

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

STATE OF TENNESSEE <i>ex rel.</i>)	
RANDY RAYBURN et al)	
)	
Petitioners,)	Civil Action No. 09-1284 -I
)	CHANCELLOR CLAUDIA C
)	BONNYMAN.
vs.)	
)	
ROBERT E. COOPER, JR.,)	
TENNESSEE ATTORNEY GENERAL)	
)	
Defendant.)	

**RESPONSE TO PLAINTIFF RAYBURN’S STATEMENT OF
UNDISPUTED MATERIAL FACTS IN SUPPORT
OF MOTION FOR PARTIAL SUMMARY JUDGMENT**

The Attorney General and Reporter, through undersigned counsel and pursuant to Rule 56.03, submits the following responses to Plaintiff Rayburn’s statement of undisputed material facts in support of his Motion for Partial Summary Judgment:

1. T.C.A. § 39-17-1305(a) makes it a criminal offense (a Class A misdemeanor) to carry a firearm where alcohol is served for on premises consumption. *T.C.A. § 39-17-1305(a).*

RESPONSE: Statement 1 is a statement of law. Tenn. Code Ann. § 39-17-1305 speaks for itself and, under Tenn. R.C.P. 56.03, no further response is required.

2. Under newly enacted T.C.A. § 39-17-1305(c) there is no exception to T.C.A. § 39-17-1305(a) for handgun permit holders who are carrying in a “restaurant” as defined in T.C.A § 39-17-1305(a). *T.C.A. §39-17-1305(c).*

RESPONSE: Statement 2 calls for an admission or denial related to the interpretation of Tenn. Code Ann. § 39-17-1305(c). It involves an issue of law; not fact and, under Tenn. R.C.P.56., no further response is required.

3. If a permit holder carries a firearm into an alcohol serving establishment that does not meet the definition of a restaurant, for example, the establishment's primary or principal business is the sale of alcoholic beverages as opposed to "meals" the permit holder is not lawfully carrying under the exception set forth in T.C.A. §39-17-1305(c) and is subject to criminal prosecution (for committing a Class A misdemeanor) under T.C.A. §39-17-1305 (a). *Tenn. Atty. Gen Op 00-020 (February 15, 2000); Petitioners' Brief in Reply to Defendant's Response Brief, p. 4, et seq.*

RESPONSE: Statement 3 is an interpretation of law or statement of a hypothetical; not a statement of fact. Under Tenn. R.C.P. 56.03, no response is required.

4. It is the burden of the accused permit holder to show that he or she fell within the ambit of the exception contained in the new law. *Petitioners' Brief in Reply to Defendant's Response Brief, p. 4, et seq.*

RESPONSE: Statement 4 is an interpretation of law; not a statement of fact. Under Tenn. R.C.P. 56.03, no response is required.

5. An alcohol serving establishment that violates the liquor license law, for example by deriving more revenue from alcohol sales than from meals sales, is usually only fined and is still allowed to operate and be open to the public for business. *Petitioners' Brief in reply to Defendant's Response Brief Affidavit of Shari Danielle Elks, the Executive Director of the Tennessee Alcoholic Beverage Commission (TABC) with verified records attached for food sales below 50% for past 5 years (Exhibit C) and copies of reports for violations for food sales below 50% for the past two years (Exhibit D).*

RESPONSE: It is admitted that the Alcoholic Beverage Commission (ABC) has examined the books of establishments that hold liquor licenses under the category of restaurants and has found that some have been in violation of the state's liquor laws because they failed to have the required volume of food sales. It is further admitted that ABC has resolved those violations through fines of those establishments instead of suspending or revoking their licenses. The fact that such violations have occurred and the sanctions that were imposed are matters of public record.

It is further stated that the foregoing matters are not relevant to disposition of this case, in that not all restaurants that hold liquor licenses have failed to comply with the food sales requirements. As a matter of public record, over 2,200 establishments that hold liquor licenses are classified as restaurants. Therefore, the fact that some restaurants, at any particular time, have failed to comply with such requirements does not mean that handgun carry permit holders will never be able to determine whether it is lawful to carry a firearm into non posted restaurants.

6. Alcohol-serving establishments are open to the public yet do not meet the definition of restaurants under T.C.A. 39-17-105(c). *Affidavit of Shari Danielle Elks, the Executive Director of the Tennessee Alcoholic Beverage Commission (TABC) with verified records attached for food sales below 50% for past 5 years (Exhibit C) and copies of reports for violations for food sales below 50% for the past two years (Exhibit D); Affidavit of Christopher Smith with Exhibits.*

RESPONSE: It is admitted that some alcohol serving establishments that are open to the public may not meet the definition of restaurants as set forth in Chapter 339. At the same time, there are many alcohol serving establishments that do meet the definition of restaurant as set forth in Chapter 339. Furthermore, it does not follow from Statement 6 that handgun carry permit holders will never be able to identify which establishments are, in fact, restaurants as defined in Chapter 339.

7. A restaurant establishment owner has no control of the preferences of their customers. While it may be the licensee's intent for the establishment to be a restaurant, in fact the establishment's true legal purpose may be that of a bar through no act of the owner. *Affidavit of Sam Sanchez.*

RESPONSE: It is admitted that Statement 7 represents the opinion Mr. Sanchez. It does not follow, however that such statement represents factual the situation for all Tennessee restaurant owners who hold licenses to sell alcoholic beverages. Furthermore, the statements of Mr. Sanchez are not probative on the issue related to the state of mind of a reasonable handgun carry permit holder in deciding whether it is lawful to carry a firearm into any particular establishment.

8. An establishment may be in violation of the language of T.C.A. § 39-17-1305(c) but still be in operation as a restaurant *Affidavit of Shari Danielle Elks, the Executive Director of the Tennessee Alcoholic Beverage Commission (TABC) with verified records attached for food sales below 50% for past 5 years (Exhibit C) and copies of reports for violations for food sales below 50% for the past two years (Exhibit D).*

RESPONSE: Statement 8 is an interpretation of law; not a statement of fact. Under Tenn. R.C.P. 56.03, no response is required.

9. The intent of the challenged law was to charge permit holders who entered "true" bars that don't meet the standards and definitions for a restaurant under § 39-17-1305 with a Class A misdemeanor. *Legislative History Tapes filed herein, cited and discussed in Petitioners' Supplemental Brief Re Legislative History and Count IX, especially] Representative McCord statement of the "problem", February 19, 2009 House Handgun Study Subcommittee hearing on the House version of the bill [HB 092] available at: [http://Ubit.II/\(WU9cd](http://Ubit.II/(WU9cd)*

RESPONSE: Statement 9 is an interpretation of law; not a statement of fact. Under Tenn. R.C.P. 56.03, no response is required.

10. Permit holders have no notice or way to determine if an establishment is a restaurant or a bar (whether its principal purpose is serving meals) as there is no distinction by licensing laws law or notice. *Tenn. Atty. Gen Op. 00-020 (February 15, 2000); Affidavits of John Doe handgun carry permit holders on file herein; Petitioners' Brief in Reply to Defendant's Response Brief passim.*

RESPONSE: Statement 10 is an interpretation of law or opinion; not a statement of fact. Under Tenn. R.C.P. 56.03, no response is required.

11. A permit holder could never know with reasonable certainty if the principal business of the premises is the serving of meals conducted on at least 5 days a week as the recent amendment to § 39-17-1305 requires. *Tenn. Atty. Gen Op. 00-020 (February 15, 2000); Affidavits of John Doe handgun carry permit holders on file herein; Petitioners' Brief in Reply to Defendant's Response Brig passim; Affidavit of Shari Danielle Elks, the Executive Director of the Tennessee Alcoholic Beverage Commission (TABe) with verified records attached for food sales below 50% for past 5 years (Exhibit C) and copies of reports for violations for food sales below 50% for the past two years (Exhibit D).; Affidavit of Christopher Smith with Exhibits.*

RESPONSE: Op. Tenn. Att'y Gen. 00-020 speaks for itself. The remainder is a statement of opinion and, under Tenn. R.C.P. 56.03, no response is required.

12. The Tennessee Attorney General has *already* opined that a principal or primary purpose limitation is subject to constitutional attack as unconstitutionally vague as applied to firearms carry by handgun owners. *Tenn. Atty. Gen Op. 00-020 (February 15, 2000).*

RESPONSE: Op. Tenn. Att’y Gen00-020 speaks for itself. In addition, Statement 11 is a statement of a legal conclusion, not one of fact. Under Tenn. R.C.P. 56.03, no response is required.

13. Congress imposed upon employers a general duty to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." *General duty clause of the Occupational Safety and Health Act of 1970 (Act), 29 U.S.C. 654(a)(1).*

RESPONSE: Statement 13 is an interpretation of law; not a statement of fact. Under Tenn. R.C.P. 56.03, no response is required.

14. OSHA developed an enforcement policy with regard to workplace violence as early as 1992 in a letter of interpretation that stated: "In a workplace' where the risk of violence and serious personal injury are significant enough to be 'recognized hazards,' the general duty clause would require the employer to take feasible steps to minimize those risks. Failure of an employer to implement feasible means of abatement of these hazards could result in the finding of an OSH Act violation. *Available at: <http://bit.ly/I19r2ZI>*

RESPONSE: Statement 14 is an interpretation of law; not a statement of fact. Under Tenn. R.C.P. 56.03, no response is required.

15. Firearms in bars and restaurants that serve alcohol are a "recognized hazard" to health, life and safety of wait staff, bartenders, employees, security staff and owners that is distinguishable from the general hazards of guns. ("It has been stated in several opinions of this Court that alcohol and firearms are a volatile combination as someone will likely be hurt." *State v. Parker*, 932 S.W.2d 945, 957 (Tenn.Cr.App.,1996);

see also *United States v. Prescott*, 599 F.2d 103 (5th Cir. 1979) (discussing the "volatile mixture" of alcohol and firearms); *Affidavit of Joshua Ryan Prather*.

RESPONSE: Statement 15 is a statement of policy and/or legal argument; not a statement of fact. Under Tenn. R.C.P. 56.03, no response is required.

16. T.C.A. § 39-17-1305 contains no exception or provision concerning "posting" premises to prohibit firearms carry. *T.C.A. § 39-17-1305*

RESPONSE: Statement 16 calls for a response to a statement of law; not fact. Under Tenn. R.C.P. 56.03, no response is required.

17. T.C.A. § 39-17-1359 permits, *inter alia*, but does not require, property owners to "post" notices that firearms are not permitted on the owner's property. *T.C.A. § 39-17-1359*.

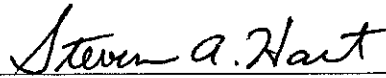
RESPONSE: Statement 17 calls for a response to a statement of law; not fact. Under Tenn. R.C.P. 56.03, no response is required.

18. By permitting private persons (restaurant owners) to determine whether to allow or apply the §1305(c) "exception" for handgun carry by permit holders to the general criminal liability set forth in T.C.A. §39-17-1305(a), Public Chapter 339 (T.C.A. § 39-17-1305(c) is an unlawful and unconstitutional delegation of the police powers of the state. *Opinion of the Shelby County Attorney (July 10, 2009)* (Public Chapter 339 is an unconstitutional delegation of police or legislative power to private parties); *American Chariot v. City of Memphis*, 164 S.W.3d600 (Tenn.Ct.App.,2004).

RESPONSE: Statement 18 calls for a response to a stated conclusion of law; not fact. Under Tenn. R.C.P. 56.03, no response is required.

Respectfully submitted,

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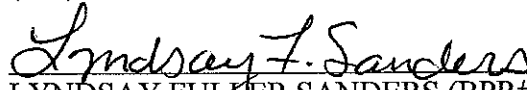


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CERTIFICATE OF SERVICE

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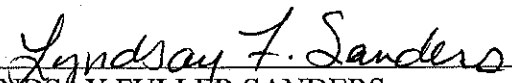
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