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Failure-to-Discipline Liability

COUNTY LAW UPDATE

by Mike Rainwater on 10/14/2004

“[A Sheriff or other supervisor] may be subject to individual liability under § 1983 as supervisors for failing adequately to receive, investigate, or act upon complaints of ... misconduct by ... department employees if they: (1) received notice of pattern of unconstitutional acts committed by subordinates; (2) demonstrated deliberate indifference to or tacit authorization of offensive acts; (3) failed to take sufficient remedial action; and (4) such failure proximately caused injury. Andrews v. Fowler, 98 F.3d 1069, 1078 (8th Cir. 1996).

“Official Policy” May Be Established by Lack of Discipline: In Andrews v. Fowler, Plaintiff claimed she was raped by Officer Fowler. The chief of police, mayor, and officer Fowler were all sued under § 1983. Plaintiff alleged the chief of police and mayor knew of several prior allegations of sexual misconduct involving Officer Fowler but they failed to discipline Officer Fowler. Plaintiff alleged that the failure to discipline was ratification of Officer Fowler’s misconduct and was evidence that the “official policy” of the city was tacit authorization of Officer Fowler’s sexual misconduct. The Court of Appeals correctly pointed out that a governmental entity may be held liable only if the deprivation was caused by an unconstitutional “policy or custom” of the entity but then ruled that failure to act on a known complaint of employee misconduct can rise to the level of official policy or custom if there is evidence of “a prior pattern of unconstitutional conduct that is so ‘persistent and widespread’ as to have the effect and force of law To establish a city's liability based on its failure to prevent misconduct by employees, the plaintiff must show that city officials had knowledge of prior incidents of police misconduct and deliberately failed to take remedial action.” *Id.* at 1074 -1075. See also Harris v. City of Pagedale, 821 F.2d 499, 504-07 (8th Cir.1987). In Fowler, the Court ruled that the “two instances of misconduct indicate that Chief of Police Price was aware that some problem existed with Fowler, but they do not indicate a ‘persistent and widespread’ pattern of misconduct that amounts to a city custom or policy of overlooking police misconduct.” *Id.* at 1076.

A Failure to Discipline Creates a Jury Question: In Ware v. Jackson County, Mo., 150 F.3d 873 (8th Cir. 1998), the Plaintiff sued the County after being raped by a jailer in the county jail. The Eighth Circuit stated: “Existence of written policies of a defendant are of no moment in the face of evidence that such policies are neither followed nor enforced, for purposes of determining whether continuing, widespread, and persistent pattern of unconstitutional conduct existed so as to establish municipal liability under § 1983. In our view, the County's deliberate indifference is evidenced by its failure to discipline adequately [Officer] Toomer and other officers who engaged in sexual misconduct when there was ample evidence that female inmates were placed at a substantial risk of serious harm. Further, there is sufficient evidence that the County had notice because [the jail administrator], a final policymaker, ... knew of Toomer's and other officers' sexual misconduct ... Evidence that county's custom of laxness or inaction toward allegations of sexual misconduct by county jail employees was the moving force or cause of rape of inmate by corrections officer, and that county thus was liable for Eighth Amendment violation in § 1983 action, was sufficient for submission to jury; reported acts of sexual misconduct by officer were sufficient to compel increased supervision, but no increased supervision occurred.” *Id.* at 882-3.

Do Not Be Indifferent in the Face of Alleged Officer Misconduct: In Andrews v. Fowler, the Court stated that the police chief and city mayor could be subject to individual capacity liability under § 1983 for failing adequately to receive, investigate, or act upon complaints of sexual misconduct by police department employees if they received notice of pattern of unconstitutional acts committed by subordinates, demonstrated deliberate indifference to or tacit authorization of offensive acts, failed to take sufficient remedial action, and such failure proximately caused injury. *Id.* at 1076. The clear lesson is that a supervisor must do something. Act on all allegations of officer misconduct. Gather the facts and impose some discipline (remember that “a good talking to” is “discipline”) for all conduct that is inappropriate conduct for a law enforcement officer. This includes information you receive regarding even off-duty misconduct. Remember also that the law in this area is very complicated. If you intend to discipline with partial or total loss of pay or position, call your lawyer first!

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