favor and issued a permanent injunction against the polygraph

⁶² *Id.* (quoting *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977)).

⁶³ *Id.*

⁶⁴ *Id.* (citation omitted).

⁶⁵ 777 F.2d 1492, 1493 (11th Cir. 1985).

⁶⁶ *Id.* at 1494.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

testing on the premise that the waiver system had the potential to violate the privilege against self-incrimination, as well as due process and privacy rights.⁷²

On appeal, the Eleventh Circuit affirmed the decision of the district court and upheld the injunction against the polygraph testing.⁷³ The court reasoned that because the City had no authority to require at least two of the waiver options, Hester and the other public employees would be in an inherently coercive situation.⁷⁴ The court noted that if it is unconstitutional for a government employer to compel a public employee to answer self-incriminating questions without immunity, then the resulting statements could not be used in a subsequent criminal proceeding.⁷⁵ According to the court, a guarantee of immunity “would serve no useful purpose.”⁷⁶ Thus, no affirmative tender of immunity is necessary because the right to immunity automatically attaches to the compelled testimony.⁷⁷

Therefore, the Fifth, Eighth, and Eleventh Circuits have all developed a “no affirmative tender” approach, which refuses to require government employers to provide public employees with notice of their rights and immunities prior to being asked potentially incriminating questions. The Fifth Circuit reasoned that no notice is required because it is the coercive nature of the choice between compelled testimony or job forfeiture that automatically attaches the right to immunity under the Fifth Amendment.⁷⁸ The Eighth Circuit reasoned that no affirmative tender of immunity is required because there is no constitutional violation unless the public employees are expressly asked to waive their immunity rights or the information is actually used against them in subsequent prosecution.⁷⁹ Finally, the Eleventh Circuit reasoned that there is no notice requirement because it is implied in *Garrity* that if it is unconstitutional to compel self-incrimination by a public employee without an explicit grant of immunity, any self-incriminating statements that are procured from compelled testimony could not be used in a subsequent criminal proceeding.⁸⁰ Thus, the decisions from the Fifth, Eighth, and Eleventh Circuits stand for the proposition that the government has no duty to provide public employees with notice of their rights and immunities under the Fifth Amendment because immunity

⁷² *Id.*

⁷³ *Id.* at 1496.

⁷⁴ *Id.* at 1495–96.

⁷⁵ *Id.* at 1496.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Gulden v. McCorkle*, 680 F.2d 1070, 1075 (5th Cir. 1982).

⁷⁹ *Hill v. Johnson*, 160 F.3d 469, 471 (8th Cir. 1998).

⁸⁰ *Hester*, 777 F.2d at 1496.

automatically attaches in coercive situations, causing the notice requirement to serve no legitimate purpose.

B. The “Duty to Advise” Approach

Alternatively, the Second,⁸¹ Seventh,⁸² and Federal⁸³ Circuits have adopted the “duty to advise” approach. Under this approach, a government employer has an affirmative duty to advise public employees about their Fifth Amendment rights and immunities prior to asking potentially incriminating questions. In the Second Circuit case *Uniformed Sanitation Men Association v. Commissioner of Sanitation of New York*, employees of the City Department of Sanitation (the “Employees”) sued the Commissioner of Sanitation of New York City (the “Commissioner”) in the United States District Court for the Southern District of New York seeking reinstatement after being fired for refusing to answer potentially incriminating questions.⁸⁴ The City of New York required private waste carriers to purchase tickets for the privilege of using the City’s waste disposal facilities.⁸⁵ Employees of the Department of Sanitation were responsible for selling those tickets.⁸⁶ At one point, officials suspected that some employees were selling the tickets for cash and pocketing the profit.⁸⁷ An investigation was conducted that included observation by detectives and wiretapping of telephones.⁸⁸

The Deputy Administrator of the Environmental Protection Administration, which included the Department of Sanitation, called the Employees in for questioning.⁸⁹ At the meeting, the Employees were represented by counsel and advised by the Deputy Administrator of their “rights and privileges” under the laws of New York and the United States Constitution.⁹⁰ When the Employees refused to answer any incriminating questions, they were suspended.⁹¹ Eventually, the Commissioner gave the Employees a second opportunity to answer, but when the Employees refused, they were fired.⁹² The Employees then filed suit and demanded reinstatement on the ground that their Fifth Amendment

⁸¹ *Uniformed Sanitation Men Ass’n v. Comm’r of Sanitation of New York*, 426 F.2d 619 (2d Cir. 1970).

⁸² *Atwell v. Lisle Park Dist.*, 286 F.3d 987 (7th Cir. 2002).

⁸³ *Modrowski v. Dep’t of Veterans Affairs*, 252 F.3d 1344 (Fed. Cir. 2001).

⁸⁴ *Uniformed Sanitation Men Ass’n*, 426 F.2d at 621–22.

⁸⁵ *Id.* at 621.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 622.

rights and immunities had been violated.⁹³ Both parties filed motions for summary judgment, and the district court granted the motion for the Employees.⁹⁴

On appeal, the Second Circuit reversed the district court's decision and explained that compelled testimony is constitutional so long as the questions posed by the government employer to public employees are about performance of their official duties and the employees are duly advised of their rights and immunities prior to questioning.⁹⁵ The court reaffirmed the rule that if public employees are asked potentially incriminating questions and are not required to waive immunity, the privilege against self-incrimination is not a bar to their dismissal for refusing to answer.⁹⁶ More notably, the court determined that proceedings wherein an employer asks pertinent questions about the performance of duties are proper when government employers advise public employees of their rights and immunities, as well as the consequences of their decisions, before asking potentially incriminating questions.⁹⁷ Thus, the Second Circuit's decision in *Uniformed Sanitation Men Association* stands for three propositions. First, before asking potentially incriminating questions, government employers must advise public employees of their rights and immunities under the Fifth Amendment.⁹⁸ Second, if employees who have been duly advised of their rights and immunities refuse to answer the government employer's questions, the employer may constitutionally fire the employees.⁹⁹ Third, if employees are duly advised of their rights and immunities and consent to answer the questions, rather than face disciplinary action, those answers cannot be used against them in subsequent criminal proceedings.¹⁰⁰

Like the Second Circuit, the Seventh Circuit also adopts the "duty to advise" approach. In *Atwell v. Lisle Park District*, Sarah Atwell brought an action in the United States District Court for the Northern District of Illinois against the Lisle Park District ("Park District") alleging that her Fifth Amendment rights were violated because the Park District terminated her for failure to cooperate with an investigation.¹⁰¹ Due to a series of financial improprieties, the Park

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 627.

⁹⁶ *Id.* at 626–27.

⁹⁷ *Id.* at 627.

⁹⁸ *Id.*

⁹⁹ *Id.* at 626.

¹⁰⁰ *Id.* at 627.

¹⁰¹ 286 F.3d 987, 989 (7th Cir. 2002).

District initiated an investigation and suspended Atwell.¹⁰² In response, Atwell obtained counsel.¹⁰³ Before questioning and during the course of an informal meeting, the investigator for the Park District told Atwell that her attorney would probably advise her to exercise her right to remain silent.¹⁰⁴ As predicted, Atwell's attorney advised her to refuse to consent to an interview and Atwell complied. After being fired by the Park District, Atwell sued, but the district court dismissed her case.¹⁰⁵

On appeal, the Seventh Circuit cited the rule as stated in *Lefkowitz v. Cunningham* and *Gardner v. Broderick*—that a government employer may compel a public employee to answer potentially incriminating questions upon penalty of job loss or disciplinary action only if that employee is not required to waive immunity.¹⁰⁶ The court affirmed the district court's decision to dismiss on the ground that the duty to advise never arose because Atwell never attended the interview.¹⁰⁷ On the issue of notice, however, the court found that a government employer who seeks to ask employees potentially incriminating questions must first warn the employees that because of the immunity guaranteed to them, they may not refuse to answer the questions on the basis that the answers may be incriminating.¹⁰⁸ The court reasoned that employees who are asked potentially incriminating questions “may instinctively ‘take the Fifth’ and . . . unknowingly set themselves up to be fired without recourse.”¹⁰⁹ Ultimately, the Seventh Circuit maintained an express notice requirement, but emphasized that the rule was limited by the fact that “there can be no duty to warn until the employee is asked specific questions,” and that given this limitation, the employee may not skip the interview altogether in an effort to avoid answering incriminating questions.¹¹⁰

Like the Second and Seventh Circuits, the Federal Circuit also follows the rule that a government employer must warn its employees of their rights and immunities before asking potentially incriminating questions. In *Modrowski v. Department of Veterans Affairs*, the circumstances were somewhat different than the typical Fifth Amendment employment case.¹¹¹ In *Modrowski*, the Department of Veterans Affairs (the “DVA”) employed Leon Modrowski as a Senior

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 989–90.

¹⁰⁶ *Id.* at 990.

¹⁰⁷ *Id.* at 991.

¹⁰⁸ *Id.* at 990.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 991 (citations omitted).

¹¹¹ 252 F.3d 1344 (Fed. Cir. 2001).

Realty Specialist in Chicago, Illinois.¹¹² During his employment, the DVA began an internal investigation into various criminal acts committed against the DVA and its property.¹¹³ In the course of this investigation, the DVA questioned Modrowski and discovered that he had participated in two unauthorized sales of property to his son-in-law, which violated DVA regulations.¹¹⁴ Consequently, the DVA conducted a series of follow-up investigations on Modrowski, and ultimately sent him a letter that purported to grant him immunity, advise him of his Fifth Amendment rights, and compel him to respond to questioning.¹¹⁵ Modrowski, however, did not understand the scope of the purported immunity and continually refused to answer any questions during subsequent interrogations.¹¹⁶ Thereafter, Modrowski obtained counsel and continued to refuse to waive his right to silence.¹¹⁷ Ultimately, the DVA discharged Modrowski from federal service on the grounds that he violated conflict of interest rules, and more specifically, failed to cooperate with the investigation.¹¹⁸ Accordingly, the Board affirmed the DVA's decision to discharge Modrowski.¹¹⁹ Modrowski appealed to the Federal Circuit.¹²⁰

On appeal, the Federal Circuit reversed the Board's decision regarding Modrowski's refusal to submit to interrogation by the DVA.¹²¹ Citing *Garrity v. New Jersey*, the court explained that the threat of discharge from public employment constitutes coercion, making any statements obtained as a result of such threat inadmissible against that employee in subsequent criminal proceedings.¹²² Moreover, the court explained that a government employer may only properly invoke the right to compel answers to pertinent questions about the performance of the employee's duties when the employee has been duly advised of the option to either answer when actually granted immunity or remain silent and face discharge.¹²³ The court further discussed that where the immunity granted by the government employer is not as comprehensive as the protection of the Fifth Amendment privilege, that employee is justified in refusing to answer potentially incriminating questions.¹²⁴

¹¹² *Id.* at 1346.

¹¹³ *Id.* at 1347.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1351.

¹¹⁷ *Id.* at 1348.

¹¹⁸ *Id.* at 1348 & n.1.

¹¹⁹ *Id.* at 1346.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 1350.

¹²³ *Id.* at 1351.

¹²⁴ *Id.*

Thus, the court held that Modrowski was justified in refusing to answer the DVA's questions because the scope of the purported grant of immunity was ambiguous, leaving open the possibility that any answers elicited during that questioning could be used against him in subsequent proceedings.¹²⁵

Therefore, the Second, Seventh, and Federal Circuits have all developed a "duty to advise" approach, which requires government employers to inform employees of their Fifth Amendment rights and immunities, as well as the consequences of their decisions, before being asked potentially incriminating questions.¹²⁶ The Second Circuit held that public employees may only be discharged for failure to cooperate while under the cloak of immunity if they are duly advised of their rights and immunities before being asked specific pertinent questions about their duties of employment.¹²⁷ In adopting this approach, the Seventh Circuit reasoned that because average employees are likely to exercise their Fifth Amendment right to remain silent, they may unknowingly subject themselves to discharge without recourse if they are not first advised of their rights and immunities under the Fifth Amendment.¹²⁸ The Federal Circuit reinforced this concept and held that notice will not be constitutionally sufficient where the government employer does not clearly advise employees of their rights and immunities in such a manner that the scope of immunity is broad enough to match the protection afforded by the Fifth Amendment.¹²⁹

III. ANALYSIS

As stated above, the Supreme Court decisions in *Garrity v. New Jersey* and its progeny stand for the proposition that under the Fifth Amendment, public employees must be granted immunity from subsequent criminal prosecution if they are coerced into answering potentially incriminating questions. Nevertheless, the federal courts have split on the issue of whether a government employer must give employees notice of their rights and immunities under the Fifth Amendment prior to asking potentially incriminating questions. The "no affirmative tender" approach of the Fifth, Eighth, and Eleventh Circuits attempts to lessen the government's burden and support the employer's interest in reliable evidence by automatically attaching the right of immunity when an employee is compelled to answer incriminating

¹²⁵ *Id.* at 1352.

¹²⁶ *See, e.g.,* *Atwell v. Lisle Park Dist.*, 286 F.3d 987, 990 (7th Cir. 2002).

¹²⁷ *Uniformed Sanitation Men Ass'n, Inc. v. Comm'r of Sanitation of New York*, 426 F.2d 619, 627 (2d Cir. 1970).

¹²⁸ *Atwell*, 286 F.3d at 990.

¹²⁹ *Modrowski*, 252 F.3d at 1352.

questions. These courts reason that a notice requirement would be duplicative because the right to immunity attaches regardless of whether notice is given. Under this approach, if public employees are coerced into answering incriminating questions by threat of discipline or job loss, those answers cannot be used against them in subsequent proceedings. If public employees refuse to answer the questions without expressly being asked to waive their right to immunity, then the employer may discharge them for failure to cooperate.

The “no affirmative tender” approach has two major problems. First, by rejecting a notice requirement, the rule creates ambiguity with respect to employee actions. For example, although the approach expressly permits employees to be fired for refusing to answer questions if they have not been asked to waive their immunity, it does not address the issue of whether discharge or discipline is appropriate where employees remain silent based on an “objectively reasonable fear” that their answers could be used against them in subsequent criminal proceedings.¹³⁰ As such, it is entirely possible that public employees could be discharged or disciplined solely because they are unaware of their rights and the consequences of their decision to remain silent.¹³¹ In essence, without a notice requirement, public employees could unknowingly subject themselves to sanctions by exercising their Fifth Amendment privilege against self-incrimination.

Second, this approach provides the government with an opportunity to take advantage of public employees. Because the rule permits the government to fire employees for exercising their right to silence when they are not required to waive immunity, it could potentially abuse its position as the more knowledgeable and powerful party.¹³² In essence, by not disclosing what the public employees’ rights and immunities are under *Garrity* and the Fifth Amendment, the government leaves its employees in a state of ambiguity that can easily be exploited. If it is not clear to public employees what their constitutional rights are, how their statements could be used against them, or how they should respond to an employer’s often vague request to submit to questioning or polygraph interrogations, the government could reasonably manipulate the situation so that its employees are fired or prosecuted, regardless of whether they answer the incriminating questions. This imbalance in power should not be constitutionally permitted.

In contrast, the “duty to advise” approach of the Second, Seventh, and Federal Circuits seeks to eliminate ambiguity and further the

¹³⁰ *Sher v. U.S. Dep’t of Veterans Affairs*, 488 F.3d 489, 510 n.23 (1st Cir. 2007) (Stahl, J., dissenting).

¹³¹ *Id.* at 511.

¹³² *Id.*

protections afforded in *Garrity* by requiring government employers to fully disclose to public employees their rights and immunities prior to subjecting them to potentially incriminating questioning. This approach, which emphasizes the protective nature of *Garrity*, has four crucial advantages.

First, by requiring government employers to warn employees that they may be fired for refusing to answer potentially incriminating questions when they have been granted immunity, the “duty to advise” approach eliminates the confusion created by the “no affirmative tender” approach. The interplay between the Fifth Amendment and *Garrity* are such that average public employees may not fully understand their rights. Even though it may be true that public employees are aware of their Fifth Amendment rights, it is more likely to be true that the same employees may not understand the various complex exceptions under *Garrity*, which is less widely known than the Fifth Amendment.¹³³ For example, because this approach expressly provides employees with the knowledge of all of their rights and immunities in this context, there is no longer a risk that the employees will exercise their right to silence and unknowingly lose their jobs as a consequence of their decision. Thus, the notice requirement permits employees to make informed decisions instead of encouraging them to make blind decisions.

Second, this approach eliminates the potential for government employers to exploit an employee’s lack of familiarity with the Fifth Amendment’s rights and immunities. By requiring the employer to fully disclose the employee’s relevant rights and immunities, as well as the consequences to the attendant decisions, the “duty to advise” approach ensures that the employee is informed and less susceptible to any misrepresentation or deception by the government. Such a requirement makes it more difficult for the government, in a position of power, to manipulate the situation into one where an employee can be fired or prosecuted irrespective of whether he or she submits to questioning. In so doing, the disclosure requirement furthers the protective nature of *Garrity* by ensuring that the Fifth Amendment rights and immunities cannot be circumvented by government employers.¹³⁴

Third, the “duty to advise” approach is favorable because the burden imposed on the government employer would be minimal.¹³⁵ In fact, the duty does not even arise until the interrogation takes place. Essentially, the government’s duty to disclose never arises if the public employee fails to attend the questioning. Furthermore, there is no indication that the notice requirement must be fact specific. In fact, the Federal Circuit

¹³³ *Id.*

¹³⁴ *See id.*

¹³⁵ *Id.* at 511 n.25.

held that notice is sufficient even if the government uses a standardized form, as long as it is clear and fully conveys the public employee's rights.¹³⁶ Therefore, in comparison to the interest of fairness and clarity, the burden of giving notice to public employees prior to questioning is minimal.

Fourth, the "duty to advise" approach is most favorable because it facilitates the government's interest in obtaining reliable information from public employees in these scenarios. Uninformed employees may be more likely to be untruthful or bend the facts in an attempt to avoid prosecution, whereas employees who know from the beginning that they are immune from their statements in subsequent prosecution may be more likely to give honest answers. Although it is true that the statements may still be used against employees in regard to discipline or discharge by the employer, it is still much more likely that the employees will be honest if they know that those statements cannot be used against them in a subsequent criminal proceeding. Therefore, the "duty to advise" approach is preferable because it reinforces the government's interest in obtaining truthful information from its employees.

CONCLUSION

Government employers are often faced with the task of questioning public employees about potentially incriminating issues. As a general rule, if the government employer seeks to compel employees to answer the questions by penalty of discipline or job loss, employees must also be provided with immunity from the use of those statements against them in subsequent proceedings. As such, a government employer cannot constitutionally fire employees for failure to waive their right to immunity. Although this rule is clear, it fails to specify whether the employer is under a duty to give public employees notice of these rights and immunities prior to interrogation.

The federal circuits are split as to whether there should be a notice requirement. The first group of circuits has adopted the "no affirmative tender" approach, rejecting a notice requirement and automatically attaching immunity when public employees are compelled to waive their right to immunity and answer potentially incriminating questions on penalty of disciplinary action or job loss. The second group of circuits has adopted the "duty to advise" approach, requiring government employers to give employees notice of their rights and immunities under the Fifth Amendment, as well as the consequences to any decisions they may make.

¹³⁶ *Id.* (citing *Hanna v. Dep't of Labor*, 18 F. App'x 787, 789–90 (Fed. Cir. 2001)).

The “duty to advise” approach is the most favorable for four reasons. First, it eliminates the potential for public employees to unknowingly subject themselves to discipline while exercising their constitutional privilege against self-incrimination. Second, it eliminates the potential that the government will use its position of power to manipulate or exploit public employees. Third, the duty imposed on the government in comparison to the protection afforded to the employees would be inherently low. Fourth, it facilitates the government’s fact-finding process by giving the employees an incentive for honesty. Therefore, the “duty to advise” approach should be adopted by all circuits.