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Staff Use of Force Against Prisoners--Part II: Governmental and Supervisory Liability

Contents

Introduction

The first article in this multi-part series on the use of force by correctional staff members against prisoners covered the general legal standard for permissible use of such force, and individual liability for excessive use of force. The focus of this article is on governmental and supervisory liability arising out of excessive use of force. Later articles in the series will include discussion of use of deadly force, use of chemical weapons, use of Tasers, stun guns and other electronic control devices, and use of dogs. This article, like the first one in the series, concentrates of federal civil rights law, and does not discuss, in any detail, liability under state law.

At the conclusion of this article, and each article in the series, a number of useful resources are listed, along with on-line links to the source documents whenever available. The listing of an item does not necessarily imply any endorsement or agreement with the views expressed therein.

Governmental Liability

In order to impose governmental liability on a municipality or agency, it is not enough to simply show that the officer who used excessive force against a prisoner was employed by a city or corrections department, at least in federal civil rights cases. While state law in many instances may allow for vicarious liability on the basis of an employer-employee relationship, so long as the employee was acting

within the “scope” of their employment or agency, and not for purely personal objectives (sometimes referred to as a “frolic of their own”), it has long been established that municipal or agency liability must be based on a showing that there was an official policy or custom, and that the policy or custom was the cause of the deprivation of the prisoner’s civil rights. See Monell v. New York City Dept. of Social Services, #75-1914, 436 U.S. 658 (1978).

The failure to show this will mean that liability may not be imposed on the city, county, or correctional agency. In Hernandez v. York County, No. 07-4774, 2008 U.S. App. Lexis 17985 (Unpub. 3rd Cir.), for instance, a prisoner who claimed that he was beaten by correctional officers failed to show that there was an unlawful county policy or custom concerning the use of excessive force, or that such a policy caused his alleged injuries. As a result, he could not go forward with his claims against the county. Further, he also failed to show that the force used against him was excessive under the circumstances. (And, if there was no deprivation of constitutional rights to begin with, it is also clear that, even if there had been an improper official policy or custom on the use of force against prisoners, there still could not have been county liability, since there could be no showing that the policy or custom caused any injury).

Similarly, Ludaway v. City of Jacksonville, Florida, No. 07-10859, 2007 U.S. App. Lexis 21150 (Unpub. 11th Cir.), the court found that the plaintiff prisoner failed to provide any evidence of an official city policy permitting or encouraging the excessive or unnecessary use of force by sheriff's employees against arrestees, or a widespread custom of such use of force, so that the city was entitled to summary judgment.

When a correctional agency is a component part of the state, rather than a municipality, so that a judgment against it would essentially result in a judgment against the state itself, there is an additional barrier to liability—the Eleventh Amendment to the U.S. Constitution which bars, among other things, claims for money damages against the states in the absence of either an explicit waiver of sovereign immunity by the state or an explicit abrogation of that immunity by Congress in connection with the exercise of one or more of its valid constitutional powers.

Illustrating this is Hunter v. Young, No. 06-3371, 2007 U.S. App. Lexis 13886 (10th Cir.), a case in which a prisoner sued over the use of a Taser® against him after he refused to obey orders from correctional officers following an altercation. Claims against the officer in his official capacity were barred by the Eleventh Amendment, as the state of Kansas had not waived its immunity against federal civil rights lawsuits for damages under the general language of a state statute, Kan. Stat. Ann. Sec. 19-811. (A lawsuit against a correctional official or employee in

their official capacity is essentially a lawsuit against their employer or agency, in this instance the state).

Similarly, in Warren v. Maine State Prison, No. CV-07-24, 490 F. Supp. 2d 9 (D. Maine 2007), the court held that a Maine state prison, as an agency of the state, could not be sued for damages under 42 U.S.C. Sec. 1983 for alleged use of excessive force against a prisoner, because of Eleventh Amendment Immunity, and the fact that the state is not a "person" subject to such liability. To the extent that there could arguably be a state law claim against the prison, there was no showing that the state had waived its 11th Amendment immunity from a suit in federal court. Additionally, the prison could not be held vicariously liable under federal law for the actions of a prison officer on the basis that it was his employer.

In Estate of Moreland v. Dieter, No. 03-3734, 395 F.3d 747 (7th Cir. 2005), cert. denied, sub nom., Estate of Moreland v. Speybroeck, 545 U.S. 1115 (2005), a federal appeals court upheld a jury's award of $29 million in compensatory and $27.5 million in punitive damages against two deputy sheriffs for causing an intoxicated pre-trial detainee's death through the use of excessive force, including pepper spray. But the court also found that the plaintiff's failure to show that the death was caused by any official policy or custom, or by deliberate indifference to a widespread pattern of violation of jail policies, required summary judgment on claims against county sheriff. The mere number of uses of pepper spray did not show that it was being misused.

On the issue of the claims against the sheriff, the appeals court noted that even the plaintiff's expert testified that the jail policies in force at the time were adequate, and the plaintiff's claim against the sheriff was based on an assertion that the jail deputies routinely violated the department's policies, and that the sheriff was deliberately indifferent to a widespread pattern of violations.

While the plaintiffs pointed to the number of reported incidents of OC-10 spray in the jail--128 incidents in 1995, 73 incidents in 1996, and 17 incidents in 1997--the appeals court reasoned that the number of pepper spray incidents, without more, did not establish that the pepper spray was being "routinely misused," or that the jail's OC-10 policy was being violated. As to three actual incidents of alleged injuries from the use of pepper spray, they all involved minor injuries, and there was nothing to suggest that these incidents involved violations of the jail's policies or amounted to a "widespread practice" to which the sheriff was deliberately indifferent.

Other cases of interest on the topic of governmental liability for excessive use of force against prisoners include:

* Aguirre v. Nueces County, Texas, No. 06-40317, 2007 U.S. App. Lexis 3028 (5th Cir.), holding that a prisoner who claimed that he was beaten by unknown

prison guards failed to present evidence of inadequate training or hiring policies that could support a claim for liability on the part of the county.

* Cunningham v. Riley, #COA04-806, 611 S.E.2d 423 (N.C. App. 2005), which decided that a North Carolina county only waived sovereign immunity to the extent of liability insurance purchased. Inmate who was awarded $49,500 by jury on his claim that a deputy sheriff assaulted him, therefore, could recover nothing, as the county's liability insurance only provided coverage for claims in excess of $250,000.

* Webb v. Goord, #02-0097(L), 340 F.3d 105 (2nd Cir. 2003), concluding that a lawsuit by New York prisoners against over fifty correctional employees concerning more than forty separate and unrelated incidents at fourteen different prisons over a period of almost ten years was properly dismissed when the complaint failed to establish the existence of a policy or practice existing throughout the state correctional system or even within one prison which caused a violation of Eighth Amendment rights.

* Jarno v. Lewis, #02-1622, 256 F. Supp. 2d 499 (E.D. Va. 2003), holding that a state-established jail authority, which held immigration detainees in custody under a contract with the federal government, acted under "color of state law" for purposes of one such detainee's excessive force claim arising out of actions of correctional officers. The federal contract did not specify how the authority was to supervise its guards and the detainee's claim alleged failure to adequately train officers and "condonation" of their use of excessive force.

* Gailor v. Armstrong, #3:99-CV-2, 187 F. Supp. 2d 729 (W.D. Ken. 2001), finding that there was insufficient evidence to hold county liable for alleged beating death of detainee at the hands of prison guards. A claim that "low-level" county officials falsified reports after prisoner's death did not show a "well-settled" county custom of excessive force.

* Lewis v. Board of Sedgwick County Commissioners, #97-1483, 140 F. Supp. 2d 1125 (D. Kan. 2001), in which a federal court overturns $500,000 jury award against county in a prisoner's claim of excessive force by jail detention officers. The alleged failure to specifically train officers that they were prohibited from standing on a detainee's back in an effort to restrain him did not constitute a "glaring" omission showing that county was deliberately indifferent.

Supervisory Liability

Supervisory personnel, such as wardens, assistant wardens, shift supervisors, etc. can certainly also be held liable in some instances for the excessive use of

force against prisoners. In federal civil rights cases, however, the mere fact that an individual is a supervisor does not automatically make them liable for the misconduct of their subordinates, in the absence of some personal role. See Durran v. Selsky, #00-CV-6067, 251 F. Supp. 2d 1208 (W.D.N.Y. 2003), holding that a mere claim that a supervisory prison official was the "maximum authority" at a prison did not serve as a basis for liability for an alleged assault on an inmate by correctional officers, in the absence of any allegation of personal involvement or other proper basis for responsibility.

Similarly, in Coleman v. Dept. of Rehab. & Corrections, #01-3169, 46 Fed. Appx. 765 (Unpub. 6th Cir. 2002), the court ruled that a prison warden could not be held vicariously liable for the alleged beating of a prisoner by unknown guards during a prison riot, when there was no claim that he was directly involved in the incident or encouraged the guards' alleged actions.

Liability may be based, however, on personal participation—which may range from the individual's own use of excessive force against a prisoner (in which case, the same rules discussed in the first article in this series apply to the supervisor, just like any other correctional employee), to ordering a particular use of force, or having knowledge of the misuse of force and failing to intervene or take corrective action.

Illustrating a supervisor's own direct personal participation in the use of force is Norton v. City of Marietta, No. 04-7133, 432 F. 3d 1145 (10th Cir. 2005), in which a detainee's claim that sheriff and two officers used excessive force against him in entering his cell, physically restraining him, and using pepper spray against him was reinstated by federal appeals court. The appeals court ruled that the trial judge improperly decided credibility of witnesses in granting summary judgment for defendants, when there were disputed factual issues about whether the detainee was combatively resisting orders at the time of the incident.

On the other hand, in Fillmore v. Page, No. 02-3208, 358 F.3d 496 (7th Cir. 2004), the dismissal of claims against a warden, who did not have physical contact with a prisoner prior to his transfer to a segregation unit was upheld, in the absence of any evidence that he ordered or condoned the excessive use of force by others, such as the alleged beating of the prisoner once he arrived in his new cell.

Liability may also be based on a supervisor's role in providing inadequate supervision, training, or discipline to officers, if it rises to the level of "deliberate indifference" to a known problem, such as a past pattern of excessive use of force by particular officer or officers, or a pattern of incidents of excessive use of force in a facility or one of its units.

Once again, the failure to show such a personal role or that the supervisor's actions or inactions actually caused the harm will bar liability. In Hernandez v. York County, No. 07-4774, 2008 U.S. App. Lexis 17985 (Unpub. 3rd Cir.), a prisoner who alleged that correctional officers beat him could not pursue claims for liability against the warden, when he failed to present any evidence that would show that the warden was personally involved in the violation of his rights.

As with governmental liability, a supervisor also may not be held liable for alleged excessive use of force in the absence of a finding that the officers indeed used force that was excessive, since in the absence of that, regardless of what the supervisor's actions or inactions were, it did not cause any injury. See Matthews v. Cordeiro, No. 05-1041, 2007 U.S. App. Lexis 28613 (Unpub. 1st Cir.), ruling that a prison superintendent was properly granted a directed verdict in a prisoner's lawsuit claiming that he was beaten on two occasions by correctional officers. Since there was no finding of a constitutional violation by the officers, there also could be no supervisory liability.

An interesting case concerning the requirement that the supervisor's action or inaction, even if allegedly improper, must actually cause the prisoner's injury in order to incur liability is Morris v. Crawford County, Arkansas, #01-2053, 173 F. Supp. 2d 870 (W.D. Ark. 2001). In that case, the court ruled that a deputy was not entitled to qualified immunity against liability for the alleged excessive use of force against a prisoner who was allegedly not resisting at the time, but that the sheriff's purported condoning of the use of the force by failing to immediately terminate the deputy occurred after the incident, and therefore did not cause the deputy's conduct, so the sheriff could not, on that basis, be held individually liable for damages.

The fact that a supervisor authorizes the use of force, or a particular operation by his subordinates does not necessarily make him or her liable for their actions if they act in a manner that is not authorized In Serna v. Colorado Dep't of Corr., No. 04-1241, 455 F.3d 1146 (10th. Cir. 2006), for instance, the court held that the Director of Colorado prisons, in authorizing the use of a special operations team to remove a prisoner from his cell to search for a loaded gun, was not liable for the officers' alleged excessive use of force, causing injuries to his jaw and testicles. No evidence showed that he either authorized or knew of any excessive force, or had any duty to personally supervise the team.

There was no evidence that the Director ordered the team to apply excessive force, that he directly supervised their on-site conduct from 50 miles away, or that he participated in the planning or execution of the operation. The Director, further, on the basis of the reports he received, believed that the cell removal occurred

without incident and according to policy, and his receipt of those reports did not show his approval of the alleged excessive use of force.

The prisoner also failed to show that the Director knew or should have known that he was, in activating the team, creating a situation causing a substantial risk of constitutional harm, but acted with deliberate indifference to it. There was also no showing of a pattern or practice of constitutional abuses by his subordinates on prior occasions. The evidence only showed that the Director, "as a high-level supervisor," authorized the use of the team to respond to a dangerous situation at a warden's request. There was nothing to show that he wanted to harm the plaintiff prisoner or to ignore harm done by his subordinates.

In contrast, in Valdes v. Crosby, No. 05-13065, 450 F.3d 1231 (11th Cir. 2006), a federal appeals court ruled that a former warden was not entitled to qualified immunity in a lawsuit over the death of death-row prisoner allegedly beaten to death by prison guards. Evidence presented, the court found, was sufficient to create a factual issue as to whether there was a widespread history of abuse by guards, whether the warden knew of the violent propensities of certain guards involved in the beating, and whether he acted with deliberate indifference to a known risk of harm.

There was evidence that the warden had been specifically warned about one of the defendant officers by a fellow officer, and told about a prior incident where a prisoner was extracted from his cell in death row and beaten so severely that he had to be airlifted by helicopter to a hospital where he remained for nine days, suffering multiple rib fractures, a back injury, and a large number of other injuries.

These alleged facts, and evidence concerning other incidents and complaints, the appeals court found, if true, were sufficient to present a valid claim entitling the plaintiff to proceed to trial and to show that inmate abuse at the hands of guards at the prison was "not an isolated occurrence, but rather occurred with sufficient regularity as to demonstrate a history of widespread abuse" there. Whether the former warden "actually drew the inference of widespread abuse and was therefore 'on notice of the need to correct or to stop' abuse by officers then becomes a factual question for the jury."

Evidence presented, the appeals court found, was sufficient to allow a jury to consider whether the former warden had established "customs and policies" that resulted in "deliberate indifference to constitutional violations" and whether he failed to take reasonable measures to correct the problem. The appeals court found that the law on this issue was clearly established, so that the former warden was not entitled to qualified immunity.

Some other cases of possible interest concerning supervisory liability for excessive use of force against prisoners include:

* Locicero v. O'Connell, No. 04 Civ. 07708, 419 F. Supp. 2d 521 (S.D.N.Y. 2006), ruling that a prison superintendent was not entitled to dismissal of a prisoner's claim that he was aware of, but deliberately ignored a correctional officer's repeated "malicious acts" against him, which resulted in the officer striking him.

* Mathews v. Crosby, No. 05-12515, 480 F.3d 1265 (11th Cir. 2007), holding that a warden was not entitled to summary judgment on a prisoner's claim that he had been warned by a previous warden about certain guards with violent tendencies who "might kill" a prisoner, including the guard who allegedly attacked him and broke his jaw. The warden, instead of firing the guard in question or taking other corrective action, allegedly promoted him to captain.

* Lenz v. Reed, No. 06-3017, 490 F.3d 991 (8th Cir. 2007), finding that a prisoner failed to show that a warden had the knowledge required to have acted with deliberate indifference to a purported substantial risk that prison guards would use excessive force against him. He claimed that the guards took him to a room without cameras and beat him, and subsequently denied him access to immediate medical care for his injuries. The employment records of the officers failed to show that they were an obvious risk to prisoners, and a trial judge's disagreement with the warden's choices in disciplining one of the officers for allegedly mistreating a prisoner by suspending him was not sufficient to support a finding of deliberate indifference.

* Christle v. Magles, No. 6:05cv334, 2007 U.S. Dist. Lexis 35438 (E.D. Tex.), deciding that a prisoner presented a viable claim for use of excessive force against correctional officer who allegedly punched him in the eye, breaking the orbital bone in his face, while he was being carried up some stairs in shackles following an incident in which the prisoner was restrained. Claims against all other defendants, including supervisory personnel and a prison nurse, however, were dismissed.

* Torres v. Mazzuca, #02-Civ-2152, 246 F. Supp. 2d 334 (S.D.N.Y. 2003), holding that a prison superintendent could not be held liable for a correctional officer's alleged unprovoked assault on prisoner when he had no reason to know of any particular risk to the inmate prior to the incident, and no personal participation in the incident.

* Combs v. Wilkinson, #00-4270, 315 F.3d 548 (6th Cir. 2002), which found that there were genuine issues as to whether the commander of a special response team failed to adequately control and instruct subordinates in suppressing

confrontational prisoners, or allowed the excessive use of “lethal levels” of gas and other chemical agents before ordering entry into a death row unit.

* Snell v. DeMello, #95-12513, 44 F. Supp. 2d 386 (D. Mass. 1999), holding that supervisory liability for prison employees' failure to prevent an assault on one inmate by another can only be based on "deliberate indifference" to a substantial risk of harm that the supervisor knew of or should have known of. Mere negligence by a supervisor in failure to prevent such an attack is not enough for federal civil rights liability.

* Estate of Davis v. Delo, #96-1896, 115 F.3d 1388 (8th Cir. 1997), in which an inmate assaulted by an officer while four other officers held him was awarded $10,000 in compensatory damages and $10,000 in punitive damages. The court found that the other officers' failure to intervene violated clearly established law, and that the prison superintendent was liable based on his knowledge of the assaulting officer's violent propensities and prior failure to order investigations.

Resources

The following are a few useful resources on the use of force by correctional personnel. It should be utilized together with the similar list of resources in the first article in this series. Further listings will appear in subsequent articles in this series.

- Use of Force in a Jail Setting. Course Number 3504. Texas Commission on Law Enforcement Officer Standards and Education.
- Unit 20. Legal Aspects of Use of Force. Basic County Corrections Course. Texas Commission on Law Enforcement Officer Standards and Education.
- Policy Directive. Firearms. State of Montana Department of Corrections. (1998).
- State of Arkansas Board of Corrections Administrative Regulations. Use of Force. (1996).
- Policy. Use of Force. Pennsylvania Department of Corrections. (2001).
- Idaho Department of Corrections. Directive on Use Of and Training In Firearms (2002).

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