

LAW ENFORCEMENT LIABILITY
ATTORNEY MICHELE FORD
Crivello & Carlson, S.C.
710 North Plankinton Avenue
Milwaukee, Wisconsin 53203
414.271.7722
mford@crivellocarlson.com

I. LIABILITY UNDER 42 U.S.C. SEC. 1983

42 U.S.C. Sec. 1983. - Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof 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, suit in equity, or other proper proceeding for redress...

A. Constitutional Provisions

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The First Amendment restricts its protection to freedom of speech, assembly and religion. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S. Ct. 1407 (1978).

Examples of law enforcement activities implicating the First Amendment:

Prohibiting protected speech in public places – i.e., political rallies, protests, etc. *Madsen v. Women's Health Center*, 129 L.Ed.2d 593, 607 (1994).

Enforcement of disorderly conduct statute against protester for purposes of suppressing speech, rather than for purposes of enforcing legitimate time, place and manner restrictions, may be unconstitutional. *Ovadal v. City of Madison, Wisconsin*, 416 F.3d 531 (7th Cir. 2005).

“Listeners' reaction to speech is not a content-neutral basis for regulation.” *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992). “Speech cannot ... be punished or banned, simply because it might offend” those who hear it. *Id.* at 134-35, 112 S.Ct. 2395. The police must preserve order when unpopular speech disrupts it; “[d]oes it follow that the police may silence the rabble-rousing speaker? Not at all. The police must permit the speech and control the crowd; there is no heckler's veto.” *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299 (7th Cir.1993).

Enforcement of ordinances amounting to harassment impacting free speech rights where officers engaged in affirmative and egregious misconduct, i.e., threatened patrons verbally or physically. See *Collins v. County of Kendall*, 807 F.2d 95 (7th

Cir. 1986); *Andree v. Ashland*, 818 F.2d 1306, 1316 (7th Cir. 1987); *P.A.B. v. Stack*, 440 F.Supp. 937 (S.D. Fla. 1977)(open police surveillance of adult business patrons and suggestions that they do not frequent the adult bookstore); *Maguin v. Millwer*, 433 F.Supp. 223 (D. Kan. 1977)(detention of patrons of adult theater by uniformed officers until they divulged their names and other personal information).

Examples of Employment Actions Implicating the First Amendment:

Public employees do not surrender all their First Amendment rights by reason of their employment; rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern. *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951 (2006).

Two inquiries guide interpretation of the constitutional protections accorded public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811. If the answer is no, the employee has no First Amendment cause of action based on the employer's reaction to the speech. If the answer is yes, the possibility of a First Amendment claim arises. The question becomes whether the government employer had an adequate justification for treating the employee differently from any other member of the general public.

This consideration reflects the importance of the relationship between the speaker's expressions and employment. Without a significant degree of control over its employees' words and actions, a government employer would have little chance to provide public services efficiently. Thus, a government entity has broader discretion to restrict speech when it acts in its employer role, but the restrictions it imposes must be directed at speech that has some potential to affect its operations. On the other hand, a citizen who works for the government is nonetheless still a citizen. The First Amendment limits a public employer's ability to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens. See *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570. So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.

Public officials do not violate the First Amendment when they deny for political reasons appointments or promotions to jobs that involve the making of policy or the giving of confidential policy-related advice to a policymaker. For in a democratic society the formulation of policy by government agencies is an inescapably political activity. *Sigsworth v. City of Aurora, Ill.*, 487 F.3d 506 (7th Cir. 2007)(Police detective's report to his supervisors, that he believed that members of his drug investigation task force broke the law by tipping off suspects regarding arrest warrants, and, according to him, jeopardized the success of the operation and the safety of those involved in it, was speech made pursuant to his official duties as a detective, rather than speech as a citizen; thus, detective's report did not qualify as "protected speech," for purpose of First Amendment retaliation claim,

arising from his removal from the task force and his failure to receive promotions): *Fuerst v. Clarke*, 454 F.3d 770 (7th Cir. 2006) (A deputy sheriff's statements made in his capacity as a union representative, rather than in the course of his employment as a deputy sheriff are protected and may not form the basis for discipline).

"A public official cannot be fired on the basis of his political affiliation unless the nature of his job makes political loyalty a valid qualification; this could be either because the job involves the making of policy and thus the exercise of political judgment or the provision of political advice to the elected superior, or because it is a job (such as speechwriting) that gives the holder access to his political superiors' confidential, politically sensitive thoughts. *Riley v. Blagojevich*, 425 F.3d 357, 359 (7th Cir.2005); *Elrod v. Burns*, 427 U.S. 347, 367-68, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); *Branti v. Finkel*, 445 U.S. 507, 518, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980).

Wis. Stat. § 164.015 provides that "no law enforcement officer may be prohibited from engaging in political activity when not on duty or not otherwise acting in an official capacity, or be denied the right to refrain from engaging in political activity." The last clause, read in light of section 164.03, which forbids any "discriminat[ion] ... by reason of the exercise of the rights under this chapter," including the right of political inactivity conferred by section 164.015, makes clear that sergeants are not expected to be political loyalists of the sheriff.

Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created. *Garcetti*, 547 U.S. 410, 126 S.Ct. 1951 (2006).

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Examples of law enforcement activities implicating the Fourth Amendment:

Actions of government agents amounting to unreasonable searches and seizures. *Schaefer v. Goch*, 153 F.3d 793, 795 (7th Cir. 1998).

False arrest:

If the officer had probable cause to believe that the person he arrested was involved in criminal activity, then a Fourth Amendment claim for false arrest is foreclosed. *Holmes v. Village of Hoffman Estate*, 511 F.3d 673 (7th Cir. 2007).

In making a decision to arrest someone for criminal conduct that he did not witness, a police officer may rely on information provided to him by the victim or by an eyewitness to the crime that the officer reasonably believes is telling the truth. *Pasiewicz v. Lake County Forest Preserve Dist.*, 270 F.3d 520, 524 (7th Cir.2001); *Gramenos v. Jewel Cos.*, 797 F.2d 432, 439 (7th Cir.1986).

"So long as a reasonably credible witness or victim informs the police that someone has committed, or is committing, a crime, the officers have probable cause to place the alleged culprit under arrest...." *Jenkins v. Keating*, 147 F.3d 577, 585 (7th Cir.1998).

Fellow law enforcement personnel are among the witnesses whose accounts the arresting officer may rely upon. *See Spiegel v. Cortese*, 196 F.3d 717, 726 (7th Cir.1999); *see also United States v. Ellis*, 499 F.3d 686, 690 (7th Cir.2007); *Panetta v. Crowley*, 460 F.3d 388, 395 (2d Cir.2006).

Malicious prosecution:

Because there is no constitutional right not to be prosecuted without probable cause, a plaintiff could not state a section 1983 claim simply by showing that he was wrongly prosecuted but rather must establish that he was deprived of a specific constitutional right, such as the right to a fair trial. *Holmes, supra*.

A malicious prosecution claim is treated differently from one for false arrest: whereas probable cause to believe that a person has committed *any* crime will preclude a false arrest claim, even if the person was arrested on additional or different charges for which there was no probable cause, *see Devenpeck v. Alford, supra*, 543 U.S. at 153, 125 S.Ct. at 593-94; *Pourghoraishi v. Flying J, Inc.*, 449 F.3d 751, 762 (7th Cir.2006), probable cause as to one charge will not bar a malicious prosecution claim based on a second, distinct charge as to which probable cause was lacking. *Johnson v. Knorr*, 477 F.3d 75, 83-85 (3d

Cir.2007).

Excessive use of force:

The force employed by a police officer is deemed excessive if, in light of the totality of the circumstances, it was greater than was reasonably necessary to effectuate the seizure. *Payne v. Pauley*, 337 F.3d 767, 773 (7th Cir.2003).

To assess the degree of force that was justified, a court considers the severity of the crime for which the plaintiff was being detained or arrested, whether he posed a threat to the safety of the officers or to other persons, and whether the plaintiff was resisting the officers and/or attempting to flee. *Graham*, 490 U.S. at 396, 109 S.Ct. at 1872. We examine the facts as they would have appeared to a reasonable officer on the scene, *ibid.*, keeping in mind that an officer often must make a split-second judgment based on rapidly evolving circumstances, *id.* at 396-97, 109 S.Ct. at 1872; *Abdullahi v. City of Madison*, 423 F.3d 763, 768 (7th Cir.2005); *Lawrence v. Kenosha County*, 391 F.3d 837, 843 (7th Cir.2004).

The type and severity of injuries a plaintiff describes would be relevant to a determination of the degree of force employed and whether that force was reasonable. *Meyer v. Robinson*, 992 F.2d 734, 739 (7th Cir.1993). But the lack of injury is not determinative. *Bastien v. Goddard*, 279 F.3d 10, 14-15 (1st Cir.2002)

Examples of employment actions implicating the Fourth Amendment:

A warrant or probable cause standard does not apply when a government employer conducts a search of its employees' offices, desks or files for purposes other than to investigate criminal activity. *Shields v. Burge*, 874 F.2d 1201, 1203 (7th Cir.1989).

To "ensure the efficient and proper operation of an agency ..., public employers must be given wide latitude to enter employee offices for work related, non-investigatory reasons." *New Jersey v. T.L.O.*, 469 U.S. 325, 351, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985).

A workplace search is reasonable if it is "justified at its inception" and if it is "reasonably related in scope to the circumstances" that prompted the search. If there are reasonable grounds to believe that the search will uncover evidence of the employee's misconduct, the search is "justified at its inception." The search is reasonable in scope if the measures taken by the employer are reasonably related to the search's objective and they are not overly intrusive in light of the nature of the alleged misconduct. *O'Connor v. Ortega*, 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714

Psychological test that employee of Indiana Department of Corrections was required to undergo in order to keep her job as a research analyst was not a search for Fourth Amendment purposes. *Greenawalt v. Indiana Dept. of Corrections*, 397 F.3d 587 (7th Cir. 2005).

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public

trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Examples of law enforcement activities implicating the Sixth Amendment:

Deprivation of right to counsel. *Kirby v. Illinois*, 406 U.S. 682 (1972); *Kaminski v. City of Whitewater, Wisconsin*, 877 F. Supp. 1289, 1295 (E.D. Wis. 1995).

Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Examples of law enforcement activities implicating the Fourteenth Amendment:

Unintended terminations of freedom of movement such as the unintentional shooting of a hostage are not "seizures" subjecting officers to liability under the Fourth Amendment, do so the Fourteenth Amendment may apply. *Schaefer, infra*.

Unintended terminations of freedom of movement brought about through unintended means such as police pursuits of suspects that end with the intervention of an unexpected and unintended factor do not qualify as seizures under the Fourth Amendment, so the Fourteenth Amendment may apply. *County of Sacramento v. Lewis*, 118 S. Ct. 1708 (1998).

Claims alleging violation of the right to bodily integrity. *Jones v. Wellham*, 104 F.3d 620, 628 (4th Cir. 1997).

B. State of Mind Requirements

Fourteenth Amendment: "Deliberate indifference" is the "functional equivalent of intentional and reckless conduct in the criminal sense - conduct that reflects complete indifference to risk. Negligence or even gross negligence is not enough. *Schaefer, infra*.

C. Municipal Liability.

Recovery under Sec. 1983 from a municipality is "limited to acts that are, properly speaking, acts 'of the municipality' - that is acts which the municipality has officially sanctioned or ordered." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986); *Bryan County Commissioners v. Brown*, 137 L.Ed.2d 626, 639 (1997).

Civil rights liability cannot be based on a *respondeat superior* theory. *Bryan County, infra*.

The Supreme Court recognizes two types of municipal claims: those alleging direct injury by intentional acts of legislative bodies or authorized decisionmakers, and those alleging indirect injury, i.e., where a municipality

allows an employee to engage in unconstitutional conduct. *Bryan County, infra*.

In "direct injury" cases, the "rigorous scrutiny" standard is held to be unnecessary, because "resolving . . . issues of fault and causation is straightforward". *Bryan County*, 137 L.Ed.2d at 639.

In "indirect injury" cases, however, the employee's conduct is the focus, and the danger of imposition of *respondeat superior* liability increases. *Bryan County*, 137 L.E.2d at 639-40. The "rigorous scrutiny" standard was adopted to prevent this, as the *Bryan* court expressly observed. *Bryan County*, 137 L.Ed.2d at 640-41.

Deprivation must be:

- (1) the result of an express policy, statement, ordinance, or regulation that, when enforced, causes a constitutional deprivation;
- (2) one of a series of incidents involving others amounting to an unconstitutional practice so permanent, well-settled, and known as to constitute a "custom or usage" with force of law;
- (3) caused by a decision of a municipal policymaker with final policymaking authority in the area in question, and the decision is intended to govern future cases with the force of law; or
- (4) caused by the absence of policy where the need for policy is apparent.

McCormick v. City of Chicago, 230 F.3d 319 (7th Cir. 2000); *Baskin v. City of Des Plaines*, 138 F.3d 701, 704-05 (7th Cir. 1998) (recognizing that a municipality can be said to have violated an individual's constitutional rights by its "express policy that, when enforced, causes a constitutional deprivation," or by its "widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law.").

C. Failure To Train Claims

- (1) the alleged failure to train reflects the entities' "deliberate" or "conscious" choice not to train governmental officials in a particular area;
- (2) the alleged deficiency in training amounts to deliberate indifference to the constitutional rights of persons involved in that area;
- (3) the choice not to train actually caused the alleged constitutional deprivation; and
- (4) the deprivation would have been avoided had the official been trained under a program that was not deficient with regard to the particular deprivation alleged.

Canton v. Harris, 489 U.S. 378 (1989); *Cornfield v. Cons. High Sch. Dist.*, 991 F.2d 1316, 1327 (7th Cir. 1993).

Liability for alleged failure to train must be based on a finding that municipal policymakers themselves have notice that a particular omission in training is likely to result in constitutional violations. *Bryan County*, 137 L.Ed.2d at 641-642 (1997); *Cornfield*, 991 F.2d at 1327.

D. Supervisory Liability

Section 1983 creates a cause of action based upon personal liability and predicated upon fault. *Bublitz v. Cottey*, 2002 WL 31242499 (S.D.Ind. 8/8/02); quoting *Rascon v. Hardiman*, 803 F.2d 269, 273 (7th Cir.1986).

An individual cannot be held liable in a § 1983 action unless he caused or participated in an alleged constitutional deprivation. *Bublitz, infra*.

Without a showing of direct responsibility for the improper action, liability will not lie against a supervisory official. *Bublitz, infra*

A causal connection, or an affirmative link, between the misconduct complained of and the official sued is necessary. In short, [i]ndividual liability for damages under section 1983 is predicated upon personal responsibility. *Bublitz, infra*

However, "[t]o recover for damages under 42 U.S.C. § 1983, a plaintiff must establish defendant's personal responsibility for the claimed deprivation of a constitutional right," not a defendant's direct participation in the deprivation. *Bublitz, infra*

"An official satisfies the personal responsibility requirement of section 1983 if she acts or fails to act with a deliberate or reckless disregard of plaintiff's constitutional rights, or if the conduct causing the constitutional deprivation occurs at her direction or with her knowledge and consent." *Ramsey v. Mellinger*, 182 F.3d 922 (7th Cir. 1999); *Rascon, infra*.

E. Individual Liability and Qualified Immunity

1. Personal Participation

Personal participation in the constitutional deprivation is required. *Fries v. Helsper*, 146 F.3d 452, 457 (7th Cir. 1998).

Arresting officer did not have supervisory liability for any constitutional violation occurring when arrestee was allegedly strip searched by female officer during intake in absence of any evidence that arresting officer either directed or ratified search; officer was not present when arrestee was searched, and regulation directing that arrestees be thoroughly searched by arresting officers, coupled with alleged conversation between arresting officer and intake officer were insufficient to raise inference. *Robinson v. Garritson*, 210 F.Supp.2d 1004 (N.D. Ill. 2002).

2. Actions Under Color of State Law Required

Section 1983 is limited to claims for damages to vindicate violations of federal law committed "under color of state law." 42 U.S.C. Sec. 1983.

The "under color of state law" requirement is a "jurisdictional prerequisite for a Sec. 1983 action." *Polk County v. Dodson*, 454 U.S. 312, 315 (1981).

Similarly, the Fourteenth Amendment requires proof of "state action", which is interpreted as identical to the "color of state law" requirement. *Hafer*, 502 U.S. at 28 ("[I]n Sec. 1983 actions the statutory requirement of action 'under color of' state law is just as broad as the Fourteenth Amendment's 'state action' requirement").

The "color of law" and "state law" requirements further the fundamental goal of "avoid[ing] imposing on the state, its agencies or officials responsibility for conduct for which they cannot fairly be blamed." *Gallagher v. "Neal Young Freedom Concert"*, 49 F.3d 1442, 1447 (10th Cir. 1995)(citations omitted).

Acts of a state or local employee in his official capacity occur under color of law regardless of whether his conduct was in furtherance of the state's goals or whether the actions constitute an abuse of power.

West v. Atkins, 487 U.S. 42, 49-50, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988).

Private conduct that is not "fairly attributable" to the state, "however discriminatory or wrongful", is not actionable under Sec. 1983. *D.T. ex. rel. M.T. v. Ind. Sch. Dist.*, 894 F.2d 1176, 1186 (10th Cir. 1990).

Whether a police officer acts under color of state law "turns on the nature and circumstances of the officer's conduct and the relationship of that conduct to the performance of his official duties." *Martinez v. Colon*, 54 F.3d 980, 986 (1st Cir. 1995).

"The important consideration ... in determining whether an officer is acting under color of state law is the nature of the specific acts performed." *Latuszkin v. City of Chicago*, 250 F.3d 502, 505-06 (7th Cir. 2001). In other words, "[d]eciding whether a police officer acted under color of state law should turn largely on the nature of the specific acts the police officer performed, rather than on merely whether he was actively assigned at the moment to the performance of police duties." *Pickrel v. City of Springfield, Illinois*, 45 F.3d 1115, 1118 (7th Cir. 1995).

Acts by an officer are not under color of law unless they are "related to the performance of the police officer's duties." *Briscoe v. LaHue*, 663 F.2d 713, 721 (7th Cir. 1981).

Courts have adopted a totality of the circumstances approach, in which the court considers the police officer's duty status, the officer's garb, the location of the incident, the nature and circumstances of the officer's conduct, and the relationship of that conduct to the performance of the officer's official duties. *Pitchell v. Callan*, 13 F.3d 545, 548 (2nd Cir. 1994).

Above all, there must be an actual or purported relationship between the officer's behavior and his duties as a police officer. *Banisared v. Clisham*, 992 F.Supp. 128, 130 (D. Conn. 1998).

Sexual assaults by police officers are not "under color of law" unless police authority is expressly used to coerce compliance. *Almand v. DeKalb County*, 103 F.3d 1510, 1512-14 (11th Cir. 1997); *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 838 (9th Cir. 1996); *Roe v. Humpke*, 128 F.3d 1213, 1215-1217 (8th Cir. 1997).

Courts distinguish cases where officers commit sexual assaults in the context of exercising or pretending to exercise law enforcement authority from cases where individuals who happen to be officers engage in sexual assault in the context of their private lives, for private purposes, under circumstances unrelated to law enforcement activities, and hold that the latter circumstances preclude the finding of "color of law." Compare *Roe* and *Almand*, *infra* with *Rogers infra* (rape occurring following officer's traffic stop of victim).

A municipal police officer may, in an appropriate circumstance, be said to have acted under color of state law even while working off duty as a private security officer. *Robles v. City of Fort Wayne*, 113 F.3d 732 (7th Cir. 1997); *Pickrel v. City of Springfield, Illinois*, 45 F.3d 1115, 1118 (7th Cir. 1995); *Greco v. Guss*, 775 F.2d 161, 168 (7th Cir. 1985).

3. Qualified Immunity

Qualified immunity applies unless the alleged violation was clearly established "before the defendant acted or failed to act." [*Rice v. Burks*, 999 F.2d 1172, 1174 (7th Cir. 1993)], requiring a plaintiff to offer a closely analogous case identifying the conduct in question as unconstitutional. *Wilke v. Scherer*, 468 U.S. 183, 195 (1984).

Government officials performing discretionary functions are shielded from liability in their individual capacity insofar as their conduct does not violate clearly established constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1992); *Hinnen v. Kelly*, 992 F.2d 140, 142 (7th Cir. 1993).

Qualified immunity is a "powerful shield that insulates [government] officials from suit." *Gregesich v. Lund*, 54 F.3d 410, 413 (7th Cir. 1995).

The purpose of qualified immunity is to allow officials to do their public business without the burden and distraction of possible lawsuits and to allow officials to reasonably anticipate when their conduct could give rise to civil liability. *Hinnen*, 992 F.2d at 143, quoting *Anderson v. Creighton*, 483 U.S. 635, 646 (1987) and *Harlow*, 457 U.S. at 814.

Qualified immunity is available to protect "all but the plainly incompetent or those who knowingly violate the law." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991).

Where immunity is raised at the summary judgment stage, the district court must conduct the following two-part analysis: (1) does the substantiated conduct set out a constitutional violation; and (2) were the constitutional standards clearly established at the time in question. *Rakovich*, 850 F.2d at 1209.

F. Indemnification

Municipal entities are obligated to indemnify their employees where the requirements of Sec. 895.46, Stats., are met.

Section 895.46(1)(a), Stats., provides in relevant part:

"895.46 State and political subdivisions thereof to pay judgments taken against officers.

(1)(a) If the defendant is in an action or special proceeding, is a public officer or employee and is proceeded against in an official capacity or is proceeded against as an individual because of acts committed while carrying out duties as an officer or employee and the jury or the court finds that the defendant was acting within the scope of employment, the judgment as to damages and costs entered against the officer or employee . . . shall be paid by the state or political subdivision of which the defendant is an officer or employee."

Acts are outside the "scope of employment", where those acts are "different in kind from that authorized . . . by the master" [*Scott v. Min-Aqua Bats*

Water Ski Club, 79 Wis. 2d 316, 321, 255 N.W.2d 536 (1977)], or are "too little actuated by a purpose to serve the master or . . . motivated entirely by the employee's own purposes." *Olsen v. Connelly*, 156 Wis. 2d 488, 499-500, 457 N.W.2d 479 (1990). It is only an employee steps aside from the employer's business to accomplish an independent purpose, or acts in a manner the employee knows is forbidden, that the employee acts outside the scope of employment. *Block v. Gomez*, 201 Wis. 2d 795, 793-94, 549 N.W.2d 783 (Ct. App. 1996).

The issue of scope of employment requires consideration of the employee's intent. *Olson*, 156 Wis. 2d at 497-498. Where the record permits no contrary inferences, the scope of employment issue is a question of law. *Graham v. Sauk Prairie*, 915 F.2d 1085, 1095-96 (7th Cir. 1990).

II. 42 U.S.C Sec. 1981

Discrimination based on employment. *Bisciglia v. Kenosha Unif. School Dist.*, 45

F.3d 223 (7th Cir. 1995)

III. 42 U.S.C Sec. 1988

Conspiracy to violate constitutional rights.

IV. STATE LAW CLAIMS

A. CLAIMS AGAINST MUNICIPALITIES

1. *Municipal Immunity For Intentional Torts*

Sec. 893.80(4), Stats. Claims against governmental bodies or officers, agents or employees; notice of injury; limitation of damages and suits.

* * *

(4) No suit may be brought against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or any agency thereof *for the intentional torts of its officers, officials, agents or employees...*

2. *Individual Immunity For Negligent Acts Involving The Exercise of Discretion*

Sec. 893.80(4), Stats. Claims against governmental bodies or officers, agents or employees; notice of injury; limitation of damages and suits.

* * *

(4) ...nor may any suit be brought against such Corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi- legislative, judicial or quasi-judicial functions.

Terms "quasi-judicial" and "quasi-legislative" acts involve "judgment and discretion". *Kierstyn v. Racine Unified School District*, 228 Wis. 2d 81, 88 596 N.W.2d 417 (1999).

Immunity applies regardless of whether a municipal official is negligent. *Estate of Cavanaugh v. Andrade*, 202 Wis. 2d 290, 216, 550 N.W.2d 103 (1996).

Statutory exceptions to immunity - 893.80 does not apply to actions commenced under s. 19.37, 19.97 or 281.99, Stats.

Immunity extends to claims for compensatory damages and for equitable relief. *Willow Creek, supra*.

The Supreme Court has held that a fairly broad range of acts and decisions by municipal employees, especially those involving law enforcement, are immune from suit. See Estate of Cavanaugh v. Andrade, 202 Wis.2d 290, 315, 550 N.W.2d 103

(1996) (a police officer's "decision to initiate or continue a high-speed chase"); *Barillari v. City of Milwaukee*, 194 Wis.2d 247, 260, 533 N.W.2d 759 (1995) ("how best to utilize law enforcement resources" and "to carry out [law enforcement] responsibilities"). *Hoskins v. Dodge County*, 2002 WI App 40, 251 Wis.2d 276, 642 N.W.2d 213 (Ct.App. 2002).

Examples:

Alleged promises or assumed duties. *Dixon v. WHO Insurance*, 2000 WI 95, 237 Wis. 2d 149, 612 N.W.2d 721 (2000); *Barillari v. Milwaukee*, 194 Wis. 2d 247, 257-258, 533 N.W.2d 247 (1995).

Decisions as to where to safely make traffic stops. *Parrett v. Sudeta*, unpublished decision (Ct. App. 8/01).

Measures taken to prevent prisoner escape. *Ottinger v. Pinel*, 215 Wis. 2d 265, 572 N.W.2d 519 (1997).

Training and supervision of police officers. *Sheridan v. City of Janesville*, 164 Wis. 2d 420, 474 N.W.2d 799 (Ct. App. 1991).

3. *Non-statutory Exceptions To Immunity:*

1. where the conduct amounts to the performance of a ministerial duty;
 2. where an existing "known present danger" makes the duty to remedy the danger "so clear and so absolute" that there is no room for discretion;
 3. where the conduct arose out of the performance of "professional" conduct;
or
4. where the conduct was "malicious, willful and intentional".

Lodl v. Progressive Northern Insurance Co., 2002 WI 71 (2002).

Ministerial Duty Exception

"Ministerial acts" are those that an officer must carry out without the exercise discretion, and are found only where conduct:

[is] absolute, certain, and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode, and occasion for its performance which such certainty that nothing remains for judgment or discretion.

Kimps, 200 Wis. 2d at 10-11.

Discretionary acts of government employees which require the application of statutes to facts or a subjective evaluation of the law are governmental acts to which immunity extends as a matter of law. *Sheridan v. City of Janesville*, 164 Wis. 2d 420, 474 N.W.2d 799 (Ct. App. 1991).

Known Present Danger Exception

Applies only to "extraordinary events" where "the nature of the danger is compelling and known to the public official and is of such force that the public officer has no discretion not to act." *Kierstyn*, 228 Wis. 2d at 96.

"Once a[n] . . . officer does take action within the scope of his official duties in response to a compelling and known danger, his decision about what action is appropriate under the circumstances is discretionary". *Kimps*, 200 Wis. 2d at 15-16. *Domino v. Walworth County*, 118 Wis. 2d 488, 347 N.W.2d 917 (Ct. App. 1984). In

Domino, the court discussed the scope of the "known present danger" exception to municipal immunity.

The plaintiff in *Domino* was injured when her motorcycle struck a tree which had fallen across a Walworth County road. *Domino*, 118 Wis. 2d at 490.

A Walworth County dispatcher had been notified of the fallen tree and sent a squad car to investigate. *Domino*, 118 Wis. 2d at 490. While the squad car was enroute, the dispatcher diverted the car to another accident and failed to reassign another car to investigate the fallen tree. *Domino*, 118 Wis. 2d at 490.

The Court of Appeals found the presence of the fallen tree created a clear and certain duty on the part of the dispatcher to send a second squad to protect the public against danger such that nothing remained for the exercise of discretion. *Domino*, 118 Wis. 2d at 491-493.

Professional Conduct (Non-Governmental Act) Exception

"Professional" or "nongovernmental" conduct exception has not been extended beyond medical decisions of medical personnel employed by a governmental body.

Kimps, 200 Wis. 2d at 17-23.

"Malicious, Willful and Intentional" Exception.

Acts that are intentional but not malicious do not create an exception to immunity. *Wilson v. Milwaukee*, 138 F.Supp. 2d 1126 (E.D. Wis. 2001).

Conduct falling within this exception must generally be proven to the result of hatred, ill will, and a desire for revenge or inflicted under circumstances where insult or injury was intended. *Ervin v. City Of Kenosha*, 159 Wis.2d 464, 464 N.W.2d 654 (1991).

Malicious acts are "[c]haracterized by, or involving, malice; having or done with, wicked, evil or mischievous intention or motives". *Id.*

4. Damage Limitations - Sec. 893.80(3), Stats.

... the amount recoverable by any person for any damages, injuries or death in any action founded on tort against any volunteer fire company organized under ch. 181 or 213, political corporation, governmental subdivision or agency thereof and against their officers, officials, agents or employees for acts done in their official capacity or in the course of their agency or employment, whether proceeded against jointly or severally, shall not exceed \$50,000. The amount recoverable under Sec. 893.80(3), Stats., shall not exceed \$25,000 in any such action against a volunteer fire company organized under ch. 181 or 213 or its officers, officials, agents or employees. If a volunteer fire company organized under ch. 181 or 213 is part of a combined fire department, the \$25,000 limit still applies to actions against the volunteer fire company or its officers, officials, agents or employees. No punitive damages may be allowed or recoverable in any such action under this subsection.