

HB0173S01 compared with HB0173

~~text~~ shows text that was in HB0173 but was deleted in HB0173S01.

text shows text that was not in HB0173 but was inserted into HB0173S01.

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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 ~~and expert~~ fees ~~as the prevailing party~~ in certain civil actions ~~adverse to~~ 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 ~~adverse to~~ involving a governmental entity;
- ▶ ~~permits~~ prohibits a court ~~to award reasonable expert~~ from awarding attorney fees to a private party ~~who prevails~~ in certain civil actions ~~adverse to a~~ involving certain governmental ~~entity~~ entities;
- ▶ prohibits a court from awarding attorney fees to a private organization in certain

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circumstances; 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 2022, Chapters 388, 428

ENACTS:

78B-5-826.5, Utah Code Annotated 1953

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

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

63G-7-301. Waivers of immunity.

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

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

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

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

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

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

(c) as to any action based on the negligent destruction, damage, or loss of goods,

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merchandise, or other property while it is in the possession of any governmental entity or employee, if the property was seized for the purpose of forfeiture under any provision of state law;

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

(e) as to any claim for attorney fees or costs under Sections 63G-2-405 and 63G-2-802;

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

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

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

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

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

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

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

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

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

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

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

(C) the public elementary or secondary school or charter school knew or in the exercise of reasonable care should have known, at the time of the employee's hiring, to be a sex

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offender, as defined in Section 77-41-102, required to register under Title 77, Chapter 41, Sex and Kidnap Offender Registry, whose status as a sex offender would have been revealed in a background check under Section 53G-11-402; ~~and~~

(k) as to a claim to recover attorney fees ~~for expert fees~~ under Section 78B-5-826.5;
and

~~(k)~~ (l) as to any action brought under Section 78B-6-2303.

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

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

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

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

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

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

(ii) "Local education agency" means:

(A) a school district;

(B) a charter school; or

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

(iii) "Local education governing board" means:

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

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

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

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

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

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

(b) Notwithstanding Subsection 63G-7-101(4), immunity from suit is waived as to a claim against a local education agency for an injury resulting from a sexual battery or sexual abuse committed against a student of a public school by a paid employee of the public school

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who is criminally charged in connection with the sexual battery or sexual abuse, unless:

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

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

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

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

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

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

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

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

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

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

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

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

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

(v) "Subordinate student" means a student:

(A) of a higher education institution; and

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

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

(i) the institution proves that the special trust employee's behavior that otherwise would

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constitute a sexual battery was:

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

(B) with the student's consent; or

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

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

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

78B-5-826.5. Attorney ~~and expert~~ fees -- Definitions --~~f~~ Award against governmental entity.

(1) As used in this section:

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

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

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

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

—— (~~d~~)~~c~~ "Governmental entity" means the same as that term is defined in Section 63G-7-102.

(~~f~~e)~~d~~ "Prevailing party" means a private party that receives, by a final judgment~~f~~, substantially the relief requested in the party's pleadings.

—— (~~f~~) in a qualified civil action:

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

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

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

(e) "Private party~~{ " }~~" means a person that is not a governmental entity.

~~{2}f~~ ~~{in a}~~ "Qualified civil action~~{ brought by or}~~" means a judicial proceeding, other than an action sounding in tort, in which:

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

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

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

(2) Except as provided in Subsection (3), in a qualified civil action, a court~~{~~

~~{a}~~ shall award attorney fees to ~~{a}~~ the prevailing party~~{ other than a governmental entity; and~~

~~{b} may, in the court's discretion, award expert fees to a~~}~~.~~

(3) Subsection (2) does not apply:

(a) if the court finds that:

(i) the matter could have been resolved via a reasonable settlement; and

(ii) the private party failed to make a timely, reasonable settlement offer;

(b) if the private party files a qualified civil action and the private party's standing to sue is based on the doctrine of associational standing, regardless of whether the private party is the prevailing party~~{ other than a governmental entity.~~

~~{3}~~;

(c) to an action brought by the Office of State Debt Collection under Title 63A, Chapter 3, Part 5, Office of State Debt Collection, seeking the collection of an accounts receivable or a criminal accounts receivable;

(d) to an action for judicial review of a decision of the Career Service Review Office under Title 67, Chapter 19a, Grievance Procedures;

(e) to an action for judicial review of a decision or order of a school board under Title 53G, Chapter 11, Part 5, School District and Utah Schools for the Deaf and the Blind

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Employee Requirements; or

(f) to an action for judicial review brought under Title 63G, Chapter 2, Part 4, Appeals, or Part 7, Applicability to Political Subdivisions, the Judiciary, and the Legislature, as applicable, of a decision or order of:

(i) a chief administrative officer;

(ii) a local appeals board;

(iii) the State Records Committee; or

(iv) an administrative unit of the judicial branch.

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

(5) Subsection (2) supersedes any other provision of law that prohibits an award of attorney fees to a private party, or makes permissive an award of attorney fees to a private party, in an action that would otherwise constitute a qualified civil action under this section.