



ISSN 1935-0007

Cite as: 2013 (1) AELE Mo. L. J. 101
Civil Liability Law Section – January 2013

Code of Silence Litigation: Officer Use of Force

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❖ Introduction

In November, 2012, a federal jury in Chicago returned a [verdict](#) in favor of a plaintiff and against the city on a claim that the city had a persistent widespread custom or practice of protecting officers from citizen complaints. The suit had been brought by a female bartender who had been assaulted by an off-duty officer.

A persistent widespread custom or practice had been alleged to constitute a de facto policy of concealing or suppressing investigations into police officer misconduct, along with a “code of silence” within the police department. The jury also found that the officer conspired with others under color of law in violation of the plaintiff’s First Amendment rights to free speech. It awarded \$850,000 in damages. *Obrycka v. City of Chicago*, #07 C 2372, U.S. Dist. Court (N.D. Ill.).

This article examines the way in which the plaintiff established her claim and convinced the court and jury of its merits. It also highlights the role of expert witness testimony, and attempts to place the case in the context of the overall problem that occurs when officers observe a code of silence about misconduct by fellow officers.

The article concludes with some brief recommendations, and a listing of relevant resources and references.

❖ **Obrycka v Chicago – Facts**

The plaintiff was working a nightshift at a neighborhood bar in Chicago on February 19, 2007. An off-duty Chicago police officer was a patron that evening. At one point, he went behind the bar without permission, after which the bartender asked him to leave the bar area. As the evening wore on, he became more physically and verbally abusive, according to the plaintiff. Finally, at about 9:30 p.m., a physical altercation occurred between him and the female bartender, after he went behind the bar a second time. The plaintiff said that he told her “nobody tells me what to do,” and started punching and kicking her. Prior to that, he had supposedly repeatedly yelled “Chicago Police Department” while flexing his biceps.

He left, and the bartender called 911. Two officers arrived to investigate the incident, and she told them that the man who beat her was a Chicago police officer and that the entire incident was captured by the bar’s video cameras.

The officers’ final police report on the incident did not mention that the perpetrator was an officer or that there was a video of what had occurred. They later told an internal departmental investigation that they had not been told that the man accused of beating the bartender was an officer,

A friend of the officer later came to see the beaten bartender to tell her that the officer would pay her medical bills and for her time off if she would forego filing a lawsuit or registering a complaint. She declined what the city subsequently admitted amounted to an attempted bribe.

The day bartender, who was a friend of the officer, reported that he had told her that she had to “get” the surveillance tape, or there would be problems for the bar and its employees. The beaten bartender stopped working at the business because she did not feel safe based on threats by the officer.

Ultimately, after the video was viewed by authorities, and the bartender released it to the media, the officer was charged with felony aggravated battery. He was found guilty and sentenced to two years of probation.

❖ **Obrycka v Chicago – Litigation**

The beaten bartender subsequently filed a [federal civil rights lawsuit](#). *Obrycka v. City of Chicago*, #07 C 2372, U.S. Dist. Court (N.D. Ill.). The case did not merely focus on the beating itself, although that was certainly part of the claim. The plaintiff also emphasized a pattern of neglect by the department in investigating and responding to this and similar incidents

The complaint noted that some of the information that the bartender reported to the investigating officers was not contained in the final police report, including that the perpetrator was a Chicago police officer and that the incident was taped by the bar's video cameras. In a subsequent court decision, the trial judge found that there was evidence that the defendant officer tried to intimidate and threaten the victim from disclosing the videotape of the incident because he knew, that without the tape, there would be no case against him. [*Obrycka v. City of Chicago*](#), #07 C 2372, 2012 U.S. Dist. Lexis 22818 (N.D. Ill.).

In her lawsuit against the officer and the City of Chicago, she alleged that a “code of silence” exists within the Chicago Police Department whereby officers conceal each other's misconduct in contravention of their sworn duties. She claimed that the de facto policy and the code of silence are evidenced and caused by the Chicago Police Department's failure to

- (1) sufficiently investigate allegations of police misconduct;
- (2) accept citizen complaints against police officers;
- (3) promptly interview suspected officers or take witness statements and preserve evidence;
- (4) properly and sufficiently discipline officers; and
- (5) maintain accurate and complete records of complaints and investigations of misconduct.

She also claimed that the Chicago Police Department sometimes fabricates exculpatory evidence or destroys evidence when investigating citizen complaints against its police officers. The de facto policy and the code of silence, she said, encourages Chicago police officers to engage in misconduct with impunity and without the fear of official consequences, and in this case was a “moving force” behind the off-duty officer's conduct in beating her in the bar, and believing that he could do so with impunity and take action after the fact to cover it up and escape the consequences.

The City argued that the plaintiff could not fulfill the **causation requirement**, namely, that the City's de facto policy – with the attendant code of silence – was the “moving force” behind her constitutional injury.

However, the court concluded that a reasonable jury could find, based on the defendants' conduct, that he was acting with impunity and in a manner in which he thought he was impervious to the consequences of his misconduct. In addition, after he attacked the

plaintiff, the defendant and his partner made numerous telephone calls to other Chicago police officers. A reasonable jury could infer that he and his partner made these telephone calls to trigger the code of silence, namely, to initiate a cover-up of his misconduct.

The City further argued that a plaintiff must show that the municipal action was taken with deliberate indifference as to the known or obvious consequences based on the Supreme Court's decision in [*Board of County Commissioners of Bryan County, Oklahoma v. Brown*](#), #95-1100, 520 U.S. 397 (1997). In that case, the Court found that a municipality could not be held vicariously liable unless the plaintiff could identify a municipal policy or custom that caused their injuries, and that, through deliberate conduct, the municipality was the "moving force" behind the injury.

The court noted that the claim for municipal liability in *Bryan County* was based on a facially lawful policy, namely, a sheriff's lawful hiring decision. In the immediate case, however, the plaintiff did not attack a facially lawful policy or municipal action. Instead, she alleged that there is an unlawful, de facto policy of impeding and interfering with police misconduct investigations and that this policy, along with the code of silence, directly caused her constitutional injury.

The plaintiff presented evidence of a widespread policy and code of silence that allowed for police misconduct and brutality without the fear of repercussions, thus affording "brutality the cloak of law." The court concluded, rejecting the city's motion for summary judgment, that, viewing the evidence and all reasonable inferences in the plaintiff's favor, "she has raised a genuine issue of material fact as to the culpability requirement, namely, the city's de facto policy and the code of silence 'shock the conscience' because the alleged policies allow for police brutality and misconduct unjustifiable by any governmental interest."

❖ Expert Witness Role

To prove her case concerning the code of silence, the plaintiff produced [Lou Reiter](#), an expert on police practices. Reiter, a retired LAPD deputy chief, found that the Chicago Police Department had an organizational environment where a code of silence and deficient administrative investigations and disciplinary procedures were present allowing police officers to engage in misconduct with little fear of sanctions. He wrote in his [report](#):

"The failure of the Chicago Police Department to acknowledge its potential and take affirmative steps to eliminate or minimize the influence of the Code of Silence, in my opinion, is a conscious choice various Chicago Police managers and executive officers have taken and, in my opinion, represents a position of deliberate indifference by the Chicago Police Department to this disruptive issue

within the agency. Any reasonable officer in the Chicago Police Department would be aware of the systemic deficiencies in the administrative investigative process and the discipline deliberative system coupled with the entrenched affect (sic) of the Code of Silence. Those officers who engage in misconduct and violate citizens' Constitutional rights would do so with the perception that their misconduct would go undiscovered or investigated in such a deficient manner or subjected to prolonged delay in adjudication that they would not be held accountable or sanctioned."

In further support of her code of silence theory, she presented the expert testimony of [Dr. Steven Whitman](#), a statistician. He found that the sustained rates for force-related complaints against Chicago police officers over the eight years prior to 2007 were statistically significantly lower than the national average sustained rates reported in the Bureau of Justice Statistics 2006 [Citizens Complaints About Police Use of Force Report](#) for the national average for all departments (8%) or the national average for larger departments like Chicago (6%).

Specifically, the average sustained rate within the Chicago Police Department was as low as 0.5% in 2004. Based on the facts in the immediate case and the expert reports and testimony, the jury found that the plaintiff had established her claim.

❖ **Code of Silence: A Persistent Issue**

Expert witness Lou Reiter's preliminary [report](#) in *Obrycka* stated that "The Code of Silence exists to varying degrees in all police agencies in the United States." And he noted that:

"The Code of Silence (Blue Veil or Blue Wall) is a reluctance for persons to come forward with negative information about another person. This concept exists to varying degrees within all walks of life and employee settings. It is more sinister in law enforcement for several reasons. Police officers have powers over citizens which no one else in America has - to restrict liberty and to use force against a member of the public. Police officers are most often the only witnesses to police abuse of citizens' rights. The paramilitary nature of most police agencies creates a closer relationship amongst police officers. Various forms of retaliation are frequent to police employees who break the Code of Silence."

❖ **Other Cases**

There have been a number of other cases addressing allegations of a "code of silence" among police officers or corrections officers, with varying results.

In [*Blair v. City of Pomona*](#), #98-55548, 223 F.3d 1074 (9th Cir. 2000), an officer asserted that he had faced retaliatory adverse employment consequences and threats for reporting misconduct by fellow officers which included not only leaving early and drinking on duty but actual crimes including stealing money, throwing a couch upon a suspect while executing a search warrant, and, taking heroin from one suspect and planting it on another. The appeals court held that the plaintiff presented evidence sufficient to create issues of fact regarding whether defendant had a custom or policy of deliberate indifference to plaintiff's right to inform his supervisors of misconduct.

Plaintiffs in [*Brandon v. Allen*](#), #C-78-2076, 516 F. Supp. 1355 (W.D. Tenn. 1981) argued that they were attacked by an off-duty officer without provocation, but also that the officer's violent propensities were well known, and that he should have been dismissed. The Director of the department could face liability because of his failure to take proper action to become informed of the officer's dangerous propensities, in part because his procedures were highly conducive to "covering up" officer misconduct. The case was the subject of further proceedings in [*Brandon v. Holt*](#), #83-1622, 469 U.S. 464 (1985), rejecting a claim of qualified immunity for the director and allowing the addition of the city as a party.

Subsequently, in [*Brandon v. Allen*](#), #78-2076, 645 F. Supp. 1261 (W.D. Tenn. 1986), the plaintiffs were awarded a total of \$51,310.75 in compensatory damages and \$50,000 in punitive damages, as well as attorney's fees of \$116,278.75 and costs of \$5,876.23.

In [*McGregory v. City of Jackson, Mississippi*](#), #08-60944, 2009 U.S. App. Lexis 13873 (Unpub. 5th Cir.), an arrestee's claim that a city was liable for false arrest and excessive use of force was rejected by a federal appeals court. The plaintiff's main argument, the court noted, was that he faced excessive force from an officer who allegedly kicked him in the ribs and then handcuffed him. Further, he argued that such force was the result of a police department custom that amounted to ignoring excessive force complaints, as well as a "code of silence" among officers, and a failure to investigate excessive force incidents. There was, however, no identification of a policymaker prior to his argument on appeal, and no evidence that the then identified policymaker, the city council members, were aware of the alleged facts in the case or of the purported code of silence.

In [*Fairley v. Andrews*](#), #07-3343, 578 F.3d 518 (7th Cir. 2009), rehearing, denied by *Fairley v. Andrews*, 2009 U.S. App. Lexis 21263 (7th Cir. 2009), cert. denied by *Andrews v. Fairley*, #09-745, 130 S. Ct. 3320 (2010), the appeals court rejected a First Amendment claim brought by two jail guards who quit after coworkers threatened to kill them for reporting excessive force on inmates. "The purported code of silence is a ban on filing

complaints about guard-on-inmate violence. Such a policy might be foolish; it might expose the County to other lawsuits; but it does not offend the first amendment, because what one guard says about another through the grievance system is part of the job, and the employer can discipline a guard for poor performance of work related tasks.”

A female police officer in [*Simon v. Naperville*](#), #98C-5263, 88 F. Supp. 2d 872 (N.D. Ill. 2000), complained that she was threatened with retaliation for reporting sexual harassment by a training supervisor. The court was unable to find that the city exercised reasonable care to promptly correct such harassment. The plaintiff may not have unreasonably failed to take advantage of any preventative or corrective opportunities, where she had legitimate concerns about harassment.

See also, [*Katt v. New York*](#), #95 Civ. 8283 151 F. Supp. 2d 313 (S.D.N.Y. 2001), in which a former civilian employee of a police department was awarded \$400,000 in compensatory damages for a sexually hostile work environment. The plaintiff said that her failure to initially complain about sexual harassment was based on tacit and explicit cues from others never to report or complain about the official misconduct of police officers.

The end result of a widespread custom of observing a “code of silence,” when it exists in a police department, has a myriad of negative and corrosive impacts. It prevents police management from being able, even when it wants to, to ferret out corrupt and misbehaving officers who routinely break departmental rules or engage in criminal conduct and discipline or remove them. It undermines the credibility of police officers as witnesses in criminal proceedings, where their testimony is a vital component of bringing criminals to justice. And it can often subject the very finest officers, those who are scrupulously honest and wish to unreservedly serve the public and the law, to harsh retaliation for simply doing what they are supposed to do—report misconduct.

It also stands as a significant barrier to good relations between the police department and the members of the community, who may come to believe that police officers consider themselves above the law or are not to be trusted. This can significantly interfere with the willingness of members of the public to cooperate with police investigations, to report criminal conduct, and to serve as witnesses in criminal proceedings. Finally, of course, as this case illustrates, it can lead to significant civil liability. The damages awarded will also undoubtedly be increased by an award of attorneys’ fees and costs under [42 U.S.C. Sec. 1988](#).

The court in *Obrycka* subsequently denied a motion to vacate the judgment concerning the “code of silence.” The court found that the “judgment’s precedential value weighs against

granting the parties' motion to vacate the judgment." [*Obrycka v. City of Chicago*](#), #07 C 2372, 2012 U.S. Dist. Lexis 179990 (N.D. Ill.).

The city stated that would pay the plaintiff compensatory damages in the amount of \$850,000, plus costs and reasonable attorney's fees in an amount yet to be determined. The city also stated that it will forego its right to appeal pursuant to the parties' post-judgment settlement.

❖ Recommendations to Consider

Here are some recommendations to consider:

1. Management should explicitly adopt a policy of "zero tolerance" for any "code of silence" conduct regarding the failure of any agency personnel, sworn or civilian, to report criminal conduct, infractions of agency rules, regulations, procedures, policies or protocols by fellow agency personnel. The penalties for having such knowledge and failing to report an attendant incident should be regarded as a serious disciplinary offense. All agency personnel must be informed that the occurrence of "code of silence" conduct could subject the involved personnel to serious disciplinary consequences up to and including termination. [Note: In *Obrycka*, the assigned officers received a 30-day suspension for not notifying their supervisor of the possible involvement of an off-duty officer, but **no discipline** for their false report and false statements to investigators.]
2. Any such policy should also recognize the value of [*esprit de corps*](#) and good morale in the agency. The goal of such policy is to inform agency personnel of the serious nature and resultant consequences of engaging in "code of silence" conduct. Further, the policy should instill in all personnel an individual and agency pride and not seek to needlessly turn officers against each other, in a quest to ferret out minor failings and petty shortcomings.
3. State and local academy curricula and agency in-service training programs should explicitly address "code of silence" conduct and include discussion of the detrimental effect that any such "code of silence" can have with respect to police-community relations, the credibility of officers as witnesses in criminal proceedings, and the possible violation of the right of good officers not to have to contend with unlawful retaliation and discrimination.
4. Agency personnel coming forward with allegations of or questioning whether "code of silence" conduct has occurred must be protected against retaliation and threats.

Mechanisms must exist to report misconduct outside the chain of command to address instances where immediate supervisors and/or superiors are involved in alleged misconduct or a cover-up.

5. Any allegations of the existence of a “code of silence” in the agency or attempts to cover up misconduct should be quickly and thoroughly investigated.

❖ **Resources**

The following are some useful resources related to the subject of this article.

- [Blue Code of Silence](#). Wikipedia article.
- [Knapp Commission](#). Wikipedia article.
- [Mollen Commission](#). Wikipedia article.
- [Whistleblower Requirements and Protection](#). AELE Case Summaries.

❖ **Prior Relevant Monthly Law Journal Articles**

- [Disciplinary Consequences of Peace Officer Untruthfulness Part II - Employee Dishonesty](#), 2008 (10) AELE Mo. L. J. 201.

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AELE Monthly Law Journal

Bernard J. Farber
Civil Liability Law Editor
P.O. Box 75401
Chicago, IL 60675-5401 USA
E-mail: bernfarber@aele.org
Tel. 1-800-763-2802

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