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Law Enforcement and the Federal Courts

Ensuring that law enforcement action is consistent with our protected constitutional liberties is crucial to the functioning of a democratic society. This task raises particularly interesting and compelling legal issues in a densely populated urban area like New York City, with over eight million residents, a police force of nearly 37,000 officers that processes over 300,000 arrests per year, and 8,000 correctional employees that are responsible for the admission, detention and release of up to 110,000 new inmate admissions each year. In view of these numbers, it is not surprising that law enforcement contacts in the city generate substantial civil rights litigation.

Lawsuits are triggered by everyday citizen encounters with law enforcement, generally resulting from arrest, prosecution and incarceration. Frequently, the cases arise from routine stops, search warrant executions, undercover buy and bust operations, homicide investigations, police shootings and the care, custody and control of detainees in city jails. Plaintiffs' claims, which ordinarily implicate various Amendments of the U.S. Constitution, range from individual damage claims for false arrest, unreasonable search and seizure, malicious prosecution and excessive force to class actions seeking institutional reform of city policing and jails. The law that authorizes individuals to bring damages actions for constitutional violations is the Civil Rights statute — 42 USC §1983. In this article, I will provide some general background information about the Special Federal Litigation Division, the division in the New York City Law Department that defends law enforcement officials in civil rights actions, and some current issues of interest.

Overview

The Special Federal Litigation Division was created in 1998. (Prior to that time, §1983 cases were handled in a number of divisions in the office.) Division attorneys appear exclusively in federal court handling a range of civil rights cases, many of which are high profile and complex. Each attorney manages a case from inception through trial and is responsible for a large and active caseload. Division attorneys vigorously defend the city against an active plaintiffs' civil rights bar before a demanding federal judiciary, which expects the parties to complete discovery and be prepared to try a case often in less than one year. Most newly admitted attorneys will try at least one federal jury trial within their first eighteen months in the Division. Out of the cases tried, Division attorneys have achieved defense verdicts in all but a few. (Last year the win/loss record was 11-1.)

What makes the work of the Division unique and challenging is the constant demand to maintain the equilibrium between individual liberty interests and the need to protect public safety and further other legitimate governmental purposes.

Cases Handled

The legitimacy of action by law enforcement officials is measured by the constitutional standard of reasonableness — was the action taken objectively reasonable under the applicable constitutional law.[1] The reasonableness of law enforcement action is informed by the circumstances in which officers find themselves at the time — not by hindsight. Such circumstances frequently require officers to make split second decisions about how to act and if, and when, to use force.[2]

These critical decisions are further complicated by the often unsettled state of the applicable constitutional standard to the actual situation confronting an officer. In instances where the law is not clearly established, the Division seeks qualified immunity for the officers, which shields them from liability for a constitutional violation if at the time of the incident it would not be clear to a reasonable officer in the same circumstances that his or her action would be unlawful.[3] Where a constitutional violation has occurred, the municipality is liable when such behavior represents a systemic pattern and practice of misconduct known to and unremedied by managers and final policy-making officials. *Monell v. Department of Social Services*, 436 US 658, 690-91 (1978); see also *City of Canton v. Harris*, 489 US 378, 38 (1989); *Oklahoma City v. Tuttle*, 471 US 808, 810 (1985); *City of St. Louis v. Praprotnik*, 485 US 112, 127-30 (1985) (plurality opinion). *Monell* is the seminal case which allowed a local government to be sued for damages under §1983, overruling prior precedent which held such entities immune from suit.

Determining the reasonableness of police conduct is most challenging when officers find themselves in dangerous and unpredictable situations, e.g., when responding to emergency calls. Within the past year, the Division tried two police shooting cases resulting in defense verdicts. The highly publicized case of *Busch v. City*, 00 CV 5211 (EDNY 2000), involved a police response to calls from the community in Borough Park regarding an emotionally disturbed individual wielding a hammer. The four-week jury trial involved whether there was an appropriate use of deadly physical force in a rapidly evolving and dangerous situation where officers discharged their weapons after attempting less forceful means of subduing the plaintiff. Another case, *Nimely v. City*, 98 CV 6925 (EDNY 1998), involved a police response to a social club shooting and the pursuit of a fleeing suspect in possession of a gun. A radio description of the shooter was transmitted over the radio. During the canvass of the area by the police for suspects, they observed the plaintiff who, in part, matched the radio description of the shooter. Upon approaching the plaintiff, they observed a gun in his hand; he fled, ultimately running into a fence and falling to the ground. When police neared him, the plaintiff, with the gun in hand, turned toward the officer, who, fearing for his life, fired his weapon.

The Division has also successfully tried cases arising out of drug sales. For example, in *Giannullo v. City*,

Continued on page 7

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Law Enforcement and the Federal Courts

Continued from page 3

00 CV 3827 (EDNY 2000), police involved in surveillance activity observed a drug counselor working in a methadone clinic sell drugs to an individual on the street. One team of officers arrested the drug counselor but did not find drugs in his possession; however, they were aware that another team had already arrested the buyer who was in possession of drugs. The district attorney declined to prosecute, and the drug counselor sued for false arrest. The key issue at trial was whether the officers, at the time they arrested the drug counselor, were actually aware that the buyer had been arrested for drug possession, and, if so, whether that was enough to constitute probable cause for his arrest. The jury found that there was.

As to malicious prosecution claims, *Boyd v. City*, 00 CV 3262 (EDNY 2000), provides a recent example of the fundamental issues encompassed within the Division's litigation. There, a central issue was the timing of a statement made by plaintiff to the police that he had purchased a car for seventy-five dollars at Kennedy Airport: Was the statement made before or after his arrest and *Miranda* warnings? Because the statement could have been considered inculpatory, if made after arrest and in the absence of *Miranda* warnings, it would likely have been suppressed, and the arresting police officers would have lacked the requisite probable cause to believe the prosecution could succeed. If the officers then did not disclose the timing to the district attorney and if the district attorney's decision to prosecute was based on the timing of the statement, they could have been found liable for malicious prosecution. The plaintiff claimed that in fact he had made the statement in question before he had been arrested and given his *Miranda* warning. However, the jury accepted the defense position that the officers did not act with malice in providing arrest information to the district attorney's office and were not responsible for initiating the prosecution. The verdict for the defendants came down on June 30, 2004.

Another type of case that the Division handles has recently been in the news. As a result of the intense public debate over the upcoming election and international events, demonstrations and protests have given rise to a lawsuit over the balance between important First Amendment concerns and the public safety. The city is currently defending a challenge by the New York Civil Liberties Union arising from police use of metal barriers and mounted officers to maintain order during large scale demonstrations.

In addition to individual damage claims, the Division also defends against class actions seeking injunctive relief for alleged systemic problems in police enforcement and the administration of the city correctional facilities. Historically, especially in the jail setting, correction officials have been bound by consent decrees litigated in years past which prescribe how city jails are expected to operate. With the 1996 passage of the Prison Litigation Reform Act, consent decrees involving prospective relief may under certain circumstances terminate within a one or two year period, as specified in 18 USC §3626.

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The work of the Division in this area has had considerable impact, since such class actions implicate federalism and separation of powers concerns as plaintiffs attempt to use the federal judiciary to reform institutions within the purview of the executive branch of government. The U.S. Court of Appeals for the Second Circuit recently clarified the circumstances under which plaintiffs have standing to challenge law enforcement action and vest the federal court with subject matter jurisdiction.[4] Under these stringent requirements, plaintiffs must do more than show that they were subjected in the past to an official unconstitutional policy; in addition, they must show that they are, unlike the ordinary citizen, personally likely to be subjected to a real and immediate threat of future injury.[5]

Beyond standing, recent cases in the Second Circuit have also made clear that municipalities cannot be expected to guarantee against law enforcement misconduct. Municipalities can only ensure that they will maintain systems, procedures and training designed to prevent constitutional violations, and that final policy-making officials on notice of constitutional violations take steps to remedy them. To hold a municipality liable for failure to train or supervise its employees, a plaintiff must show that: (1) the plaintiff's constitutional rights were violated; (2) a specifically identified deficiency existed in the city's training or supervision of the officer who committed the violation; (3) the deficiency in the training or supervision amounted to deliberate indifference; and (4) such deficiency actually caused the alleged constitutional deprivation and that it was not caused by other reasons (such as the negligent administration of a valid training program or that one or more officers negligently or intentionally disregarded their training). *Amnesty Am. v. Town of W. Hartford*, 361 F3d 113, 131 (2d Cir 2004); see *City of Canton Ohio*, 489 US at 387.

This standard was applied in *Anthony v. City*, 339 F3d 129 (2d Cir. 2003), a §1983 claim against the city alleging failure to train or supervise. In response to a 911 call by a woman claiming that she was being attacked by a man with a knife and a gun, the police entered an apartment and found a disabled woman with Down's Syndrome without a guardian or caretaker. Police committed her to a hospital involuntarily, and she was released the next day. The woman then sued for damages, alleging that the city had an official policy of seizing and hospitalizing disabled persons and failed to train or supervise officers in how to interact with non-violent disabled individuals. On appeal of summary judgment granted in favor of the city, the Second Circuit affirmed, holding that the evidence demonstrated that the city did have appropriate training procedures in place.[6] *Anthony* also involved a second issue that is often litigated in §1983 municipal liability cases: Whose acts constitute the acts of a final policy-maker? The Second Circuit held that the police sergeant in charge of the entry into the plaintiff's apartment was not a final policy-maker simply because the sergeant had been granted, and exercised, his discretion in performing his duties.

Conclusion

The highly specialized constitutional litigation of the Special Federal Litigation Division defends the proper exercise of governmental authority which provides for the protection of citizens. In the ever-evolving body of law governing law enforcement conduct, particularly in light of current events, the division will continue to handle challenging cases of fundamental importance.

1. E.g., *United States v. Bayless*, 201 F3d 116, 132-35 (a stop that falls short of an arrest must be supported by objective reasonable articulable suspicion); *United States v. Patrick*, 899 F2d 169, 171 (2d Cir 1990) (probable cause to arrest is based on objective reasonable assessment of totality of the circumstances presented).
2. *Graham v. Connor*, 490 US 386, 396-97 (1989).
3. See *Saucier v. Katz*, 533 US 194, 201-02 (2001) ("The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.")
4. *Shain v. Ellison*, 356 F3d 211, 216 (2d Cir 2004) ("[A] federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement are unconstitutional." (internal quotation omitted)). Although *Shain* was not a class action, the same standing requirements apply in a class context. See *Simon v. E. Ky. Welfare Rights Org.*, 426 US 26, 40 n.20 (1976) ("That a suit may be a class action ...adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." (internal quotation marks omitted)).
5. *Shain* at 216 (citing *City of Los Angeles v. Lyons*, 461 US 95 (1983)).
6. *Anthony*, 339 F3d at 140.