



Sexual Misconduct
**Failure to Train &
Failure to Supervise**
Article 3 of 4



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The Second Brass Ring-Failure to Train

Police agencies have an obligation to train its police officers for the recurring tasks that officers will face during their career. Where it is foreseeable that a police officer will face a particular task that may result in harm to another person, the officer's agency must provide training in how to conduct that task in a manner which is consistent with generally accepted practices in law enforcement. What is "generally accepted" is defined by the law enforcement profession and by court decisions analyzing police conduct.

Training serves as a means toward high-level performance by police officers. Training is an input toward proper performance. Unfortunately, many agencies conduct training to avoid, or in response to civil liability rather than to promote high-level performance. Over the past two decades, attacks on training have become one of the weapons for persons who file lawsuits against the police.

The foundation case on failure to train is *City of Canton v Harris*.¹ Geraldine Harris was arrested by the Canton Police and brought to lock-up. During the booking process she fell to the floor several times. When asked if she needed medical assistance, she responded incoherently. No medical attention was ever summoned for her. Following her release, relatives brought her to the hospital where she was treated for several emotional ailments.

¹ *City of Canton v Harris*, 489 U.S. 378 (1989).

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During the trial on Harris' claims, evidence was established that shift commanders had the sole discretion to determine whether or not a detainee needed medical attention. It was further established that the shift commanders were given no training to assist them in making these medical evaluations. Harris prevailed on her claim at the trial court level, but the United States Court of Appeals for the 6th Circuit vacated the finding against the city because of the jury instructions. The 6th Circuit would have applied a standard of recklessness, intentional or gross negligence.

The United States Supreme Court held that "a municipality may be held liable under § 1983 for violations of rights guaranteed by the Federal Constitution, which violations result from the municipality's failure to adequately train its employees, only if that failure reflects a **DELIBERATE INDIFFERENCE** on the part of the municipality to the constitutional rights of its inhabitants.

It should be noted that failure to train cases can be established in two ways. The first involves a lack of training in an area where there is a patently obvious need for training, for example an officer who is untrained in deadly force unreasonably shoots someone. The second method of establishing a failure to train by an agency is to establish a pattern of conduct by officers that would put the final policymaker on notice and the policymaker failed to respond with training.

Certain forms of conduct are beyond the reach of failure to train. For example, in *Walker v. City of New York*, a plaintiff who spent nineteen years in jail for a crime he did not commit brought a failure to train claim based on the department's failure to train its officers not to commit perjury.² Walker's wrongful conviction was based upon perjured testimony by a police officer. The United States Court of Appeal for the 2nd Circuit held: "*If the conduct on which the claim is based is such that a common person would know the right response without training, there is no duty to train.*" The court, in its decision provided a three-part analysis for determining when a duty to train is established:

- Plaintiff has to show that a policy maker knows to a moral certainty that his or her employees will confront a given situation.

² *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992).

- The plaintiff must show that the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult or that there is a history of employees mishandling the situation.
- The plaintiff must show that the wrong choice by the city employee will frequently cause the deprivation of a citizen's constitutional rights.

When considering the areas of training that must be covered, an agency can simply apply this three-part test. For example, does the chief know to a moral certainty that officers may face deadly force situations? Second, is deadly force a situation that presents officers with a difficult choice of the sort that training or supervision would make easier? Finally, if an officer makes the wrong choice in a deadly force situation, is it likely to lead to a constitutional violation?

A case from the United States Court of Appeals for the 10th Circuit involved injuries suffered by a quadriplegic during a car stop.³ Clarence Paul, a partial quadriplegic was riding as a passenger in Lloyd Gildon's auto. Gildon's wife had reported the vehicle stolen. Officer Gilpatrick of the Altus, Oklahoma Police Department stopped the vehicle. During the stop, the officer ordered Paul out of the vehicle. Paul responded that he was paralyzed and unable to get out. The officer then allegedly chambered a round into his shotgun. Paul then rolled down the window and again informed the officer that he was paralyzed and could not get out of the car.

Paul testified that two officers grabbed him by the neck and pulled him from the vehicle. Officer Gilpatrick placed his knee on Paul's neck and back while he handcuffed him. During this ordeal Clarence Paul urinated on himself and became unconscious. He asked the officers to call him an ambulance. Paul was taken to the hospital where it was determined that his neck was fractured and his hip was sprained. Paul filed a lawsuit alleging that the police department improperly trained officers to place their knees on suspect's neck while handcuffing them. The city introduced training materials from the Council of Law Enforcement Educational Training that specifically included instructions not to place a knee on a suspect's neck "for

³ See, *Paul v. City of Altus*, No. 96-6376 (10th Cir. 1998).

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obvious medical reasons.” The city took the position that if Officer Gilpatrick did put his knee on Paul’s neck he acted in violation of this training.

The court refused to grant the city’s request for summary judgment after reviewing an incident report left by one of the officers at the scene. The report asserted: “Gilpatrick then brought the subjects (sic) right arm around the middle of his back and had his knee on the subject’s neck. The way we’re instructed to handcuff in the felony prone position.” The court concluded that there was an issue of fact as to what the officers were actually trained to do. Thus, from an agency liability standpoint the entire case rests on what the officer was trained; was he trained as stated in the report? Or, was he trained in accord with the CLEET lesson plan?

This case also provides a good example of why training must be documented at two levels, first, what was trained; second, who was trained. At trial in cases like this, the agency and its trainers may be in an adverse position to the officer since the agency and its trainers will not be liable if it can be shown that the officer acted inconsistently with documented training.

The Third Brass Ring-Failure to Supervise

Shaw v. Stroud is one of the most cited cases on liability imposed for failure to supervise.⁴ On February 27, 1990, Officer Morris, a seven-year veteran of the North Carolina Highway Patrol stopped Sidney Bowen, a 42 year-old black man as he pulled into his driveway, on suspicion of driving while impaired. At the officer’s request, Bowen presented his license and sat in the patrol car. As the officer reached for his ticket book Bowen ran off. Bowen fell to the ground and Morris caught him. Meanwhile Bowen’s wife and daughter watched from the front porch as Bowen shouted to them that he was going to jail. As they neared the patrol car, Bowen shouted to his daughter to get help, “the law is trying to kill me in my own front yard.” Morris called for back-up and as he put the microphone down Bowen pulled away. Morris began striking Bowen in the head and shoulders with his flashlight. Bowen fell to the ground but struggled back up and grabbed for the flashlight. Morris let go of the flashlight, backed up and shot Bowen. Bowen again swung at Morris, at which point Morris backed up further and fired at Bowen until he fell to the ground. Morris’ version of these events was different, in that he indicated that he fired after Bowen took his flashlight off him, hit him once and was poised to strike him in the head a second time.

⁴ *Shaw v. Stroud*, 13 F.3d 791 (4th Cir. 1994).

Sergeant Stroud was Morris's supervisor from the time Morris was hired in 1983 until late November of 1988 approximately 15 months prior to the shooting. "During his tenure as Morris' supervisor, Stroud received reports about Morris' use of excessive force." The court cited to several incidents where allegations of excessive force came to Stroud's attention and he failed to take any action. In addition "Morris instituted a disproportionately high number of assault charges against arrestees. From September 1987 to December 1988, during Stroud's tenure, six of the nine charges of assault on a law enforcement officer in Columbus County, North Carolina were brought by Morris. There were forty-six charges for resisting arrest, twenty of which were initiated by Morris. From 1984 to 1990, thirteen people arrested by Morris alleged that he used excessive force."

In December of 1988, Sergeant Smith became Morris' supervisor. He knew nothing of Morris' history and was not informed of his history by Stroud. In May of 1989, a judge brought Morris' activities to the attention of a Sergeant White, informing White that he had observed numerous occasions that appeared to involve Morris' use of excessive force. The judge further reported that these incidents seemed to involve black suspects and persons of the lower socio-economic class. White brought this complaint to Smith's attention and it was decided to closely monitor Morris. Smith rode with Morris on at least two occasions.

The complaints continued. One involved a defense attorney who complained about the treatment of a client during a drunken driving arrest. Smith sent a line sergeant to the trial for drunk driving; however, no evidence of improper conduct was brought forward. The fire chief complained that Morris was rude to him at an accident scene; Smith counseled him. Three weeks before Bowens' death Morris had to take a drunk driver to the hospital because of fractured skull incurred during the course of the arrest. Although the arrested man complained that Morris had struck him in the head with his gun, there is no indication that the man made this clear to Smith, who had responded to the hospital.

In analyzing the claim made against the supervisors for failing to supervise Morris, the court began by pointing out:

"The principle is firmly entrenched that supervisory officials may be held liable in certain circumstances for the constitutional injuries inflicted by their subordinates... Recognizing that supervisory liability can extend to the highest levels of state government, we have noted that liability is ultimately

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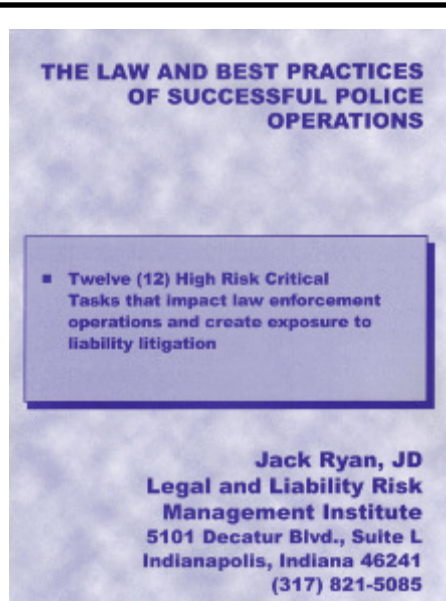
determined by pinpointing the persons in the decision-making chain whose deliberate indifference permitted the constitutional abuses to continue unchecked.”

The court identified the elements necessary to establish supervisory liability under §1983 as follows:

“(1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed ‘a pervasive and unreasonable risk’ of constitutional injury to citizens like the plaintiff; (2) that the supervisor’s response to that knowledge was so inadequate as to show ‘deliberate indifference to or tacit authorization of the alleged offensive practices,’ and (3) that there was an ‘affirmative causal link’ between the supervisor’s inaction and the particular constitutional injury suffered by the plaintiff.”

The court found that Stroud had knowledge of Morris’ conduct and was deliberately indifferent to that conduct. Notwithstanding the fifteen month gap between the shooting and Stroud’s supervision of Morris, the court concluded that *“Bowen’s death was a natural and foreseeable consequence of Stroud’s failure to investigate, or even to address, the pervasive violent propensities of one of his officers. Because Stroud was aware of Morris’ frequent use of excessive force, it follows that he knew that Morris’ unchecked service on the force posed a constant and dangerous threat to the welfare of arrestees.”*

In dealing with Smith, the court found that the actions taken by Smith, while maybe not being the most effective, were sufficient to overcome deliberate indifference or tacit authorization on his part. The court cited Smith’s two ride-alongs with Morris and his assignment of a line sergeant to attend court on a case where it was alleged that Morris had committed improper conduct. Smith’s conduct was negligent and possibly grossly negligent, but it was not deliberately indifferent. The court granted summary judgment to Smith.



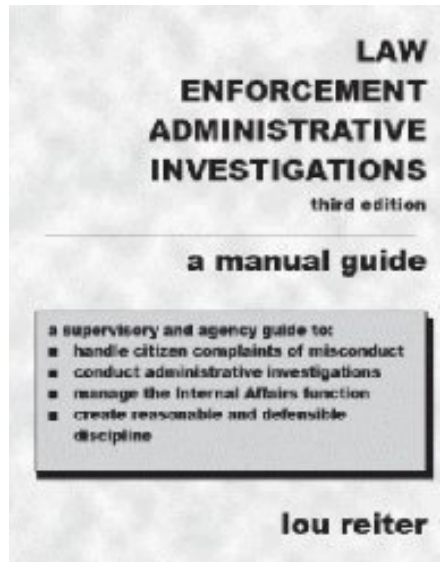
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