**Sexual Misconduct**

**The Need for Policy and Training**

**Article 4 of 4**

**By Jack Ryan, J.D.**
**with contributions by: Lou Reiter**

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## The Need for Policy and Training

Utilizing the *Walker* formula previously cited: Does the policy-maker and/or trainer know to a moral certainty that officers will face situations that may involve sexual harassment, discrimination or misconduct in the law enforcement profession? Would an officer be better equipped to deal with these situations if trained and directed by policy? Is there likely to be an injury (legal, psychological, or physical) if the officer makes the wrong choice?

Are we on notice?

Consider some cases:

*Lewis v. City of Jacksonville*[1]

"This lawsuit originates from allegations that Defendant Larry Pugh sexually assaulted Plaintiff Evelyn Lewis in March of 2005, during a time when Defendant Pugh was a police officer for the City of Jacksonville, Texas.

Plaintiff Lewis alleges that Pugh offered her a ride while she was walking home from a friend's house early in the morning sometime in March 2005. Pugh was in uniform, was armed with a gun, and was driving a City of Jacksonville police car at the time. Lewis accepted the ride and Defendant Pugh took Lewis to an abandoned trailer house and raped her. Lewis

[1] *Lewis v. City of Jacksonville,* 2007 U.S. Dist. LEXIS 34754 (E. Dist Texas 2007)

indicates that she was afraid Pugh would shoot her if she resisted. Lewis states that she never had consensual sex with Pugh and did not want to have sex with him.

Plaintiff indicates that she called Jacksonville Police Detective Tonya Harris the next day but was unable to reach her. Lewis eventually spoke on the phone with Jacksonville Assistant Police Chief John Page and told him what had happened. Assistant Chief Page asked to speak with Lewis in person, but Lewis said she would rather talk to Detective Harris. Lewis states that she spoke with Detective Harris during the next day or two and told Detective Harris what Officer Pugh had done to her. According to Lewis's Declaration, Detective Harris "felt like the City of Jacksonville knew something bad about Pugh before he raped me." Harris further indicated that "they had a suspicion" and wanted Lewis to "wear a wire." Lewis does not indicate whether she ever did "wear a wire."

Sometime later, Lewis spoke with Joe Evans, an investigator for the Cherokee County District Attorney who was not affiliated with the City of Jacksonville, and told Investigator Evans what Pugh had done to her. About a month-and-a-half to two months later, in October 2005, Lewis gave Investigator Evans a written statement. Lewis also spoke with the FBI shortly after her visit with Evans.

On October 21, 2005, within a day or two of Lewis's written statement to Investigator Evans, Defendant Pugh was placed on suspension by Defendant former Police Chief Mark Johnson. Former Police Chief Johnson fired Pugh on February 8, 2006, after being notified that Pugh had been arrested on charges of sexual assault.

Lewis also alleges that Defendant Pugh assaulted her on August 9, 2006, after Pugh was no longer a police officer.

In her suit, Plaintiff Lewis brings claims against Defendant Pugh for deprivation of rights under color of law pursuant to *42 U.S.C. § 1983*, and for state assault and battery claims arising from the August 9, 2006 incident. Plaintiff Lewis also asserts claims against the City of Jacksonville and former Police Chief Johnson (collectively "Defendants") under *42 U.S.C. § 1983* for their failure to supervise Officer Pugh, their deficient hiring and retention of Pugh, and their toleration of a custom of police misconduct.

Defendants City of Jacksonville and former Police Chief Johnson move for summary judgment on the grounds that there is no evidence to support a cause of action against the City of Jacksonville and former Police Chief Johnson for municipal or supervisory liability under *42 U.S.C. § 1983*…

Plaintiff argues that several incidents involving Officer Pugh that occurred both before and after the alleged March 2005 sexual assault are sufficient to prove deliberate indifference on the part of the City and Chief Johnson. These incidents occurred from October 2004 through October 2005. The first incident involving Pugh occurred on October 22, 2004 at the "Tomato Bowl," a football stadium in Jacksonville. On that occasion, Jacksonville police officers including Officer Pugh allegedly used excessive force when arresting several individuals during an incident following a high school football game. Following this incident, several of the alleged victims attended a community meeting that was attended by Police Chief Johnson and voiced complaints that Jacksonville police officers had used excessive force during arrests at the Tomato Bowl incident. Several victims of that incident also attended a Jacksonville City Council meeting where they voiced similar complaints. There were no allegations of sexual misconduct related to the October 22, 2004 Tomato Bowl incident.

In the second incident, Officer Pugh allegedly used excessive force and made an unlawful arrest of an individual following a traffic stop in October 2005. This event occurred approximately six months after the Plaintiff alleges she was raped, and no allegation of sexual misconduct was made in relation to the October 2005 incident.

In addition to these two allegations of excessive force, there is evidence that Officer Pugh may have engaged in other instances of sexual misconduct with other individuals while on duty. There is no evidence, however, as to *when* these other events occurred. More importantly, however, the Plaintiff's evidence indicates that the City of Jacksonville and former Police Chief Johnson were not made aware of any incidents of sexual misconduct involving Pugh until June of 2005, at least two months after Pugh is alleged to have raped Plaintiff.

Plaintiff also produces evidence that the City of Jacksonville hired a consultant in the spring or summer of 2005 to assess the Jacksonville police department and recommend changes or improvements. After the consultant had completed his review, the consultant recommended to the City Council that the police department implement several procedural reforms, including

use of accountability programs, dated log sheets, and additional management and training programs for all members of the department. There is no evidence that the consultant knew of or made recommendations based on any knowledge of alleged sexual misconduct by City of Jacksonville police officers during his 2005 assessment. The consultant reviewed the Jacksonville police department again in April 2006 and recommended at that time that the City fire or demote Chief Johnson. Chief Johnson was suspended prior to his retirement in 2006. Chief Johnson was told he was suspended because of his failure to properly supervise the police department.

Based on the foregoing, the Court concludes that there is no genuine issue of material fact as to Plaintiff's claim that the Defendants' were deliberately indifferent in their training or supervision of Officer Pugh. Plaintiff has produced no evidence that demonstrates a pattern of similar sexual offenses by Pugh prior to March of 2005 that would support a finding that the Defendants deliberately ignored a risk that Pugh might engage in sexual misconduct while on duty. The evidence indicates that Plaintiff's March 2005 complaint of sexual misconduct was the *first* complaint of its type received by the police department. Though citizens had made prior allegations of *excessive force,* a municipality or supervisor must have notice of a pattern of *similar* violations and the officer's prior conduct must actually "point to the specific violation in question." *Davis, 406 F.3d at 383*."

The court concluded that plaintiff could not establish the requisite proof to grab one of the brass rings necessary to put the agency on the hook.

*Doe and Roe v. City of Dalles*[2]

"On May 25, 1999, plaintiff was ordered committed to a Youth Corrections Facility and placed in the legal custody of the Oregon Youth Authority. He was then released from the custody of the Oregon Youth Authority in mid or early November, 2000.

Within a matter of days following his release, plaintiff began talking with defendant Kirk, who was a police officer for the City of The Dalles at the time.

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[2] *Doe and Roe v. City of Dalles,* 2004 U.S. Dist. LEXIS 10780 (Dist. Oregon 2004).

Roe and Kirk met with each other and began playing video games and lifting weights together.

On several occasions, plaintiff drank alcohol at Kirk's house. On one of these occasions, Kirk placed Roe's feet on his lap and began rubbing them.

At some point between plaintiff's release and December 22 or 23, 2000, Roe and Kirk traveled to Portland together to pick up a motorcycle.

On another occasion, Roe, while at Kirk's residence, communicated with a woman via the internet. Roe exchanged photographs with the woman over the internet, including pictures of himself taken by Kirk. In one of the photos, Roe was unclothed.

Roe testified in his deposition that he was provided alcohol by Kirk and that he was sexually assaulted by Kirk at Kirk's residence within a day or two of Christmas Eve, 2000. Roe also testified that he had no further contact with Kirk after the incident.

On January 9, 2001, Chief Waterbury issued a written warning to defendant Kirk, based on reports that Kirk had served alcohol to Roe.

On April 16, 2001, Chief Waterbury spoke with plaintiff's mother regarding the allegations against Kirk. Plaintiff's mother informed Chief Waterbury that Kirk had supplied alcohol to plaintiff on several occasions and that Kirk had taken pictures of her son without his clothes on.

On April 18, 2001, Chief Waterbury interviewed Kirk regarding the allegations. Chief Waterbury suspended Kirk the same day. Afterwards, The Dalles Police Department commenced an internal investigation of Kirk based on the allegations against him.

On April 25, 2001, after learning from Chief Waterbury that he would be terminated, Kirk resigned from his position with The Dalles Police Department.

On July 17, 2002, Kirk pleaded guilty to the crimes of Harassment, Sex Abuse III, and Official Misconduct for his conduct toward Roe.

In addition to the events surrounding the alleged abuse of plaintiff Roe, The Dalles Police Department has had several other incidents involving officers giving alcohol to minors and incidents of sexual misconduct by its officers. Throughout the 1990s, officials within The Dalles Police Department were aware of the fact that several officers were spending significant amounts

of time alone with minors and that the officers had allowed certain minors to become part of their personal lives. The Dalles Police Department received complaints from parents during this time period.

Several police officers, including defendant Kirk, were involved in the Explorer Scouts Program, which was run jointly by several entities including the City of The Dalles through The Dalles Police Department and the Boy Scouts of America. Through the Explorer Scouts Program, Scouts learned about law enforcement. Plaintiff Roe was not an Explorer Scout.

In 1992 or 1993, the Police Department learned of inappropriate sexual contact by police officer David Webb with a minor female Explorer Scout. Webb's employment was terminated on April 6, 1993. He later pleaded guilty and was convicted of Attempted Contributing to the Sexual Delinquency of a Minor.

In 1995, The Dalles Police Sergeant James Tannehill initiated a relationship with "T.R.," a minor male Explorer Scout. Sergeant Tannehill gave T.R. alcohol and ultimately had sexual relations with him. The relationship continued until sometime in 1996 or early 1997. Tannehill pleaded guilty and was convicted of child sexual abuse charges."

In examining the potential agency and supervisory liability the court asserted:

"A municipality cannot be liable under a *respondeat superior* theory for the acts of its employees under *42 U.S.C. § 1983*. *Gibson v. County of Washoe, 290 F.3d 1175, 1185 (9th Cir. 2002)*. It is only "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under *§ 1983*." *Monell v. Department of Social Servs. of New York City, 436 U.S. 658, 694, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978)*. A plaintiff may establish local governmental liability by showing that: (1) a governmental employee committed the alleged constitutional violation pursuant to a formal governmental policy or a "longstanding practice or custom which constitutes the 'standard operating procedure' of the local governmental entity"; (2) the individual who committed the constitutional tort was an official with "'final policy-making authority' and that the challenged action itself thus constituted an act of official governmental policy"; or (3) "an official with final policy-making authority ratified a subordinate's unconstitutional decision or action

and the basis for it." *Gillette v. Delmore, 979 F.2d 1342, 1346-47 (9th Cir. 1992)*, cert denied, *510 U.S. 932, 126 L. Ed. 2d 310, 114 S. Ct. 345 (1993)* (internal citations omitted).

A supervisor may be liable under *section 1983* if a plaintiff can establish three elements:

(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.

Plaintiff contends that the City had an informal custom or practice of disregarding complaints of its police officers engaging in inappropriate behavior with minors. I acknowledge the City's argument that Webb, Tannehill, and Kirk were all disciplined and ultimately lost their jobs because of their conduct. However, I find that significant questions of fact exist as to the timing of these incidents, and specifically, when and if policy level officials gained knowledge of alcohol and sex abuse that appeared prevalent in the police officers' interactions with minors. Evidence of the officials' knowledge of any specific threat to Roe is quite slim, but I cannot say that no reasonable jury would find based on all of the evidence, including evidence of reports of similar misconduct of other officers around the same time, that the City and Waterbury had knowledge or acted with the requisite deliberate indifference toward Roe. Plaintiff may establish liability by showing that through *omissions* the City is responsible for the alleged constitutional violations. *Gibson, 290 F.3d at 1186*. This will be a heavy burden for plaintiff because he must show that the City's deliberate indifference led to its omissions and that the omissions caused the employee to commit the constitutional violation. *Id.;* however, I am not prepared to rule on a motion for summary judgment that plaintiff will be unable to carry this burden. Defendants' motion for summary judgment against the *section 1983* claim is denied."

Thus, the court concluded that this plaintiff could take their case to the jury against the agency and supervisors alleging a custom and practice of allowing sex with minors.

*Jacob v. City of Osceola*[3]

"Kenig was a police officer for Osceola. He worked for Osceola on a part-time basis beginning in September 2003, but he became a full-time officer a month later in October. Osceola terminated Kenig's employment on August 17, 2004. Kenig was Osceola's only full-time police officer during the relevant time period and he usually worked the night shift, getting off work at about 3:00 or 4:00 a.m.

Prior to hiring Kenig, Booker obtained a criminal background check on Kenig, which did not reveal any reason not to hire him. Booker also spoke with two of Kenig's former employers: the City of Holden Police Department and Ronald Snodgrass ("Snodgrass"), who was the Sheriff of St. Clair County. The Holden Police Department did not discourage Booker from hiring Kenig.

When Booker contacted Snodgrass about Kenig, Kenig was employed at the St. Clair County's Sheriff's Department and he was applying for the position with Osceola. Snodgrass told Booker that Kenig did not meet the county's standards for becoming a road deputy who patrolled the county alone. Snodgrass told Booker that Kenig would be fine as a city officer because he would be confined to the city limits area, but that he did not believe Kenig could be an officer without boundaries. Booker did not ask Snodgrass about the county's standards for its deputies or why Kenig did not meet those standards, primarily because Snodgrass participated in the decision to hire Kenig in Osceola.

Because Osceola did not have a chief of police and because Booker had no law enforcement training, Booker asked Snodgrass to sit in on the interviews for candidates for the Osceola position, even though Snodgrass was affiliated with St. Clair County and not Osceola. Kenig interviewed for the position and Snodgrass participated in the interview and the hiring decision. Snodgrass did not object to hiring Kenig to be an officer in Osceola and he never conveyed any basis for not hiring Kenig to Booker.

[3] *Jacob v. City of Osceola,* 2006 U.S. Dist. LEXIS 26232 (W. Dist. Missouri 2006).

Osceola terminated Kenig's employment on August 17, 2004, because he provided alcohol to a minor and for brandishing his weapon during a dispute. Kenig pleaded guilty to providing alcohol to a minor in early 2005.

During the relevant time period, Osceola had an employee manual that prohibited sexual harassment. *See* Def. Ex. 9 [Doc. # 50] at § 6(A). During his deposition, Kenig admitted that during his police training he learned that sexual comments and sexual advances were inappropriate and that they violated citizens' constitutional rights. *See* Def. Ex. 11 [Doc. # 50] at 95:11-25.

**B. Kenig's Assault on Crystal Jacob**

For purposes of evaluating Defendants' Motion, the Court will assume that Jacob's allegations are true.

Jacob was home alone at her house in Osceola on July 13, 2004. Between 2:00 p.m. and 5:00 p.m. that afternoon, she called the Osceola Police because she was afraid her estranged husband would return to the home. Kenig responded to the call and stayed about thirty minutes at the home. When he left, he made a statement about Jacob inviting him back [*5] for dinner later.

Later that evening, Jacob called the Osceola Police Department around 9:00 p.m., and Kenig responded to the call. Jacob called again because her estranged husband had alleged that Jacob's friends were breaking into their home to steal things. When Kenig arrived, Jacob met him at the front porch. Kenig said he would stay until the situation was resolved. Kenig stayed for approximately two hours and he followed her around the house. Jacob stated that Kenig made her uncomfortable because he was following her too closely and making sexual comments, but she could not remember exactly what his comments were.

Later in the evening, Kenig and Jacob were on her back porch. Kenig discussed his divorce and his girlfriend and he talked about how he liked to be with other women. Kenig asked Jacob to have sex with him and she declined. Jacob did not ask Kenig to leave because she was afraid of being alone. At some point, Kenig reached over and touched Jacob's breast. She ended the conversation and told Kenig to leave. Kenig told Jacob, "Why don't you get into something more comfortable" and Jacob again told him to leave.

Kenig walked toward Jacob's front door and she went to her bedroom to change clothes to get ready for bed. Kenig returned down the hallway and he could see into Jacob's bedroom. Jacob was naked from the waist down and she jumped into her bathroom so Kenig could not see her. Kenig apologized and Jacob again told him to leave. When Jacob came out of the bathroom, she saw that Kenig had unzipped his pants and he was exposing his penis to her. Kenig stated, "I've seen yours and now you've seen mine." Jacob told him to leave and Kenig re-zipped his pants.

Jacob started to leave the bedroom to escort Kenig to the front door. Kenig pulled her back into the room. Kenig reached around Jacob's waist and over her shoulder and put one hand down her pants to fondle her vagina and the other hand under her shirt to fondle her breast. Kenig prevented Jacob from moving her arms as he fondled her.

Jacob pulled away as Kenig was kissing her neck and she asked him what he was doing. Kenig responded, "Well, you said you didn't want to have sex tonight." Jacob again told Kenig to leave and he did.

Kenig was subsequently fired by Osceola in August 2004, but not because of the incident with Jacob. Jacob did not report Kenig's conduct to Booker or Osceola, although she did tell another officer about what Kenig did after Kenig was terminated.

## C. Other Complaints About Kenig

### *1. Jessica Miller*

Jessica Miller ("Miller") alleged that in March 2004, Kenig responded to a call at the city park in Osceola. Miller alleged that, against her will, Kenig unzipped her pants and fondled her vagina. Miller told Kenig to stop and he did. Shortly thereafter, Miller alleged that Kenig responded to a call at her home and he suggested that he come back later to help her change into her pajamas.

#### a. Miller's Complaint to Sharon Brunson

In a declaration submitted with Plaintiff's Opposition to Defendants' Motion, Miller stated that she told Sharon Brunson ("Brunson") about the park incident with Kenig. Brunson was a member of the Osceola Board of Aldermen at the time. According to Miller, Brunson wrote down the information and told her she would follow up with her about it.

In an initial statement, Miller stated that she reported Kenig's conduct "shortly thereafter." *See* Miller Declaration [Doc. # 52] dated January 2, 2006, at P4. Subsequently, Defendants procured their own statement from Miller which stated, "I don't remember when I told [Brunson] about the incident with [Kenig]. It could have been after July 14, 2004." *See* Defendants' Reply [Doc. # 56] at Ex. A dated January 17, 2006. Jacob obtained another statement from Miller, which stated,

> *After thinking about it I am certain that it happened in the spring around March 2004 (when Kenig unzipped my pants) and I told [Brunson] within a few weeks after it happened about him unzipping my pants. [Brunson] knew who I was from coming in the store that's why I felt comfortable talking to her.*

*See* Miller's Statement [Doc. # 59-2] dated January 27, 2006. [2]

2 Initially, the Court did not allow Jacob to submit Miller's Third Declaration dated January 27, 2006. *See* Order [Doc. # 60] However, in the interest of considering all of the available evidence, the Court will vacate its Order and consider Miller's Third Declaration. Accordingly, the Court will grant Plaintiff's Motion for Leave to File Jessica Miller's Third Declaration. [Doc. # 59]

Brunson [also executed a statement regarding when Miller told her about Kenig. According to Brunson's statement,

> *[Miller] explained to me that one evening when she had been drinking that [Kenig] had tried to kiss her and unzip her pants. She said that she believed she may have come on to him, and given him the wrong idea.*

*Id.* Regarding the timing, Brunson stated that she did not remember the date of the conversation with Miller. According to her, "It possibly occurred after July 14, 2004. It could have been sometime in the Fall of 2004." *Id.*

**b. Miller's Complaint to Snodgrass**

Miller also stated that she told Snodgrass about the incident with Kenig. Miller stated, "I also discussed the situation with [Snodgrass]. [Snodgrass] told me that he would report the information to [Booker]." *See See* Miller Declaration [Doc. # 52] dated January 2, 2006, at P5. Regarding her complaint to Snodgrass, Miller stated, "I don't remember exactly what I told [Snodgrass]. All I know is I made comments here and there when he came in

the store about the rude things that [Kenig] said to me." [3] *See* Defendants' Reply [Doc. # 56] at Ex. A dated January 17, 2006.

3 At the time, Miller worked in a grocery store in Osceola and Snodgrass would come into the store where she worked. *See* Snodgrass Dep. [Doc. # 52] at 58:6-17.

Snodgrass testified about Miller's complaint. Snodgrass could not recall exactly what Miller told him about Kenig. According to his best recollection, she complained that "Kenig had made some type of comment to her, and she just wanted me to know about it." *See* Snodgrass Dep. [Doc. # 52] at 59:18-20. Snodgrass believed the comments were probably inappropriate, although he could not recall exactly what they were. Snodgrass did not testify that Miller complained about Kenig touching her against her will or unzipping her pants at the park. Snodgrass's testimony focused solely on Miller's complaint about Kenig's inappropriate comments.

Snodgrass told Booker about Miller's complaint, but he did not give Booker her name because "she wanted nothing done about it." *Id.* at 63:10. Snodgrass testified that Miller did not want the comments investigated nor did she want her name relayed to Booker. Thus, he did not provide Miller's name to Booker and there is no evidence that Booker followed up on the information Snodgrass gave him.

There is no evidence regarding the timing of Miller's complaint to Snodgrass. In his deposition, Snodgrass simply testified that, "I think it was warm" when he talked to Miller about Kenig. *Id.* at 59:1. Snodgrass testified that Miller provided him with only one complaint regarding Kenig. *Id.* at 58:23.

***2. Tammy Ryan***

In March 2004, Tammy Ryan ("Ryan") called the Osceola Police Department to report child abuse at a neighbor's house and Kenig responded to the call. In response to a question from Ryan, Kenig responded "twelve inches." Later in the conversation, Ryan again tried to ask Kenig a question and he stated, "I think my answer was better." She responded, "What do you mean?" and he stated, "twelve inches, didn't your sister tell you?" *See* Ryan Dep. [Doc. # 52] at 13:23 to 15:23. Ryan interpreted Kenig's response as referring to the size of his penis because Ryan's sister had previously dated Kenig. *Id.*

A few days later, Kenig called Ryan at around 2:00 a.m. He told her that he was getting off work at 3:00 a.m. and he said, "You owe me. You want to come by my house and take care of what you owe me?" *Id.* at 16:16-25. Ryan hung up on Kenig and he called twice more within the next week and said the same thing. Again, Ryan interpreted Kenig's comments as being sexual.

Ryan continued to follow up with telephone calls about the child who was allegedly abused and she eventually contacted the Division of Family Services. In a subsequent telephone conversation, Kenig told her to he was "going to shoot her in the F'ing foot" if she did not stop calling about the child. *Id.* at 20:17 to 21:1.

Ryan contacted Booker and complained about Kenig's comments and his threat. Ryan would have spoken with Booker in March or April 2004 based on the timing set out in her deposition. Booker did not follow up with Ryan about her complaint.

***3. Tara Scott***

In June 2004, Tara Scott ("Scott") and her mother, Diana Morgan ("Morgan"), went to Booker's house to complain about Kenig. Earlier, Scott was walking home in the rain and Kenig offered her a ride home. According to Scott, Kenig "insisted" that she get in the car, but she refused. Morgan contacted Booker and told him that Scott was afraid of police officers and men in general because of her experience with men in the past. Morgan asked Booker to instruct Kenig not to offer Scott a ride or talk to her unless Scott requested it. Booker followed up with Kenig and he stated that he was only offering her a ride because it was raining. There is no evidence that Kenig made any sexual or inappropriate comments to Scott.

***4. Vicky Raymond***

It is unclear when Vicky Raymond ("Raymond") made a complaint about Kenig, but it was prior to his termination in August 2004. Raymond complained to Donna Hudson ("Hudson"), a member of the Osceola Board of Alderman, that Kenig had made an inappropriate comment to her when she was at the hospital. There is no evidence regarding the nature of the comment. Raymond submitted her complaint to Hudson who in turn notified the rest of the Board of Aldermen and Booker during a subsequent meeting. Booker contacted Raymond about her complaint and she denied that she

had a complaint or that there was a problem. *See* Booker Dep. [Doc. # 52] at 69:16 to 70:2. Booker did not specifically ask Raymond if Kenig's comment was sexual in nature, but she denied that she had any problem with him. Booker contacted Raymond the day after Hudson notified him of the problem.

***4. Charlene Sommer***

Charlene Sommer ("Sommer") alleged that Kenig tried to kiss her against her will and that he touched her breast while she was getting out of his vehicle. The incident occurred in August 2004. Sommer reported the incident to Booker.

***5. Sac Osage Hospital Incident***

Snodgrass testified that he heard a rumor that Kenig had touched a woman on the buttocks at the Sac Osage Hospital after he followed her into a nurse's station. *See* Snodgrass Dep. [Doc. # 52] at 31:19-24. Snodgrass stated that he did not receive the complaint and that "it came through a second party, and I cannot remember who the second party is. And I believe one of my deputies even also told me about the situation." *Id.* There is no evidence of when this occurred. Snodgrass reported the incident to Booker and Booker stated that he already had the information. *Id.* at 62:19 to 63:7.

***6. Housing Incident***

Snodgrass also testified that he heard about a complaint from an individual who lived in a housing unit in Osceola and an officer had allegedly touched her breast. *Id.* at 32:14-17. There is no name provided for the complainant nor is there any evidence about when this occurred. In fact, Snodgrass was not even sure that Kenig was the officer who allegedly committed the misconduct. *Id.* at 67-68. Snodgrass again classified this as a "rumor."

***7. Theresa Temkey***

Theresa Temkey ("Temkey") had contact with Kenig in June 2004. Kenig allegedly exposed his penis to Temkey and slid his nightstick up her nightgown. Temkey did not tell anyone about the incident with Kenig until May 2005.

**D. Jacob's Complaint**

In April 2005, Jacob filed a two-count Complaint against Defendants and Kenig. *See* Complaint [Doc. # 1]. The first count was filed under *42 U.S.C. § 1983* and alleged that Kenig violated Jacob's constitutional rights and the other Defendants were liable because they condoned a pattern of misconduct, provided inadequate training, and had inadequate hiring procedures. Jacob sued Booker and Kenig in both their individual and official capacities. *Id.* at P32. The second count was filed against Kenig only for battery. Defendants moved for summary judgment on Count I of Jacob's Complaint in its entirety."

Notwithstanding all of these events, the federal trial court ruled that the events were insufficient to put the city on notice of Kenig's propensities and thus, let the city out of the case.

## Avoiding Deliberate Indifference

An agency can avoid entity liability through proper policy, training and supervision. Where officers respond in accordance with proper policy, training and supervision, the officer will also avoid individual liability. This, when dealing with sexual misconduct as well as harassment and discrimination, agencies must have a zero tolerance policy and validate that policy through training, supervision and enforcement.

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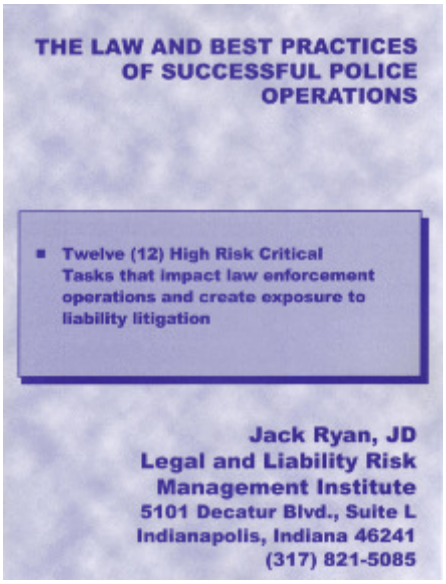


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by Jack Ryan

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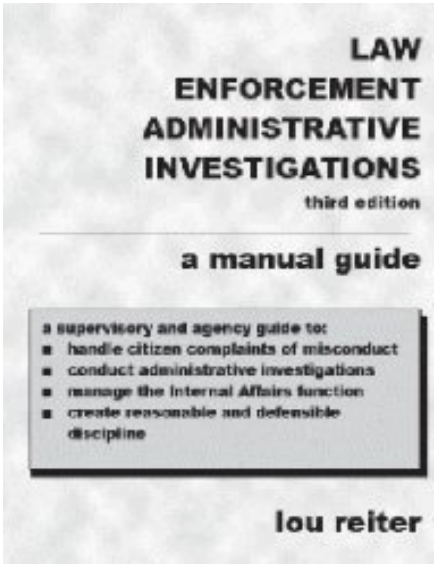


## Law Enforcement Administrative Investigations

by Lou Reiter

**With Contributing Authors**: Patrick Gallagher, Sue Carter Collins, M.S., J.D., PhD, Marilyn M. McFadden, M.P.A., J.D., Steve Rothlein, and Jack Ryan

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