

**Representative Kera Birkeland** proposes the following substitute bill:

**GOVERNMENT ATTORNEY FEES AMENDMENTS**

2022 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Kera Birkeland**

Senate Sponsor: \_\_\_\_\_

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**LONG TITLE**

**General Description:**

This bill allows a private party to recover attorney and expert fees as the prevailing party in certain civil actions against a governmental entity.

**Highlighted Provisions:**

This bill:

- ▶ defines terms;
- ▶ requires a court to award reasonable attorney fees to a private party who prevails in certain civil actions against a governmental entity;
- ▶ permits a court to award reasonable expert fees to a private party who prevails in certain civil actions against a governmental entity; and
- ▶ makes technical and conforming changes.

**Money Appropriated in this Bill:**

None

**Other Special Clauses:**

None

**Utah Code Sections Affected:**

AMENDS:

**63G-7-301**, as last amended by Laws of Utah 2020, Chapters 288, 338, and 365



26 ENACTS:

27 [78B-5-826.5](#), Utah Code Annotated 1953

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29 *Be it enacted by the Legislature of the state of Utah:*

30 Section 1. Section [63G-7-301](#) is amended to read:

31 **[63G-7-301. Waivers of immunity.](#)**

32 (1) (a) Immunity from suit of each governmental entity is waived as to any contractual  
33 obligation.

34 (b) Actions arising out of contractual rights or obligations are not subject to the  
35 requirements of Section [63G-7-401](#), [63G-7-402](#), [63G-7-403](#), or [63G-7-601](#).

36 (c) The Division of Water Resources is not liable for failure to deliver water from a  
37 reservoir or associated facility authorized by Title 73, Chapter 26, Bear River Development  
38 Act, if the failure to deliver the contractual amount of water is due to drought, other natural  
39 condition, or safety condition that causes a deficiency in the amount of available water.

40 (2) Immunity from suit of each governmental entity is waived:

41 (a) as to any action brought to recover, obtain possession of, or quiet title to real or  
42 personal property;

43 (b) as to any action brought to foreclose mortgages or other liens on real or personal  
44 property, to determine any adverse claim on real or personal property, or to obtain an  
45 adjudication about any mortgage or other lien that the governmental entity may have or claim  
46 on real or personal property;

47 (c) as to any action based on the negligent destruction, damage, or loss of goods,  
48 merchandise, or other property while it is in the possession of any governmental entity or  
49 employee, if the property was seized for the purpose of forfeiture under any provision of state  
50 law;

51 (d) subject to Subsection [63G-7-302](#)(1), as to any action brought under the authority of  
52 Utah Constitution, Article I, Section 22, for the recovery of compensation from the  
53 governmental entity when the governmental entity has taken or damaged private property for  
54 public uses without just compensation;

55 (e) subject to Subsection [63G-7-302](#)(2), as to any action brought to recover attorney  
56 fees under Sections [63G-2-405](#) and [63G-2-802](#);

57 (f) for actual damages under Title 67, Chapter 21, Utah Protection of Public Employees  
58 Act;

59 (g) as to any action brought to obtain relief from a land use regulation that imposes a  
60 substantial burden on the free exercise of religion under Title 63L, Chapter 5, Utah Religious  
61 Land Use Act;

62 (h) except as provided in Subsection 63G-7-201(3), as to any injury caused by:

63 (i) a defective, unsafe, or dangerous condition of any highway, road, street, alley,  
64 crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located on them; or

65 (ii) any defective or dangerous condition of a public building, structure, dam, reservoir,  
66 or other public improvement;

67 (i) subject to Subsections 63G-7-101(4) and 63G-7-201(4), as to any injury  
68 proximately caused by a negligent act or omission of an employee committed within the scope  
69 of employment; [~~and~~]

70 (j) notwithstanding Subsection 63G-7-101(4), as to a claim for an injury resulting from  
71 a sexual battery, as provided in Section 76-9-702.1, committed:

72 (i) against a student of a public elementary or secondary school, including a charter  
73 school; and

74 (ii) by an employee of a public elementary or secondary school or charter school who:

75 (A) at the time of the sexual battery, held a position of special trust, as defined in  
76 Section 76-5-404.1, with respect to the student;

77 (B) is criminally charged in connection with the sexual battery; and

78 (C) the public elementary or secondary school or charter school knew or in the exercise  
79 of reasonable care should have known, at the time of the employee's hiring, to be a sex  
80 offender, as defined in Section 77-41-102, required to register under Title 77, Chapter 41, Sex  
81 and Kidnap Offender Registry, whose status as a sex offender would have been revealed in a  
82 background check under Section 53G-11-402[?]; and

83 (k) as to a claim to recover attorney fees or expert fees under Section 78B-5-826.5.

84 (3) (a) As used in this Subsection (3):

85 (i) "Code of conduct" means a code of conduct that:

86 (A) is not less stringent than a model code of conduct, created by the State Board of  
87 Education, establishing a professional standard of care for preventing the conduct described in

88 Subsection (3)(a)(i)(D);

89 (B) is adopted by the applicable local education governing body;

90 (C) regulates behavior of a school employee toward a student; and

91 (D) includes a prohibition against any sexual conduct between an employee and a  
92 student and against the employee and student sharing any sexually explicit or lewd  
93 communication, image, or photograph.

94 (ii) "Local education agency" means:

95 (A) a school district;

96 (B) a charter school; or

97 (C) the Utah Schools for the Deaf and the Blind.

98 (iii) "Local education governing board" means:

99 (A) for a school district, the local school board;

100 (B) for a charter school, the charter school governing board; or

101 (C) for the Utah Schools for the Deaf and the Blind, the state board.

102 (iv) "Public school" means a public elementary or secondary school.

103 (v) "Sexual abuse" means the offense described in Subsection 76-5-404.1(2).

104 (vi) "Sexual battery" means the offense described in Section 76-9-702.1, considering  
105 the term "child" in that section to include an individual under age 18.

106 (b) Notwithstanding Subsection 63G-7-101(4), immunity from suit is waived as to a  
107 claim against a local education agency for an injury resulting from a sexual battery or sexual  
108 abuse committed against a student of a public school by a paid employee of the public school  
109 who is criminally charged in connection with the sexual battery or sexual abuse, unless:

110 (i) at the time of the sexual battery or sexual abuse, the public school was subject to a  
111 code of conduct; and

112 (ii) before the sexual battery or sexual abuse occurred, the public school had:

113 (A) provided training on the code of conduct to the employee; and

114 (B) required the employee to sign a statement acknowledging that the employee has  
115 read and understands the code of conduct.

116 (4) (a) As used in this Subsection (4):

117 (i) "Higher education institution" means an institution included within the state system  
118 of higher education under Section 53B-1-102.

119 (ii) "Policy governing behavior" means a policy adopted by a higher education  
120 institution or the Utah Board of Higher Education that:

121 (A) establishes a professional standard of care for preventing the conduct described in  
122 Subsections (4)(a)(ii)(C) and (D);

123 (B) regulates behavior of a special trust employee toward a subordinate student;

124 (C) includes a prohibition against any sexual conduct between a special trust employee  
125 and a subordinate student; and

126 (D) includes a prohibition against a special trust employee and subordinate student  
127 sharing any sexually explicit or lewd communication, image, or photograph.

128 (iii) "Sexual battery" means the offense described in Section [76-9-702.1](#).

129 (iv) "Special trust employee" means an employee of a higher education institution who  
130 is in a position of special trust, as defined in Section [76-5-404.1](#), with a higher education  
131 student.

132 (v) "Subordinate student" means a student:

133 (A) of a higher education institution; and

134 (B) whose educational opportunities could be adversely impacted by a special trust  
135 employee.

136 (b) Notwithstanding Subsection [63G-7-101\(4\)](#), immunity from suit is waived as to a  
137 claim for an injury resulting from a sexual battery committed against a subordinate student by a  
138 special trust employee, unless:

139 (i) the institution proves that the special trust employee's behavior that otherwise would  
140 constitute a sexual battery was:

141 (A) with a subordinate student who was at least 18 years old at the time of the  
142 behavior; and

143 (B) with the student's consent; or

144 (ii) (A) at the time of the sexual battery, the higher education institution was subject to  
145 a policy governing behavior; and

146 (B) before the sexual battery occurred, the higher education institution had taken steps  
147 to implement and enforce the policy governing behavior.

148 Section 2. Section [78B-5-826.5](#) is enacted to read:

149 **78B-5-826.5. Attorney fees -- Award against governmental entity.**

150 (1) As used in this section:

151 (a) "Attorney fees" means attorney fees reasonably incurred in a civil action on behalf  
152 of the prevailing party.

153 (b) "Civil action" means a judicial or arbitration proceeding, other than an action  
154 sounding in contract or tort, in which a party seeks monetary or equitable relief at common law  
155 or pursuant to statute, including an action for judicial review of agency or administrative  
156 proceedings.

157 (c) "Expert fees" means fees reasonably incurred in a civil action by an expert retained  
158 by or on behalf of the prevailing party.

159 (d) "Governmental entity" means the same as that term is defined in Section  
160 [63G-7-102](#).

161 (e) "Prevailing party" means a party that receives, by a final judgment, substantially the  
162 relief requested in the party's pleadings.

163 (2) In a civil action brought by or against a governmental entity, a court:

164 (a) shall award attorney fees to a prevailing party other than a governmental entity; and

165 (b) may, in the court's discretion, award expert fees to a prevailing party other than a  
166 governmental entity.

167 (3) The aggregate total of attorney fees and expert fees awarded under this section may  
168 not exceed \$100,000.

169 (4) A claim for attorney fees or expert fees under this section is not subject to Title  
170 63G, Chapter 7, Part 4, Notice of Claim Against a Governmental Entity or a Government  
171 Employee.