

Representative Kera Birkeland proposes the following substitute bill:

GOVERNMENT ATTORNEY FEES AMENDMENTS

2023 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Kera Birkeland

Senate Sponsor: _____

LONG TITLE

General Description:

This bill allows a private party to recover attorney fees in certain civil actions involving 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 involving a governmental entity;
- ▶ prohibits a court from awarding attorney fees to a private party in certain civil actions involving certain governmental entities;
- ▶ prohibits a court from awarding attorney fees to a private organization in certain circumstances; and
- ▶ makes technical and conforming changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:



26 AMENDS:

27 **63G-7-301**, as last amended by Laws of Utah 2022, Chapters 388, 428

28 ENACTS:

29 **78B-5-826.5**, Utah Code Annotated 1953

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

32 Section 1. Section **63G-7-301** is amended to read:

33 **63G-7-301. Waivers of immunity.**

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

36 (b) Actions arising out of contractual rights or obligations are not subject to the
37 requirements of Section **63G-7-401**, **63G-7-402**, **63G-7-403**, or **63G-7-601**.

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

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

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

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

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

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

57 (e) as to any claim for attorney fees or costs under Sections [63G-2-405](#) and [63G-2-802](#);
58 (f) for actual damages under Title 67, Chapter 21, Utah Protection of Public Employees
59 Act;

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

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

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

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

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

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

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

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

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

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

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

84 (k) as to a claim to recover attorney fees under Section [78B-5-826.5](#); and

85 ~~(l)~~ (l) as to any action brought under Section [78B-6-2303](#).

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

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

88 (A) is not less stringent than a model code of conduct, created by the State Board of
89 Education, establishing a professional standard of care for preventing the conduct described in
90 Subsection (3)(a)(i)(D);

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

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

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

96 (ii) "Local education agency" means:

97 (A) a school district;

98 (B) a charter school; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

130 (iii) "Sexual battery" means the offense described in Section 76-9-702.1.

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

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

135 (A) of a higher education institution; and

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

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

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

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

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

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

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

150 Section 2. Section **78B-5-826.5** is enacted to read:

151 **78B-5-826.5. Attorney fees -- Definitions -- Award against governmental entity.**

152 (1) As used in this section:

153 (a) "Associational standing" means that an association, organization, or similar
154 representational entity has standing to sue because at least one of its individual members has
155 standing to sue and the participation of the individual member in the lawsuit is not necessary to
156 the resolution of the lawsuit.

157 (b) "Attorney fees" means attorney fees reasonably incurred in a qualified civil action
158 on behalf of a prevailing party.

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

161 (d) "Prevailing party" means a private party that receives, by a final judgment in a
162 qualified civil action:

163 (i) dismissal of the governmental entity's claims for monetary or equitable relief against
164 the private party;

165 (ii) reversal or vacatur of any decision, fine, fee, order, or decree imposed by the
166 governmental entity against the private party; or

167 (iii) a substantial, material, and favorable modification of any decision, fine, fee, order,
168 or decree imposed by the governmental entity against the private party.

169 (e) "Private party" means a person that is not a governmental entity.

170 (f) "Qualified civil action" means a judicial proceeding, other than an action sounding
171 in tort, in which:

172 (i) a governmental entity seeks monetary or equitable relief against a private party at
173 common law or pursuant to a state or local law;

174 (ii) a private party seeks equitable relief against a governmental entity to compel the
175 governmental entity to act in accordance with a state or local law; or

176 (iii) a private party seeks judicial review of an agency or administrative action.

177 (2) Except as provided in Subsection (3), in a qualified civil action, a court shall award
178 attorney fees to the prevailing party.

179 (3) Subsection (2) does not apply:

180 (a) if the court finds that:

181 (i) the matter could have been resolved via a reasonable settlement; and
182 (ii) the private party failed to make a timely, reasonable settlement offer;
183 (b) if the private party files a qualified civil action and the private party's standing to
184 sue is based on the doctrine of associational standing, regardless of whether the private party is
185 the prevailing party;
186 (c) to an action brought by the Office of State Debt Collection under Title 63A,
187 Chapter 3, Part 5, Office of State Debt Collection, seeking the collection of an accounts
188 receivable or a criminal accounts receivable;
189 (d) to an action for judicial review of a decision of the Career Service Review Office
190 under Title 67, Chapter 19a, Grievance Procedures;
191 (e) to an action for judicial review of a decision or order of a school board under Title
192 53G, Chapter 11, Part 5, School District and Utah Schools for the Deaf and the Blind
193 Employee Requirements; or
194 (f) to an action for judicial review brought under Title 63G, Chapter 2, Part 4, Appeals,
195 or Part 7, Applicability to Political Subdivisions, the Judiciary, and the Legislature, as
196 applicable, of a decision or order of:
197 (i) a chief administrative officer;
198 (ii) a local appeals board;
199 (iii) the State Records Committee; or
200 (iv) an administrative unit of the judicial branch.
201 (4) A claim for attorney fees under this section is not subject to Title 63G, Chapter 7,
202 Part 4, Notice of Claim Against a Governmental Entity or a Government Employee.
203 (5) Subsection (2) supersedes any other provision of law that prohibits an award of
204 attorney fees to a private party, or makes permissive an award of attorney fees to a private
205 party, in an action that would otherwise constitute a qualified civil action under this section.