Police Misconduct Update: Front Burner Topics under Section 1983: *Municipal Liability*

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Police Misconduct Update: Front Burner Topics under Section 1983*

Wayne C. Beyer, Esq.

Municipal Liability

Effect of Officer Hiring and Retention Crisis

According to the Washington, D.C. think tank, the Police Executive Research Forum Poand a looming retirement bubble."

PERF says:

> Fewer people are applying to become police officers, and more people are leaving the profession, often after only a few years on the job. These trends are occurring even as many police and sheriffs' offices are already short-staffed and facing challenges in developing a diverse workforce
>
> . . . .
>
> There are ominous signs that the workforce crisis in policing may be getting worse. Traditional sources of job applicants—the military and family members of current officers—are diminishing. A robust economy and strong job growth are creating more options for people entering the labor market, so police agencies are facing more competition in hiring. And the often-rigid, quasi-military organizational structure of most police agencies does not align with the preferences of many of today's job applicants.

PERF, "The Workforce Crisis, and What Police Agencies Are Doing About it," available at https://www.policeforum.org/assets/WorkforceCrisis.pdf (hereafter "Workforce Crisis") at 7.

PERF's survey found that "the number of applicants for police officer positions had decreased, either significantly (36%) or slightly (27%), over the past five years"[;] officers left to accept a job at another local law enforcement agency or secondarily to pursue a career outside of law enforcement; and "about 8.5 percent of current officers are eligible for retirement, and 15.5 percent will become eligible within five years." Workforce Crisis at 8.

A new kind of officer is needed for a new kind of mission.

> [T]he work of policing itself is changing. The work of police officers is becoming more challenging. Criminal offenders are committing new types of cyber-crime, and are using computers to commit old types of crime in new ways, so officers must understand and be comfortable with new technologies. Furthermore, today's police officers increasingly are being asked to deal with social problems, such as untreated mental illness, substance abuse, and homelessness. As a result, the skills, temperament, and life experiences needed to succeed as an officer are becoming more complex.

Workforce Crisis, at 7.

To increase their applicant pools to attract officers with computer and language proficiency in other than English, and more minorities, agencies are offering college tuition reimbursement,

health club memberships, signing bonuses and more flexible hours. In addition, agencies have relaxed standards for prior drug use, DUIs, and traffic violations; revised tattoo and facial hair policies; reduced educational requirements; relaxed physical standards; and reduced standards on financial debt and credit history. Workforce Crisis, at 34-35.

Practice Tip: The question, of course, for the practitioner, is whether these problems in recruitment and retention have an effect on the civil liability cases. Defects in a municipality's hiring, training, supervision and discipline can be the basis for liability. *Board of County Commissioners v. Brown*, 117 S. Ct. 1382 (1997); *City of Canton v. Harris*, 489 U.S. 378 (1989). Although the policy or custom does not itself have to be unconstitutional, it must lead to unconstitutional consequences. The city, town, or county must be aware of the problem; it must be "deliberately indifferent" to its solution; and the defect must be causally related to the violation. Causation requires more than cause-in-fact; it requires legal cause, a close connection between the problem and the violation. See "Practitioner's Guide," Chapter 13, Individual, Supervisory, and Municipal Liability, IV. Municipal Liability, F. Liability Based on Deliberate Indifference to Hiring, Training, Supervision and Discipline, 3. Hiring. Plaintiffs should do discovery on when an officer was hired, whether the department relaxed its recruitment standards to fill vacancies, and whether the officer has had disciplinary problems that went uncorrected because of the need to retain even unsatisfactory officers.

De-escalation and Crisis Intervention and Failure to Train

De-escalation and crisis intervention remain front burner topics in law enforcement. Theories on municipal liability are discussed in the "Practitioner's Guide," Chapter 13: Individual, Supervisory, and Municipal Liability, IV. Municipal Liability, F. Liability Based on Deliberate Indifference to Hiring, Training, Supervision and Discipline. The 2018 Supplement emphasized the Failure to Train on De-Escalation and Crisis Intervention. See Deadly Force and Emotionally Disturbed Persons (EDPs), National Consensus Policy, PERF's Guiding Principles, and Principle of De-Escalation, and Failure to Train on De-Escalation and Crisis Intervention. Establishing liability presents under this theory presents challenges for the plaintiff's side, e.g., showing a municipal policy of "deliberate indifference"; making out a causal relationship between the policy and the injury; and overcoming caselaw that says a police officer does not have to choose the best of alternatives in a "tense, uncertain" situation. Accordingly, the cases often employ a secondary Americans with Disabilities Act (ADA) theory under which the police should have reasonably accommodated the plaintiff's mental state. See "Practitioner's Guide," Chapter 8: Fourth Amendment: Deadly Force, IV. Recurring Fourth Amendment Situations, B. Subject Armed with Edged Weapon; Police Interaction with Mentally Ill, and 2018 Supplement, Deadly Force and Emotionally Disturbed Persons (EDPs), ADA and Exigent Circumstances Exception. And finally, a state law negligence claim should be explored, as it would have a lower liability threshold. See generally "Practitioner's Guide," Chapter 18: Common Law Claims and Defenses.

Roell v. Hamilton County, OH, 870 F.3d 471 (6th Cir. 2017), is an illustrative case. Officers encountered a man who was mentally unstable and unarmed. The question raised was whether officers were required to take his diminished capacity into account when they approached him and tried to take him into custody. The subject suffered from chronic, severe mental illness, including schizoaffective disorder and delusional disorder, and when he went off his medication he could become unpredictable, dangerous, and violent. At 2:30 a.m., his neighbor woke up to a loud noise and found the subject standing at her window wearing only a t-shirt, nude from the waist down.

She called 911 and said that her neighbor was "acting crazy." When the officers arrived on the scene, they wrestled with the subject and tased him multiple times before eventually subduing him and handcuffing him with two sets of handcuffs and shackles. The subject stopped breathing while he was shackled, and never regained consciousness. The deputy coroner determined that the cause of death was "excited delirium due to schizoaffective disorder."

The estate's case was before the Sixth Circuit on appeal from the District Court's grant of summary judgment for the defendants. In affirming the district court, the panel majority ruled:

(1) The estate's § 1983 excessive force claim was that the individual deputy defendants "foreseeably caused any resistance or escalated the encounter by failing to use verbal and tactical de-escalation[,]" and cited state peace officer training materials that required verbal de-escalation techniques before attempting to physically restrain a subject exhibiting signs of excited delirium. But "[e]ven assuming that law-enforcement officers must 'adjust the application of force downward' when confronted with a conspicuously mentally unstable arrestee, no precedent establishes that the level of force used by the deputies in this case was excessive or that the deputies were required to use only verbal de-escalation techniques." 870 F.3d at 482-87 (citation omitted).

(2) The estate's § 1983 claim against the county included a failure to train on "officer interactions with individuals suffering from mental illness and excited delirium." But the Circuit majority found that "the deputies received training on topics that included the use of force and tasers, crisis intervention techniques, interacting with the special-needs population and mentally ill suspects, and recognizing the symptoms of excited delirium." 870 F.3d at 487-88.

(3) The estate had an ADA claim under which the county "had a duty to accommodate [the subject's] disability by 'having its officers take steps to calm the situation, converse with [the subject] in a non-threatening manner, pause to gather information from [the neighbor], refrain from the application of force, and summon EMS to the scene at the earliest moment possible." Although several other circuits had ruled that the ADA applies to arrests, neither the Sixth Circuit nor the Supreme Court had decided that issue. It need not be decided in this case, because the estate's proposed accommodations were unreasonable in the light of exigent circumstances and "overriding public safety concerns." 870 F.3d at 489-90 (citation and internal quotation marks omitted).

In *Haberle on Behalf of Her Two Minor Children*, 885 F.3d 170 (3d Cir. 2018), a man with mental health problems was having a serious mental episode, told the woman he had children with that he was suicidal, and broke into a friend's home and stole a handgun. The woman contacted police, who obtained an arrest warrant. Local police officers responded to the man's location. Some officers wanted to set up a perimeter and ask the state police to send crisis negotiators. Others suggested asking the woman to help communicate with the man. The lead officer rebuffed those suggestions, calling the other officers "a bunch of f[—]ing pussies." He intended to immediately go to the apartment, stating "[t]his is how we do things in [my department]." He knocked on the door of the apartment, and identified himself as a police officer. The man then went into one of the bedrooms of the apartment and shot himself with the stolen gun.

On appeal, the Third Circuit panel ruled: (1) The Fourth Amendment did not apply because the man had not been seized. 885 F.3d at 176. (2) A Fourteenth Amendment state-created-danger theory was not viable. Even though there was disagreement on how to manage the risk, the shooting officer was not deliberately indifferent to it. 885 F.3d at 177-78. (3) As to the ADA claim,

although the courts are split, the panel concluded that arrests by police officers are "services, programs, or activities of a public entity" requiring a reasonable accommodation for one's disability. But the Circuit decided the issue under whether the man had been subjected to discrimination based on his disability. Here, the panel imposed a questionable *Monell* requirement: the plaintiff had to show a pattern of violations, or deliberate indifference, e.g., to the risk of harm without policies or training on interacting with mentally disturbed individuals:

> [The Plaintiff] also complains that "a set of policies and procedures had been drafted by the Department" which should have guided "interact[ion] with mentally disturbed individuals, and those in crisis situations[,]" but that "the said policies and procedures were not adopted by the Borough Council, nor were they implemented by the Mayor or Police Department." . . . At most, she claims that the Borough's conduct falls "beneath the nationally recognized standards for police department operations" with regard to those with mental illness. But, assuming that is true, falling below national standards does not, in and of itself, make the risk of an ADA violation in such circumstances "so patently obvious that a [municipality] could be held liable" without "a pre-existing pattern of violations."

885 F.3d at 182 (record and case citations omitted).

The Circuit remanded to allow the plaintiff to amend her ADA claim.

Estate of Ceballos v. Husk, 919 F.3d 1204 (10th Cir. 2019), was discussed earlier in connection with the Tenth Circuit's test of reckless or deliberate police conduct that precipitates the need to use lethal force. A man's wife reported that her husband, who was drunk and probably on drugs, was armed with baseball bats and acting crazy. She had left the residence with her 17-month-old daughter. A responding officer went back to his patrol car to get his beanbag shotgun. Without waiting for that officer to return, as the decedent emerged from his garage with the baseball bat in hand, one officer drew a firearm and the other a taser. Both shouted commands as the man approached them. The officer with the taser shot and the officer with the gun shot and killed the man.

The city offered a 40-hour Crisis Intervention Training (CIT) course, designed to train officers to deal with persons in crisis:

> by using techniques such as maintaining safety by using time and distance; taking steps to calm the situation by using quiet voices; avoiding getting too close, too fast; not rushing into the situation; assessing the need for backup; making a plan with fellow officers for the best course of action; gathering information from those on the scene; avoiding escalating the situation; communicating in a calm, non-threatening manner; not having multiple people giving commands at the same time; and containing the subject by establishing a perimeter.

919 F.3d at 1211.

The course was not mandatory and the officer who shot his gun had not been CIT trained. Plaintiff's proposed expert witness would have testified that the failure to employ CIT strategies was "not consistent with well-established modern police standards." Citing Tenth Circuit authority, the panel majority affirmed the district court's denial of qualified immunity for the officer. "[T]he responding officers knew [the man's] capacity to reason was diminished, whatever

the underlying reason might have been—mental health problems, emotional distress, drunkenness, or drugs." "[T]he Tenth Circuit decision in *Allen* [*v. Muskogee*, 119 F.3d 837, 839-41 (10th Cir. 1997)] would have put a reasonable officer on notice that the reckless manner in which [the shooting officer] approached [the man] and his precipitous resort to lethal force violated clearly established Fourth Amendment law." 919 F.3d at 1217, 1220. Because the case was on interlocutory appeal on the entitlement of the individual officer to qualified immunity, the Circuit did not consider the § 1983 failure to train claim against the city or the state law wrongful death claim against the shooting officer.

See also Joseph v. Doe, Civil Action No. 17-5051 (E.D. La. 1/3/2019) (police responded to calls that plaintiffs' decedent was experiencing mental health crisis; unarmed, he retreated behind counter at convenience store and was already laying down when first responding officer drew his gun and put his 300 pound weight on him; fourteen responding officers either participated in tasing, punching man in head, kicking him in groin or standing by and watching; man, who had not committed crime, was placed in handcuffs and shackles and placed face down in patrol car where he became unresponsive and later died; saying, "[t]he New Orleans Police Department requires that 'when feasible based on the circumstances, officers will use de-escalation techniques, disengagement; area containment; surveillance; waiting out a suspect; summoning reinforcements; and/or calling in specialized units such as mental health and crisis resources, in order to reduce the need for force, and increase officer and civilian safety.' Many other police agencies, including the New York, Seattle, and Dallas police departments, have implemented deescalation training[;]" but granting summary judgment on Fourteenth Amendment claim based on positional asphyxia.);

Felix v. City of New York, 344 F. Supp.3d 644. 659-61, 664-66 (S.D. N.Y. 2018) (officers accessed apartment of paranoid schizophrenic man in facility housing individuals with mental illness without warrant, exigent circumstances or knocking and announcing, precipitating physical altercation and shooting; denying motion to dismiss where plaintiff relied on inspector general report criticizing police department's lack of an emotionally disturbed persons policy and failure to properly train police officers on handling emotionally disturbed persons beyond offering only a 'one-day training' involving 'a short, basic lecture on mental illnesses' and four role-playing scenarios; also denying motion to dismiss ADA claim where plaintiff alleged failure to train officers about treatment of individuals with mental illness, including implementing Crisis Intervention Training (CIT), backup calls, and similar policies.);

Cambre v. Smith, Civil Action No. 18-6509 (E.D. La. 12/10/2018) (dispatched to plaintiff's residence for welfare check, officers allegedly began yelling and cursing at him, tased him, and jumped on top of him before taking him to hospital handcuffed and on stretcher; dismissing plaintiff's amended complaint which cited to a press release indicating that defendant sheriff had "assembled a crisis intervention team trained in de-escalation techniques for situations involving individuals in crisis. [Plaintiff] alleges that the crisis intervention team was limited to four deputies and that [parish sheriff's office's] policies were defective because none of the four deputies were deployed to the scene of the alleged January 2018 incident involving [Plaintiff]. . . . [T]he press release states that the crisis intervention team was tasked with, among other things, 'training other departmental personnel in crisis intervention techniques.' . . . Regardless of whether the four trained deputies were deployed to the scene, [Plaintiff] has not pled facts sufficient to allege that [the sheriff] acted with deliberate indifference. . . . [T]he press release demonstrates, if anything, that [the sheriff] was aware of the problems posed by behavioral health-related dispatch calls and

that he was actively working to address such problems, which simply cannot constitute deliberate indifference.");

Remirez v. Escajeda, No. EP-17-CV-00193-DCG (W.D. Tex. 1/11/2018) (plaintiffs' complaint stated that their son was threatening to hang himself and needed help; when officer arrived son was hanging from basketball net but grabbing rope with both hands and touching ground with his tiptoes to save his own life; for unstated reasons, officer tased him and then removed him from the noose, but resuscitation efforts failed; denying defense motion to dismiss failure to train claim: "Plaintiffs make numerous factual allegations as to why the City of El Paso's training was inadequate, including pointing out the City's failure to train officers on how to respond to crisis intervention calls, the City's failure to train officers on how to de-escalate potential confrontations with mentally ill persons in crisis, and the City's failure to train officers on the steps needed to minimize deadly or intermediate force when confronted with a mentally ill person in crisis.");

Sanchez v. Gomez, 283 F. Supp. 524, 545 (W.D. Tex. 2017) (police were at plaintiff parents' residence to investigate complaint involving son who had been acting strange and exhibiting signs of mental illness, when they entered home without consent and without warrant, attempted to subdue their son with taser, and fired five rounds that proved fatal; denying dismissal of plaintiffs' complaint based on allegations that police department "failed to train its officers on how to (1) make first contact with a mentally unstable individual; (2) de-escalate mental health crises rather than escalate the confrontation; (3) take steps to minimize the use of deadly or intermediate force when dealing with such a person; and (4) respond to crisis intervention calls or use verbal de-escalation tactics.");

Tenorio v. Pitzer, Civ. No. 12-01295 MCA/KBM, Consolidated with Civ. No. 13-00574 MCA/KBM (D.N.M. 9/25/2017) (earlier finding that "the tactics employed by [defendant officer] and his fellow APD [Albuquerque Police Department] officers unreasonably created the circumstances precipitating [defendant officer's] resort to deadly force. Causation in this context requires the factfinder to decide whether [defendant officer's] allegedly unreasonable use of deadly force would have been avoided had the responding officers been trained and supervised under a 'program that was not deficient in [the] identified respect[s][;]'" and in this decision denying summary judgment allowing Department of Justice (DOJ) "findings that (1) APD officers use deadly force in circumstances where there is no imminent threat of death or serious bodily harm to officers or others; (2) APD officers use deadly force against people who pose a threat only to themselves; (3) APD officers use deadly force in situations where their own conduct creates the need to resort to deadly force; (4) APD officers are not adequately trained to deal with people in emotional crisis; (5) APD officers do not utilize CIT officers to de-escalate encounters; and (6) APD training over-emphasizes the use of force, especially weapons, to resolve stressful encounters.");

Clark v. Colbert, Case No. 16-CV-115-JHP (E.D. Okla. 7/18/2017) (plaintiff was schizophrenic patient who was off his medications and cut his brother with knife; after local police took tactical command from deputy sheriffs, officers tried verbal persuasion, pepperballs, Taser, and eventually firearms when plaintiff charged group at about ten feet; granting summary judgment in favor of county board under ADA; even if ADA applied to exigent circumstances, deputies had CLEET (Council on Law Enforcement Education and Training) certifications and defendant deputy who was major "was taught about how to recognize the signs of mental illness,

to use de-escalation techniques when dealing with the mentally ill, to use soft words and non-threatening language when dealing with the mentally ill, and about the prevalence of mental illness in society. . . . Plaintiff has also failed to show any causal link between the alleged failure to implement such policies and training and his injuries;" additionally, local police department not county board was responsible for disarming plaintiff and taking him into custody, but, to extent that state negligence claim was based on that plan, county board had discretionary immunity).

Practice Tip: For additional resources issued since publication of the "Practitioner's Guide," and the 2018 supplement, see U.S. Department of Justice's Office of Community Oriented Policing Services (COPS Office), "Law Enforcement Best Practices: Lessons Learned from the Field," https://cops.usdoj.gov/RIC/ric.php?page=detail&id=COPS-W0875, and the Police Executive Research Forum (PERF) (2020) "Refining the Role of Less-Lethal Technologies: Critical Thinking, Communications, and Tactics Are Essential in Defusing Critical Incidents," available at https://www.policeforum.org/assets/LessLethal.pdf