

DISCOVERY IN THE POLICE MISCONDUCT CASE

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STATE LAW CLAIMS NEGLIGENCE STANDARD

- ⦿ Failure of supervision
- ⦿ Failure to hire
- ⦿ Failure to train
- ⦿ Failure to enact, implement and enforce policies and procedures
- ⦿ Direct claim

STATE LAW CLAIMS INTENTIONAL TORTS

- False arrest
- Assault and battery/Excessive force
- Abuse of process
- Malicious prosecution
- Emotional distress claims
- *Respondeat Superior* applicable



DEFENSES TO A STATE CLAIM

- Title 59 Immunities
- Outside scope of employment
- Good faith qualified immunity
- Probable cause

THE FEDERAL CIVIL RIGHTS ACT

42 U.S.A. Section 1983

Every person who, under color of law, any statute, ordinance, regulation, **custom** or **usage** of any State...subjects...any citizen of the United States...to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law...

THE NEW JERSEY CIVIL RIGHTS ACT

N.J.S.A. 10:6-2

Mirrors Section 1983

REQUISITES FOR THE CIVIL RIGHTS CLAIM

- ⦿ Must prove a specific violation of the constitution
- ⦿ Deliberate indifference/Reckless disregard standard
- ⦿ Pattern, custom, policy, practice
- ⦿ Intentional conduct
- ⦿ No *Respondeat Superior* – The “Monell Claim”
- ⦿ Must be a nexus between the violations and the injuries - causation

INDIVIDUAL LIABILITY

SUPERVISORY LIABILITY

BOTH REQUIRE SEPARATE &
DISTINCT INTENTIONAL CONDUCT

Keenan v. City of Philadelphia 983 F.2d (3rd Cir 1992)

**WHY BOTHER WITH A FEDERAL
CIVIL RIGHTS CLAIM?**

**WHY NOT SIMPLY BRING A STATE
LAW NEGLIGENCE
OR INTENTIONAL TORT CLAIM?**

FEDERAL CIVIL RIGHTS CLAIMS NOT SUBJECT TO TITLE 59 DEFENSES

- ⦿ Failure to intervene
- ⦿ Failure to protect
- ⦿ Escapes/chases
- ⦿ Inmate on inmate violence cases
- ⦿ Failure to enforce the law
- ⦿ Failure to arrest

See Chapter 5, Title 59-Correction and police activities

OTHER REASONS TO BRING A CIVIL RIGHTS CLAIM

- ⦿ Fee shifting
- ⦿ Direct claim against government
- ⦿ Federal court
- ⦿ Injury threshold
- ⦿ Punitives against the individual
- ⦿ Failure to file notice of claim

CUSTOM, POLICY AND USAGE

POLICY = OFFICIAL POLICY

CUSTOM OR USAGE = UNOFFICIAL
POLICY

HOW DO YOU SHOW CUSTOM OR USAGE

- ⦿ Misconduct is widespread without ramification or discipline
- ⦿ Lack of action shows acquiescence in inappropriate conduct
- ⦿ Failure to enact, enforce, implement policies and standards
- ⦿ Failure to discipline
- ⦿ Failure to accept or properly investigate complaints
- ⦿ Failure in training
- ⦿ Pattern of misconduct by prior incidents
- ⦿ Failure of recordkeeping

DELIBERATE INDIFFERENCE

- ⦿ Equivalent to recklessness
- ⦿ Supervisor – policymaking official – “knows and disregards an excessive or substantial risk of harm”

Farmer v. Brennan, 511 U.S. 825 (1994)

JOINT DISCOVERY PLAN

- ⦿ Anticipated motion practice on discovery
- ⦿ List anticipated areas of dispute
- ⦿ Request additional interrogatories
- ⦿ Request additional depositions
- ⦿ Protective orders – reasonable

REQUIRED DISCOVERY ON THE SECTION 1983 CASE

- ⦿ Civilian complaints
- ⦿ Internal complaints
- ⦿ Inmate complaints
- ⦿ Ombudsman
- ⦿ External agency complaints
- ⦿ Overseeing agency annual reports
- ⦿ Internal affairs investigations
- ⦿ Characterization of complaints

COMPLAINTS = NOTICE

THE INTERNAL AFFAIRS COMPLAINT

- ◉ Witness statements
- ◉ Officer statements
- ◉ Taped, written
- ◉ Categorized and filed properly
- ◉ Filing the complaint
- ◉ Tracking & monitoring of complaints
- ◉ Annual reviews

**FAILURE TO CONDUCT PROPER INVESTIGATION = UNOFFICIAL POLICY
OR CUSTOM**

Beck v. City of Pittsburgh - 89 F.3d 966 (3d Cir 1996)

DISCIPLINE

- ⦿ Notices of preliminary intent
- ⦿ Notices of charges or hearing
- ⦿ Notices of final discipline
- ⦿ ALL officers, not just the ones in the subject matter
- ⦿ Discipline of policymakers
- ⦿ All files

LACK OF ACTION = UNOFFICIAL POLICY OR CUSTOM

MORE COMPLAINTS

- ⦿ Lawsuits
- ⦿ Notices of claims

**FAILURE TO MAINTAIN, CATEGORIZE AND ACCESS =
UNOFFICIAL POLICY OR CUSTOM**

POLICIES, PROCEDURES, PROTOCOL

- Police/Corrections manual
- Inmate manual
- How to file a complaint
- How to investigate a complaint
- Discipline
- Monitoring and tracking of complaints

MORE POLICIES

- Specific to the case – classification
- Use of force/discharge firearm
- Arrest
- Inmate on inmate violence
- Surveillance
- Excessive force
- Discharge firearm

MORE POLICIES

- ⦿ Dealing with the public
- ⦿ Provision of medical care
- ⦿ Notification to kin

**FAILURE TO MAINTAIN, CATEGORIZE AND ACCESS =
UNOFFICIAL POLICY OR CUSTOM**

TRAINING

- ⦿ All materials
- ⦿ Police academy – separate defendant?
- ⦿ Excessive force
- ⦿ Discharge firearm
- ⦿ Sign off sheets showing training actually given
- ⦿ Curriculum standards
- ⦿ Continuing education

**FAILURE TO TRAIN = UNOFFICIAL POLICY OR
CUSTOM**

City of Canton, Ohio v. Harris, 489 U.S. 378 (1989)

BASIC RECORDS

- ⦿ Arrest reports
- ⦿ Investigative reports
- ⦿ Witness statements
- ⦿ Prior incidents on officers involved
- ⦿ Booking records
- ⦿ Jail records
- ⦿ Prior incarcerations or arrests
- ⦿ Medical
- ⦿ Surveillance tapes
- ⦿ Collective Bargaining Agreement



DEPOSITIONS

- ⦿ Who to name and call
- ⦿ Persons with knowledge

F.R.C.P. 30(b) (6)



THE EXPERT WITNESS

- ⦿ Review all internal affairs files
- ⦿ Review all policy
- ⦿ Industry wide standards
- ⦿ Necessity of use of force
- ⦿ Credentials & net opinion - Daubert



QUESTIONS?

