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CIVIL LIABILITY 101 – SECTION 1983 OVERVIEW

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DISCLAIMER

THIS CLASS DOES NOT CONSTITUTE LEGAL ADVICE.

NOTHING IN YOUR POLICIES OR PROCEDURES SHOULD BE CHANGED UNTIL YOU HAVE DISCUSSED THE MATTER WITH YOUR LEGAL COUNSEL.

"It ain't what you don't know that gets you into trouble. It's what you know for sure that just ain't so."

Mark Twain

To protect people from drowning we can put up fences around our pools, put locks on the gates to the pool and install pool monitoring alarms…but perhaps the best protection against drowning is to teach people how to swim…*Anonymous*

LIABILITY!!

COSTS

- 2000 study - $492,000.00 award
- 2000 study - $60,000.00 fees
- 2000 – 2005 study - $627,000 award
- 2001 Texas study - $55,000.00 avg. settlement

Critical Issues in Police Civil Liability, Kappeler, 4th Ed., 2006, (p. 9 – 10)

DISCOVERY

Plaintiff's counsel will almost certainly request the following: the department's policy manual (or parts thereof), the officer's personnel file, and the officer's training records (these can include basic police academy records as well).

THREE TYPES OF ENCOUNTERS BETWEEN CIVILIANS AND POLICE

- CONSENSUAL ENCOUNTER – POLICE CONTACT – MUST BE VOLUNTARY
- DETENTION – IN ORDER TO BE LAWFUL IT MUST BE BASED UPON REASONABLE SUSPICION
- ARREST – IN ORDER TO BE LAWFUL IT MUST BE BASED UPON PROBABLE CAUSE

STATE LAW

TEXAS PENAL CODE

SECTION 39.03

OFFICIAL OPPRESSION

A public servant acting under color of his office or employment commits an offense if he:

(1) Intentionally subjects another to mistreatment or to arrest, detention, search, seizure, dispossession, assessment or lien that he knows is unlawful;

(2) Intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity, knowing his conduct is unlawful…

FEDERAL LAW

USC TITLE 41

CHAPTER 21, SECTION 1983

Every person, who under color of any statute, ordinance, regulation, custom or usage, of any state…subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any right, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

FEDERAL LAW

USC TITLE 42

CHAPTER 21 SECTION 1988(b)

THE PREVAILING PARTY IS ENTITLED TO ATTORNEY'S FEES…

FEDERAL LAW

USC TITLE 18

CH. 13 SECTION 242

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State…to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States:

- One year and fine
- Bodily injury or use or attempted use of deadly weapon, fire or explosives – ten years and fine
- Death, kidnapping or attempt, aggravated sexual abuse or attempt, attempted murder – up to life and a fine

Elements of a 1983 Action

- A person: this includes an officer and a municipality;
- Acting under color of law: this applies when an officer uses her authority to arrest, search, detain or seize a person. This may include off-duty conduct;
- Subjects another to a violation of a right or protection and the right must be clearly established at the time of the alleged violation.

"PERSON"

- The individual officer will qualify as a person for purposes of the statute.
- A municipality can also be liable under the statute, but only if it is the policy or custom of the municipality that caused the constitutional violation*

**Monell v. New York City Dept. of Social Services*, 98 S.Ct. 2018 (1978)*

"COLOR OF LAW"

- The person must exercise a power that exists only because the person is clothed with the authority of state law.
- This may also extend to an officer who claims to have an authority (think off-duty work by an officer for a private contractor).
- Should not include purely personal conduct by an officer.

"FEDERALLY PROTECTED RIGHT"

- A violation of a state law or city ordinance that does not also violate a federal right is not actionable under section 1983.
- Violations of judge-made rules that do not violate the core right of a constitutional amendment are not actionable under section 1983: Consider the case of *Chavez v. Martinez* in which a violation of the *Miranda* rule did not equate to a violation of the 5th amendment since the statement was never used at trial.

QUALIFIED IMMUNITY

The qualified immunity standard "gives ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law…"*

Hunter v. Bryant, 112 S.Ct. 534 (1991)*

QUALIFIED IMMUNITY

- Did the officer violate "clearly established statutory or constitutional rights of which a reasonable person would have known?" *Harlow v. Fitzgerald*, 102 S.Ct. 2727 (1982). If no violation, then qualified immunity should apply. The officer's subjective belief about the law is irrelevant. The test is whether a "reasonable officer" could have believed the action taken was lawful
- The test for qualified immunity looks at the state of the law at the time of the alleged violation. Was the law governing the officer's conduct clearly established?

WHAT IS THE TEST FOR DETERMINING IF A LAW WAS "CLEARLY ESTABLISHED" FOR PURPOSES OF QUALIFIED IMMUNITY?

In order for a court to determine that a constitutional or statutory right was clearly established at the time of the officer's conduct, it need only be shown that the contours of the right were "sufficiently clear that a reasonable official would understand that what he is doing violates that right."*

Hope v. Pelzer, 122 S.Ct. 2508 (2002)*

QUALIFIED IMMUNITY FOR ARREST, SEARCH OR SEIZURE

- In cases involving unlawful arrest, search or seizure the officer will be entitled to qualified immunity if the officer can successfully prove: (1) she acted pursuant to probable cause; or (2) even if probable cause did not exist, that a reasonable officer could have believed in its existence.

THE VIDEOGRAPHER*

Person was videotaping the police station from a public sidewalk across the street. Two officers approach and asked for identification. He refused. Officers handcuffed him and placed him in the back of a patrol car, explaining this is what happens when you don't identify yourself to the police. A lieutenant arrived and after visiting with the officers and the detained person, the person was released. He sued.

His lawsuit alleged:

1. His 1st Amendment right to videotape the police was violated
2. The initial detention was illegal
3. His arrest was illegal

*Turner v. Driver, 843 F.3d 678 (5th Cir. 2017)

THE VIDEOGRAPHER - DETENTION

A police officer may only detain a person if the officer has reasonable suspicion that criminal activity is afoot.

In this case the court decided the officers could have reasonably suspected the videographer was "casing the station for an attack, stalking an officer, or otherwise preparing for criminal activity."

The court specifically stated that the officers' initial approach to the videographer, *prior to the handcuffing* was not "plainly incompetent" or a "knowing violation of the law."

However, the handcuffing and placing him in the patrol car were "disproportionate to any potential threat that [videographer] posed or to the investigative needs of the officers."

Qualified immunity was granted on the initial detention.

THE VIDEOGRAPHER - ARREST

The court noted that there was no evidence that the videographer posed any threat to the officers; thus, there was no safety justification for the handcuffing or placing him in the car. Nor did placing him in the patrol car further the needs of the investigation, as the officers did nothing in the way of investigation except repeatedly ask him to identify himself, which he repeatedly refused to do.

Since there was no safety threat that justified the handcuffing and placing him in the patrol car; nor did either step further the investigation, the court decided that these acts constituted an arrest of the videographer. The court noted that one officer stated he was arresting the videographer for failing to identify himself. The test for arrest is whether a reasonable person, under the same circumstances, would have understood the actions "to constitute a restraint on [his] freedom of movement of the degree which the law associates with formal arrest."

Once a police detention rises to this level it must be supported by probable cause. There was none here to support a charge of failure to identify. The law prohibiting arrests without probable cause was well established at this time.

Qualified immunity on the arrest was denied.

THE VIDEOGRAPHER – 1st AMENDMENT

The court determined that a person's 1st amendment right to film the police was not "clearly established" when the two officers took action against the videographer.

Accordingly, these two officers were eligible for qualified immunity on the 1st amendment violation since their actions did not violate clearly established law.

However, the court ruled that going forward there is a protected 1st amendment right to videotape the police. Now that right is clearly established.

POINTS TO CONSIDER

Do your policies and training address First Amendment rights, particularly in the videotaping context?

Do your policies and training clearly set forth the particulars of the offense of failure to identify? Is the policy being followed?

Do your policies and training include the parameters of a detention? Reasonable suspicion? Length of detention? Justification of safety measures.

CHAVEZ V. MARTINEZ*

- Does an interview of a wounded suspect, without following *Miranda*, in and of itself, violate the Constitution?
- No. The statements were never used against the defendant, so no 5th Amendment violation.
- The Court was not in agreement as to whether the officer's conduct violated the 14th Amendment (it was not argued).

*123 S.Ct. 1994

POINTS TO CONSIDER

Does your training and policy clearly define when the Miranda warning is constitutionally required?

LIABILITY NOTWITHSTANDING SIGNED WARRANT

- A police officer may be sued for money damages by the victim of an unlawful arrest.
- The test is whether a reasonably well-trained officer, under the same circumstances, "would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant."
- This liability extends to objectively unreasonable searches and seizures.

Malley v. Briggs, 106 S.Ct. 1092 (1986)

WARRANT ISSUES

- Reckless disregard for the truth – *Franks v. Delaware, 98 S.Ct. 2674*
- Present a facially invalid affidavit – *Malley v. Briggs, 106 S.Ct. 1092*
- Omission of material facts – *Kohler v. Englade, 470 F.3d 1104*

POINTS TO CONSIDER

Does your policy and training include how to prepare affidavits?

CITY LIABILITY FOR TRAINING ISSUES

In *City of Canton v. Harris** the Supreme Court held that a city can be held liable for a failure to train its officers.

The failure to train must amount to a "deliberate indifference" to the rights of persons with whom the police come into contact.

Such indifference can be thought of as a "policy or custom" when the choice is made from alternatives by policy makers.

109 S.Ct. 1197 (1988)*

Deficient Training

It must be the training program itself that is deficient. It is not enough to show that one officer was poorly trained.

The "identified deficiency in a city's training program must be closely related to the ultimate injury."

DELIBERATE INDIFFERENCE

Requires proof that the city disregarded a known or obvious consequence of his action i.e. selection of training;

A showing of deliberate indifference is difficult, though not impossible, based upon a single occurrence;

A plaintiff "must prove that the 'highly predictable' consequence of a failure to train would result in the specific injury suffered, and that the failure to train represented the 'moving force' behind the constitutional violation."

Hobart v. City of Stafford, 784 F.Supp2d 732 (U.S. Dist Ct., S.D. Texas, 2011)

THE TRAINING PROGRAM – MINIMUM STANDARD

The U.S. Fifth Circuit is of the opinion that as long as a police department's training regimen meets the standards set out by the Texas Commission on Law Enforcement (TCOLE), the department's program is presumptively sufficient for purposes of liability regarding the curriculum.

"Here, the only training-related evidence in the record demonstrated that the City's training procedures complied with state law. We consider compliance with state requirements as a factor counseling against a 'failure to train' finding."

The court acknowledged that the pleadings indicated the officers had received the minimum training required by TCLEOSE (now TCOLE).

Zarnow v. Wichita Falls, 614 F3d 161 (U.S. 5th Circuit, 2010)

OTHER COURTS DISTINGUISH ZARNOW

One federal court held that the ruling in Zarnow does not create an absolute immunity from suit if the department's training program complies with TCOLE standards; rather, compliance with TCOLE is a factor "counseling against" a finding by the court that the training curriculum was deficient.

Such compliance does not "automatically preclude liability for failure to train."

Hobart v. City of Stafford, 784 F.Supp.2d 732 (S.D. Texas, Houston Div. 2011)

POINTS TO CONSIDER

Does your training program meet TCOLE minimums?

Who teaches your classes? Qualifications?

Have you had recurring issues that could have been addressed through training?

In what shape are your training records?

SUMMARY

- The actions of officers can and do lead to liability for local governments.
- Training programs and policies are an excellent defense to liability.
- Training programs should include frequent updates on the law – statutes and cases.
- The updates should include both federal and state law.
- The updates should not be limited to a review of new criminal legislation.
- The updates should include information about search and seizure issues.
- If your training programs are in sync with current law, then your officer should be able to assert qualified immunity if she follows her training and the policies.

DON'T FORGET THE OFFICER

Lawsuits obviously can take a financial toll, but they can also tax a person's mindset. I have visited with many officers over the years about lawsuits. The frequently express concerns as to how employers just roll over and settle, that they don't "have my back." Oftentimes, no one has bothered to sit down and explain the realities of the litigation to the officer. Decisions are made higher up the food chain and the affected officer does not have the benefit of hearing those discussions.

Take a moment to explain things; for example, the cost of defense vs. the cost of settlement. This doesn't mean the officer will be happy with the reason, some may not accept it. But many will appreciate the time taken to explain things to them and most are professional enough to understand why certain decisions are made.

So, while analyzing, reading, researching, and planning are important – so too is the human being. Don't forget the officer.

Vathekin v. Prince George's County

- A canine handler can be held liable for failure to give a verbal warning upon releasing the dog.
- The failure to do so is considered objectively unreasonable.
- Any canine training program or policy should include this point.

Cooper v. Dupnik

- Can a coerced confession from a person in custody amount to a constitutional violation for purposes of section 1983?
- Yes. A refusal to honor a request for an attorney or the right to remain silent under Miranda may expose an officer to civil liability.
- Does your training program include regular updates on obtaining confessions?

Areas of Potential Liability

- Intentional conduct
- Negligence in general
- Negligent appointment
- Negligent retention
- Negligent assignment
- Negligent supervision
- Negligent entrustment
- Negligent training