CIVIL RIGHTS UPDATE:

A SURVEY OF RECENT FEDERAL COURT DECISIONS COVERING CLAIMS OF EMPLOYMENT DISCRIMINATION, RETALIATION, FAILURE TO TRAIN, IMPROPER HIRING AND IMPROPER SUPERVISION

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Introduction

Governmental entities today find themselves confronted with an array of legal challenges to many routine, everyday decisions. The employment arena alone is full of possible claims of discrimination, retaliation, improper hiring, improper training or supervision. This paper will present several case studies of recent claims addressing these topics. The goal is to present actual cases in a manner similar to law school. The facts will be discussed (in this instance taken directly from the case itself), and then the significant elements of the ruling will be discussed, together with legal definitions and tests that are routinely applied by the courts. Finally, a brief discussion will be presented on how to avoid similar problems in your own organizations, or lessons to take back to improve your chances of avoiding litigation.

TOPIC: EMPLOYMENT DISCRIMINATION

CASE: *Oden v. Oktibbeha County, Mississippi*, 246 F.3d 458 (5th Cir. 2001)

FACTS: From the Court's Opinion,

'In September of 1976, Jesse Oden and George Carrithers joined the Oktibbeha County Sheriff's Department. Oden worked as a part time radio operator, while Carrithers served as a part time jailer. The Department promoted Oden to full time road deputy in 1979. Carrithers received the same rank in 1980.

'Sheriff Dolph Bryan dismissed his former chief deputy in 1986. Deputy Oden inquired about the job, but Sheriff Bryan informed him that he would not fill the vacant position. At the same time, Sheriff Bryan assigned Deputy Carrithers to office duties and gave him the title "administrative assistant." Deputy Oden remained working in the field. In 1997, Sheriff Bryan promoted Deputy Carrithers to chief deputy.

'Deputy Oden filed a complaint with the Equal Employment Opportunity Commission, claiming age and race discrimination. Oden then sued Oktibbeha County, Sheriff Dolph Bryan in his official capacity, and Sheriff Dolph Bryan individually, asserting causes of action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981, and 42 U.S.C. § 1985.'

RULING: A claim of race discrimination requires the employee to prove a *prima facie* case of discrimination. The *prima facie* case requires the employee to show that he or she is in a protected class under Title VII (i.e., race, sex, color, national origin, religion, etc.), that he or she is otherwise qualified for the position, that the employer took adverse personnel action against the employee, and that members of non-protected classes who were similarly situated did not receive the adverse personnel action. Once this has been done, a presumption is created that discrimination is the reason for the adverse employment action. The employer must then come forward and present non-discriminatory, legitimate business-related reasons for its actions towards the employee. At that

point, the presumption drops out of the case, and the burden shifts back to the employee to show that the reasons put forth by the employer are a pretext, and to prove that discriminatory intent was the true basis for the employer's action. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742 (1993).

There are many issues presented in this case, despite the apparently limited facts alleged. For purposes of this paper, one of the important legal issue relates to who is the employer for purposes of assessing liability. In this case, Mr. Oden sued the Sheriff in his official capacity as the Sheriff, and in his individual capacity. Mr. Oden also sued the County. The Court takes great pains to analyze each of these Defendants and determine which one actually is the "employer" for purposes of Title VII.

The simplest of these issues is that the Sheriff cannot be liable in his individual capacity. By definition under Title VII, another person who is acting according to his job description and job duties is not personally responsible for discriminatory acts taken in the context of those official duties. Thus, an individual cannot be the "employer" unless the individual is not acting in his official capacity. Here, the Sheriff was clearly acting in his official capacity when he promoted one deputy instead of Oden, so he could not be individually liable.

A more difficult question is presented in the analysis of whether the Sheriff in his official capacity is the employer, or if the County is the employer. The Court analyzes Mississippi law, and determines that while the County does have final approval of the Sheriff's budget, the Sheriff retains all other employment options regarding his deputies. The Sheriff in Mississippi has sole authority to appoint, remove, promote, and fix the compensation of the deputies. Given this arrangement, the court concludes that the County is not the "employer" for Title VII purposes, and the Sheriff, in his official capacity only, IS the "employer."

The other significant issue in this case is the court's discussion of the evidence. The Sheriff tried to argue that Oden was not "qualified" to be promoted, because he had no experience working in the office. The argument was that certain computer skills, and certain office procedures were essential requirements for the job. The evidence produced at trial, however, showed that the prior holder of the Chief Deputy position was promoted to the position from a "road" deputy position. Additionally, Oden showed that he has completed more law enforcement training than the deputy who was promoted, and that Oden did have proficiency in many office skills, such as reviewing other deputies' paperwork. However, it was impossible for him to develop further office skills, because the Sheriff had made the earlier decision to move Carrithers into the office. It would be unfair for the Sheriff to argue that Oden was unqualified, merely because the Sheriff had decided to allow someone else to become qualified. Finally, the Sheriff made a strategic error in his testimony. He testified that if he could have filled two chief deputy positions, he would have put Oden in one o them. This is certainly an implicit statement that Oden had the ability to do the job.

Given these fallacious arguments, the court concludes that the jury could have believed the employer's stated rationale was a pretext, and that intentional discrimination was present in the

decision to promote a white deputy over Oden, an African-American.

LESSONS LEARNED: One important lesson is that the criteria for promotion should be clearly spelled out, and should be consistently applied. The employer exposes itself to a finding of pretext when it makes up qualifications on the spot, or when it does not apply the criteria to every decision that is made. The other significant lesson relates to keeping these job criteria fundamentally fair. Do not establish criteria that guarantees a position to any particular employee. Again, these can support a jury inference of pretext.

TOPIC: EMPLOYMENT DISCRIMINATION/RETALIATION

CASE: *United States v. Matagorda County, Texas*, 181 F.Supp2d 673 (S.D. Tex. 2002)

FACTS: From the Court's Opinion,

'Christopher Jordan ("Jordan"), an African-American, began working as a sheriff's deputy-jailer for the Matagorda County Sheriff's Department ("the Department") on October 7, 1995. [FN1] In June 1996, Jordan's direct supervisor, Sgt. Wayne O'Brien ("O'Brien") was having trouble understanding several African-American inmates and said aloud, in front of Jordan, "I don't understand nigger lip." Upset by O'Brien's comment, Jordan complained to O'Brien's direct supervisor, Capt. Robert Dearing and consequently, Capt. Dearing orally reprimanded O'Brien. Although O'Brien stopped making such comments in the presence of Jordan, Gwen Galloway, one of Jordan's co-workers at the jail avers that she "often heard Sgt. O'Brien call Mr. Jordan, behind Mr. Jordan's back so that Mr. Jordan could not hear, things such as 'lazy nigger' and 'stupid nigger.' " In October 1996, Jordan requested and was granted a transfer to another shift, where he was no longer supervised by O'Brien.

> FN1. Jordan was hired by Sheriff Kilgore. On January 1, 1997, Sheriff Kilgore was replaced by Mitchell.

'Although O'Brien did not supervise Jordan directly over the course of the next two years, the two men encountered each other frequently due to the small size of the Department. During this time, O'Brien routinely berated Jordan and publicly stated that Jordan was "not smart enough" to work at the Department. [FN2] Troi Johnson, who worked in the jail with Jordan, avers that "Sgt. O'Brien's antipathy toward Mr. Jordan was so intense that it became almost a dark joke between jail employees" and that O'Brien routinely called Jordan, but not anyone else in the Department, a "picket bitch." In February 1999, O'Brien was promoted to Captain. As part of his new duties, Capt. O'Brien once again supervised Jordan. In the five weeks following O'Brien's promotion, Jordan was reprimanded on two occasions, one of which included a three-day suspension. [FN3]

> FN2. There is some indication that Jordan's troubles during this time period were not solely with O'Brien. Jordan alleges that Mitchell implicitly threatened to fire him in August 1998 because Jordan complained to Mitchell about inappropriate

comments made to him by Capt. Dearing. According to Jordan, Mitchell became infuriated when Jordan indicated that he would take legal action if Mitchell did not take steps to stop the improper treatment.

FN3. Prior to O'Brien's promotion, Jordan had never been suspended from work and had been disciplined only three times in over three years of working at the Department.

'In March 1999, Jordan filed a charge with the EEOC complaining of racism in the Department. On March 29, 1999, the EEOC sent a letter to Mitchell, notifying him of Jordan's charges. During the following two weeks, Jordan was reprimanded on two occasions and docked one day of holiday leave. Also within the two weeks after Jordan's filing of the EEOC charge, two inmates (Pete Martinez and John Silva) claimed that Jordan had illegally provided them with alcohol. After an internal investigation, which included undercover tape recording and the collection of physical evidence, Mitchell fired Jordan on April 21, 1999. [FN4] Jordan subsequently amended his EEOC complaint to add a claim of retaliation. Soon after, the Department referred the charges against Jordan to the local District Attorney's office for prosecution. A grand jury issued an indictment against Jordan and Jordan remains under criminal indictment today.

FN4. The parties disagree as to what occurred when Jordan was confronted with the charges against him. Jordan claims that he denied the charges, while Mitchell asserts that Jordan failed to deny them as such. Mitchell contends that Jordan's alleged failure to deny the charges was one reason why Jordan was fired.

'Four weeks later, John Silva also accused a white Department deputy, Glen Davis, of illegally providing him with alcohol and marijuana. The Department's subsequent investigation of Davis differed from the Jordan investigation in several ways: (1) Davis was promptly informed that he was under investigation, but Jordan was not; (2) Davis was polygraphed (and scheduled for a follow-up polygraph after the polygraph examiner concluded that he was not telling the truth), while Jordan was never polygraphed at all; and (3) the Department made an undercover audiotape of Davis *after* telling Davis that he was under investigation, but made an undercover video of Jordan *before* telling Jordan of the charges against him. Davis was not fired as a result of the investigation into his conduct and the charges against Davis were not referred for prosecution to the District Attorney. The investigation into Davis was closed in June 2000.

'In January 2001, two EEOC investigators visited Mitchell and questioned him about the allegations that had been made against Davis. Mitchell subsequently ordered Davis to take the second polygraph. Shortly before his follow-up polygraph was to begin, Davis quit. The Department filed a form with the Texas Commission on Law Enforcement Standards and Education indicating that Davis had resigned. The form made no mention that Davis had resigned while under suspicion of illegal conduct. The same form that was filed regarding Jordan indicated that Jordan had been terminated for illegal conduct, including the acceptance of bribes.

'Based upon this factual scenario, the United States of America ("United States") filed this lawsuit alleging two independent violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq*. First, the United States alleges that Defendants discriminated against Jordan by subjecting him to disparate discipline. Secondly, the United States alleges that Defendants violated Title VII by retaliating against Jordan because he complained to Department officials about what he perceived to be discrimination and because he complained about similar problems to the EEOC. Jordan subsequently intervened, adding claims under 42 U.S.C. § 1983, 42 U.S.C. § 1981 and the Omnibus Crime Control and Safe Street Act of 1978.'

RULING: As is readily apparent, this case presents similar issues to *Oden*. However, some different wrinkles appear in this case. As an initial matter, the court must determine under Texas law now whether the Sheriff or the County is the "employer" for Title VII purposes. Surprisingly, the court initially rejects the *Oden* analysis, because Texas law is different than Mississippi law regarding the ultimate responsibility for employment decisions regarding deputies.

As discussed by the court, in Texas the County retains the right to fix the salaries of the deputies, and controls how many deputies the Sheriff will have in a given year. Because certain economic controls are thus retained by the County, there is a hybrid employment relationship between the Sheriff, the County, and the deputies. The court then analyzes other Fifth Circuit cases, and determines that in a hybrid setting, the party that actually controls work assignments, work schedules, means and methods of carrying out job duties, and the right to hire, fire, discipline, and promote is the actual "employer" for Title VII purposes. Given this analysis, the Sheriff is held to be the "employer" in Texas, not the County.

Jordan made several clams of violations of Title VII. First he argued that he was the victim of discrimination in that he was disciplined differently than white deputies, prior to his termination. He also alleges that he was denied a promotion for discriminatory reasons, and finally he argues that he was retaliated against for filing an EEOC complaint. The court dismisses the first two arguments, but supports Jordan on the retaliation claim.

Regarding the unfair discipline, the court notes that writing Jordan up, and suspending him with pay are not "ultimate employment decisions." Title VII only protects employees from "ultimate employment decision", thus he cannot make a claim for violation of Title VII based on the simple disciplinary issues presented before his termination. "Ultimate employment decisions" are those decisions that affect hiring, granting leave, termination, promotion, and compensation. Unless one of these issues is affected by the employer's actions, Title VII is not implicated.

The court rejects the failure to promote claim, because Jordan did not prove *prima facie* his case. He failed to show that any particular deputies were promoted over him. Nor can he show that the unnamed deputies who were allegedly promoted instead of him were not members of a protected class. Given this lack of proof, Jordan has no claim for failure to promote.

The court then turns to the retaliation claim, and finds merit to the claim. A claim for

retaliation under Title VII has several elements, similar in nature to the test for discrimination under Title VII. In Title VII retaliation cases, an employer may only be liable if it has retaliated against an employee in an ultimate employment decision. *Mattern v. Eastman Kodak Co*., 104 F.3d 702, 707 (5th Cir. 1997). However, other types of retaliation not rising to the level of "ultimate employment actions", such as moving an employee to a different office, bad treatment by a supervisor, and poor job evaluations, may be seen as evidence of retaliatory intent. The key issue here is whether the alleged act of retaliation is connected in any way to the employee's filing of a Title VII complaint.

Because it is only rarely that an employer openly admits to such acts of retaliation, the issue of causation is usually proven by circumstantial evidence. Here, the court concludes that because he was terminated a very short time after filing his claim of discrimination with the EEOC, a jury could find a causal connection present. The burden then shifted to the Sheriff to explain in non-discriminatory reasons why he terminated Jordan. The argument presented was that the Sheriff believed that Jordan had violated departmental policy and state law by providing alcohol to inmates. This is certainly a legitimate, non-discriminatory reasons for terminating a deputy. However, the Sheriff in this case made one mistake. He was inconsistent. There was another officer who was alleged to have provided alcohol to inmates, and he was not terminated. Because of this inconsistency, the court concludes that a jury could find that retaliation was intended against Jordan.

LESSONS LEARNED: Again, the primary lesson here is that the employer must be consistent. It helps when the employee does not even make out their *prima facie* case on some claims, but one inconsistency in disciplining employees can lead to a jury trial about what was truly motivating the employer. This is especially true when the employee has recently filed a claim of discrimination under Title VII.

The other significant issue in this case is the difficulty the court had in determining who is the "employer" of the Sheriff's deputies under Texas law. This court seems to have the analysis correct, but so long as the Commissioner's Court retains certain economic controls over the deputies, the issue is not as simply resolved as it was in *Oden* when applying Mississippi law.

TOPIC: RETALIATION

CASE: *Keenan v. Tejeda*, 290 F.3d 252 (5th Cir. 2002)

FACTS: From the Court's Opinion,

'Keenan and Przybylski worked for several months in 1995 as reserve deputy constables for Precinct Five of Bexar County. During this time, Keenan and Przybylski observed on-duty deputy constables serving notices to vacate premises and providing private security services. In return for his deputies' services, Constable Ruben Tejeda would collect a small fee. Keenan and Przybylski believed these practices were unlawful, a view confirmed by two Texas Attorney General Letter Opinions. [FN1]

FN1. Op. Tex. Att'y Gen. No. 97-026 (1997); Op. Tex. Att'y Gen. No. 97-069 (1997). Both opinions were issued in response to queries from the Bexar County Criminal District Attorney.

'After resigning their positions, Keenan and Przybylski reported these activities to the Bexar County district attorney and a San Antonio television station, KENS-TV, which aired a highly critical, six-part investigative report entitled "Constable Cash" in November 1996. Richard Keenan appeared in the "Constable Cash" series as a disguised informant. Despite the attempt to conceal Keenan's identity, Constable Tejeda and Deputy Constable Joseph Martinez apparently believed (according to the chief deputy constable) that Keenan and Przybylski were responsible for exposing the improper practices in the constable's office. Keenan and Przybylski allege that Constable Tejeda and his deputies began harassing them in retaliation for exercising their First Amendment rights. The plaintiffs focus on two incidents.

'First, in June 1997, Deputy Constable Martinez stopped Przybylski's car as Przybylski and Keenan were driving down a heavily-traveled street in San Antonio at 11:45 p.m. on a Sunday night. Chief Deputy Constable Michael Lacey stated in his affidavit that he drove to the scene because he had heard a deputy say over the precinct's radio that he had "spotted Keenan and Przybylski," and Deputy Martinez had said, "Let's get them." When Lacey arrived, Martinez and three other deputies were holding Keenan and Przybylski at gunpoint. [FN2] Constable Tejeda arrived shortly thereafter with several other deputy constables and four officers from the San Antonio Police Department. The constables detained Keenan and Przybylski for approximately 30 minutes to an hour and cited Przybylski for driving without a rear license- plate light. The police report suggests that Przybylski showed the officers that the light was working, but Deputy Martinez wrote in his report that the "light was inoperable at the time of the offense." The traffic ticket was later dismissed.

FN2. Martinez and the other deputy constables have stated in affidavits that they observed a traffic violation, that they did not know who was in the car until one of the deputies asked Przybylski for his driver's license, and that they never drew their weapons. But, given the procedural posture of this case, we view the evidence in the light most favorable to the plaintiffs.

'Second, in December 1997, Keenan attempted to videotape Constable Tejeda using part-time constable employees illegally to provide security services at a private facility. Constable Tejeda noticed Keenan and ordered Deputy Constable Martinez to arrest him on a misdemeanor "deadly conduct" charge. Constable Tejeda maintains that Keenan pointed a gun at him. Keenan admits carrying a 9mm pistol in the glove box of his car, but he insists that he was pointing a video camera, not a gun. Keenan was tried on the deadly conduct charge and found not guilty. [FN3]

FN3. Keenan and Przybylski also allege that, at several times during 1997 and 1998, Constable Tejeda and Deputy Constable Martinez ordered or encouraged other employees of Precinct 5 to file false or misleading police reports involving Keenan and Przybylski. Most of these reports appear to have been filed in

connection with the traffic stop and deadly conduct incidents. The only other evidence of false statements constitutes inadmissible hearsay.

'In 1999, Keenan and Przybylski filed this § 1983 action against Constable Tejeda, Deputy Constable Martinez, and Bexar County. The plaintiffs alleged that the defendants retaliated against them for speaking out against corruption in the constable's office. The plaintiffs also asserted that the defendants' actions denied them due process and equal protection of the law.'

RULING: Too many issues are presented in this case to address them all in this discussion. For purposes of this paper, the primary issues to discuss relate to the issue of whether government officials can retaliate against private citizens (as opposes to other government employees) for exercising their constitutional right to free speech. The other important issue is whether the chief constable of a precinct can be said to be acting on behalf of the County.

As discussed in the *Matagorda County* case above, the elements of a retaliation claim affecting a government employee are pretty straightforward. This case presents the somewhat more subtle issue of whether a government officials can retaliate against a private citizen for the private citizen's exercise of their constitutional right to free speech. *Keenan* presents the first occasion in Fifth Circuit case law where a private citizen accuses the government of trying to "chill" his or her exercise of constitutional rights. The Court adopts a test developed in other Circuits which is similar to the traditional retaliation claim.

The elements of a private citizen's claim for retaliation against a government official are: 1) the private citizen was engaged in constitutionally protected activity; 2) the defendants' actions causes them to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and 3) the adverse actions of the defendants were substantially motivated against the private citizen's exercise of their constitutionally protected rights. This *Keenan* case turns largely on the second issue.

The primary argument advanced by the constable is that the alleged acts of retaliation are so trivial that they cannot rise to the level of a constitutional violation. This is a variation on a common argument in employment-based retaliation claims. Oftentimes the governmental employee can prevail by showing that the supposed acts of retaliation did not affect any "ultimate employment decision", as discussed in the *Matagorda County* case, above. Here, the constable tries to argue that merely engaging in unwarranted traffic stops and writing tickets for minor or nonexistent infractions are not severe actions to "chill the activities of a person of ordinary firmness". As you might expect, the Fifth Circuit was not terrifically moved by this argument, and concluded that the constables' actions were in fact sufficiently severe enough to chill the desire of an ordinary person to continue pointing out corruption. Ultimately, the Fifth Circuit reversed the trial court's judgment in favor of the defendant.

The second significant issue for county officials in this case is the discussion towards the end of the case about whether Bexar County itself could be held liable and responsible for the actions

of the constable. This is a variation on the discussion in the Title VII cases on who is the "employer". Here the issue turns on the issue of whether a constable sets policy for the County.

In *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018 (1978), the Supreme Court held that in order to hold a governmental entity liable for allegedly violating a party's constitutional rights under 42 U.S.C. § 1983, the aggrieved party must show that the alleged violation occurred as the result of a formal policy of the governmental entity or the actions of someone who is a "policy maker" for the governmental entity. Here, the plaintiffs argued that the constable is a policy maker for the County. The Fifth Circuit had previously analyzed Texas law, in the case of *Rhode v. Denson*, 776 F.2d 107 (5th Cir. 1985), and concluded that under Texas law, a constable does not possess policy making authority for the county, in the area of law enforcement. As the court said in *Rhodes*, "We are unpersuaded that a constable of a Texas county precinct occupies a relationship to the County such that his edicts or acts may fairly be said to represent official county policy." Based on this earlier ruling, the court refused to say that the county could be held responsible under § 1983 for the actions of the constable. The constable may be liable himself for his own unconstitutional acts, but they cannot be inferred to the county itself.

LESSONS LEARNED: Two primary issues to take away from this case. First, it is possible for a governmental actor, particularly one involved in law enforcement, to violate the constitutional right to free speech of a private citizen. It is never a strong argument to pin your entire case on whether or not the retaliatory acts you took are severe enough to chill someone's right to free speech. It is a legitimate argument, no doubt, but it is not something you generally want to have to argue to a jury.

The second issue of note is that generally a constable's actions will not impose liability on the county itself. Only if the constable is acting pursuant to official county policy can the county be found liable.

TOPIC: RETALIATION

CASE: *Hitt v. Connell*, ___ F.3d ___ (5th Cir. 2002) (Westlaw Citation: 2002 WL 1764149)

FACTS: From the Court's Opinion,

'Harold Merritt Hitt was employed as a deputy constable in precinct 2 of Bexar County from 1993 until March 1997, when he was fired by Constable Connell. Hitt alleged, and a jury found, that his employment was terminated because Connell disapproved of Hitt's involvement with two affiliated labor unions, the Alamo Area Peace Officers' Association and the Texas Conference of Police and Sheriffs ("TCOPS").

'The dispute between Connell and Hitt began in October 1995 when Connell ordered his

deputies to start reporting to the office 15 minutes before their shifts were scheduled to begin. Deputy Hitt, who was serving as the secretary of the local union, wrote to TCOPS for advice about getting paid for these extra 15 minutes. Connell learned of Hitt's letter and called a general meeting of his deputies, one of whom surreptitiously tape-recorded what was said. Connell reiterated that his deputies would not be paid for the 15 minutes before their shifts, but his main point was that salary grievances should not be aired outside the constable's office. Connell suggested that deputies who continued to complain to the union were in danger of losing their commissions.

'Three deputies--Ray Mullins, Joe Algueseva, and Robert Whitney--testified at trial that Constable Connell spoke to each of them privately not long after this meeting and told them that he would not tolerate union activity in his office. Each deputy testified that Connell referred specifically to Hitt and said that he intended to fire Hitt because he was a "troublemaker." One of the deputies, Ray Mullins, served as president of the local union. Mullins tape- recorded a conversation in which Connell said several times that they would have a "running gun battle" if Mullins did not quit the union. Connell threatened to "play dirty" and said he would start by taking away Mullins's $500 monthly car allowance. During this recorded conversation, Connell observed in passing that he could fire Hitt with impunity. [FN1]

> FN1. Mullins nevertheless remained active in the union, and Connell fired him in early 1996. Mullins appealed the decision, the Bexar County Civil Service Commission ordered that Mullins be reinstated, and he was assigned to a new precinct.

'Connell fired Hitt in March 1997. Connell testified that he harbored no ill will toward the deputies who were active in the union. Moreover, Connell insisted that Hitt would have lost his job regardless of his union activity because Hitt had made a "bomb threat" in a January 1997 telephone conversation with his immediate supervisor, Deputy Robert North.

'The gist of the telephone conversation is not in dispute. Hitt was angry that North had assigned a first-year constable to patrol traffic in a certain neighborhood. In his account of the conversation, which was written approximately three weeks after the telephone conversation, Deputy North wrote:

> "Sgt. Hitt stated, was I trying to get him (Sgt. Hitt) in trouble or fired. Sgt. Hitt stated, he knew what was going on and that I (Sgt. North) was fixing to be in the war....
> Sgt. Hitt stated, that when the bomb went off with Horn (Asst. Chief Horn) that it might get my (Sgt. North) legs also.
> As Sgt. Hitt and myself (Sgt. North) are both Vietnam veterans, it could have meant that the bomb, when it went off, would take out Asst. Chief Horn, and possibly my (Sgt. North) legs, as we both had seen in Vietnam.
> This statement could have only meant to be taken figuratively. But I don't know this for sure. Sgt. Hitt's tone of voice was filled with a lot of anger."

'Hitt concedes that Deputy North's account of the conversation is generally accurate. Hitt argues, however, that violent figures of speech were used regularly around the office (e.g., Connell's "running gun battle") and that "the war" and "the bomb" referred to an ongoing criminal investigation of the constable's department.

'Sergeant Gerardo De Los Santos of the Texas Rangers testified at trial that he had been investigating the constable's office since Deputy Mullins had contacted him in December 1995. At the time of the telephone conversation between Hitt and North, Sergeant De Los Santos was completing his investigation and had decided that there was sufficient evidence of retaliation and discrimination to file a report with the Bexar County District Attorney's Office. (He interviewed and took statements from Hitt in January and February of 1997, and then filed his report in late February.)

'Deputy North admitted at trial that he had never really believed that Hitt was making a legitimate bomb threat. Consequently, North waited three weeks before informing Constable Connell and Chief Deputy Chuck Horn of the conversation, and one reason why he submitted the report was that he had been ordered "to look for things to write Hitt up about." Then, after North submitted the memorandum quoted above, Chief Deputy Horn instructed North to revise his memo and omit any suggestion that Hitt's reference to a "bomb" should be taken figuratively.

'In February 1997, Constable Connell delivered a proposed notice of termination to Hitt. Citing the telephone conversation between Hitt and North, Connell wrote that such "unprofessionalism ... cannot and will not be tolerated." On March 5, Connell informed Hitt that his employment was terminated. Hitt appealed his dismissal to the Bexar County Civil Service Commission, but the commissioners who heard the appeal voted to uphold Constable Connell's decision.'

RULING: This is the second case decided in four months by the Fifth Circuit alleging retaliation by a Bexar County constable's office. This case involves a different constable's office, and is somewhat more traditional in that it involves a claim that an employee of the constable's office suffered adverse employment action as a result of his exercise of his constitutional rights.

Generally, this case involves a claim by a former deputy constable that he suffered retaliation for exercising his first amendment right to association, *i.e.*, joining a union and taking actions in the workplace as a union member. The general rule is that an employee's right to freedom of association, like the right to free speech, must be weighed against the disruption to the workplace, as an initial matter. The law understands that while employees have the right speak freely, and have the right to associate together in a union, that right cannot be exercised in such a manner as to make it difficult or impossible for the work of the government to be completed. Besides this "balancing" test, the court must also look to see if the protected activity is a "substantial or motivating factor" in the employer's decision to take adverse employment action.

This case involves a decision to terminate an employee. Because Bexar County is a civil

service county, the constable's decision to terminate this employee was reviewed by the civil service commission. The primary argument in the case has to do with the constable's argument that his motivation is irrelevant, because the civil service commission upheld the termination, and that body had no retaliatory intent. Constable Connell's argument is that because the civil service commission was the actual "decision maker" in this employment action, only it's motivations are at issue, not his own. However, the Fifth Circuit does not accept this argument.

The court decides that the civil service commission does not make the final decision. Analyzing Texas law, the Fifth Circuit concludes that the civil service commission in Texas merely reviews and approves, or reverses and modifies the employment action taken by another county official. The commission does not initiate the employment action, nor does it have authority to generally oversee the employment of the county's employees. It is a review board, not a final decision maker. The constable did not *recommend* a course of action to the civil service commission, like a school superintendent recommends actions to a school board. The constable imposes the discipline (up to and including termination), and then it is up to the employee to decide whether to invoke the commission to review the action.

LESSONS LEARNED: Obviously, the effort to invoke the civil service commission as an intervening decision maker would make it easier for a county supervisory to mask retaliatory employment decisions. However, prior to this ruling, it would have seemed a decent argument to make that if the civil service commission supported the decision, the action must have been appropriate. The problem for this argument has more to do with the nature of the civil service laws in Texas than it does with logic.

TOPIC: IMPROPER HIRING/FAILURE TO TRAIN OR SUPERVISE

CASE: *Butler v. Nance*, 2002 WL 1042133 (N.D. Tex. - May 21, 2002)

FACTS: From the Court's Opinion,

'Plaintiffs allege: On or about January 28, 2000, at approximately 12:32 a.m., the Azle police department attempted to stop Butler's vehicle for failing to maintain a single lane of traffic and for traveling forty-eight miles per hour in a forty-mile-per-hour zone. Butler did not stop and continued in the direction of the City, where she lived. Defendant Shawn Nance ("Nance"), a police officer employed by the City, joined in the pursuit of Butler. Nance took over control of the pursuit and parked his vehicle across the roadway to prevent Butler from passing. Butler drove at a low rate of speed around Nance's vehicle. Nance rejoined the low-speed pursuit, again placing his vehicle across the roadway. That time, when Butler attempted to drive around Nance's vehicle at a low rate of speed, Nance opened fire on plaintiff's vehicle, firing four .40 caliber bullets into the cabin of Butler's car, striking her in the head and causing severe, life-threatening, and debilitating injuries.

At the time Nance fired upon her, Butler's car was traveling at less than ten miles per hour and presented no danger to any person.

'Plaintiffs further allege: In 1997, Nance received his license as a basic peace officer from Tarrant County Junior College. He was employed by the Azle police department. During the course of his recruit training program, Nance was consistently at or below the minimum acceptable standards established for police officers in that program. On May 8, 1998, Nance was terminated from the Azle police department. Approximately six months after being fired, Nance was hired at the neighboring City police department. City had a policy of employing officers without first performing background checks. Although records of Nance's performance at the Azle police department were available, City did not inspect them. Moreover, after hiring Nance, City did not provide him any further training. During his tenure, City received numerous complaints about Nance, but failed to take any corrective action.

'Plaintiffs sue City under 42 U.S.C. § 1983 and under the Texas Tort Claims Act, Tex. Civ. Prac. & Rem.Code § 101.021, seeking damages arising out of Nance's shooting of Butler.'

RULING: This is another fairly recent case that explains and defines the standard for § 1983 liability very well. The facts of the case are egregious. It is difficult to argue that a low speed chase such as this should result in a police officer shooting the driver. There is a saying among lawyers that "bad facts make bad law", meaning that if the facts are ugly enough, the judge or the jury will go out of their way to find somebody liable. On the other hand, in federal court the standards of liability have been refined to such a degree that even with bad facts, the governmental body itself may escape liability.

This case turns on the issue of what a reasonable hiring practice turns out to be. Ms. Butler argues that merely because Mr. Nance had been fired from the Azle police department, he should not have been hired by the City of Pelican Bay. Unfortunately for her case, the Supreme Court has set a fairly high standard for liability for improper hiring. In the case of *Board of Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 117 S.Ct. 1382 (1997), the Supreme Court held that, "Only where adequate scrutiny of an applicant's background would lead a reasonable policy maker to conclude that the plainly obvious consequence of the [hiring] decision . . . would be the deprivation of a third party's federally protected right can the official's failure . . . constitute 'deliberate indifference'." In this case, the court's analysis shows the level of refinement and subtlety involved in this standard. A finding of culpability must depend on a finding that "*this* officer was highly likely to inflict the *particular* injury sustained by the plaintiff."

Applying this standard, the court looks to what information a reasonable inquiry into Mr. Nance's background would have shown. It is not sufficient to merely argue that he'd been fired from a prior police job, or that in hindsight it seems likely or probable that he would someday use excessive force. Rather, the issue is whether a review of his prior employment history would show a substantial likelihood that he would have used excessive force in stopping a vehicle under similar circumstances. Reviewing the employment records available from Azle, the court concludes that

there is no evidence to argue that a reasonable employment official would have known that Mr. Nance would shoot to stop a low speed chase. By no stretch was Mr. Nance a good employee at Azle, based on the records available, but there is no evidence that he would use such unreasonable force to stop a low speed chase.

On the other hand, Ms. Butler also argued that the City failed to train and supervise Mr. Nance properly. On this claim, the evidence was much more favorable to the injured woman. The evidence established that on a prior occasion, Mr. Nance had taken an individual involved in a routine traffic stop into custody, with his weapon drawn. When the person arrested complained to the police chief, he merely stated that, "I stand behind my men." Ms. Butler had a prior complaint against Mr. Nance, in which her son was thrown to the ground and beaten by Nance. She complained to the Mayor, who testified that he told the Chief to investigate, but no investigation ever took place. Also, a few weeks before shooting Ms. Butler, Mr. Nance had shot into the ground behind a citizen who was walking along a city street near an abandoned vehicle who refused Mr. Nance's order to freeze and get down on the ground. The Chief later praised Nance by telling him that other officers probably would have shot the individual, not merely fired near him.

Given these events, the court concludes that Ms. Butler raised a sufficient issue to let the jury decide whether the City was properly supervising and training Mr. Nance. High level City officials were aware of the somewhat edgy character demonstrated by Mr. Nance in his official duties, and this issue is preserved for trial.

LESSONS LEARNED: Although the standard for liability for improper hiring is set very high, it is imperative that all law enforcement agencies conduct thorough and comprehensive background checks with former employers of candidates for employment. Mr. Nance's record at Azle included issues such as lying to cover up violations of official policy, arresting persons without first confirming the existence of a warrant, threatening drivers of cars involved in traffic stops if they did not consent to searches of their vehicles, and ultimately was terminated for failing to make it through Azle's probationary period. Additionally, if you do hire someone with this sort of background, you must ensure that proper training and supervision takes place, especially when complaints are made regarding such an officer.

TOPIC: FAILURE TO TRAIN/FAILURE TO SUPERVISE

CASE: *Abdeljalil v. City of Fort Worth*, 55 F.Supp.2d 614 (N.D. Tex. 1999), *affirmed* 234 F.3d 28 (Table)(5th cir. 2000)

FACTS: From the Court's Opinion,

'Prior to October 19, 1997, Shirley worked in the evidence room of the Fort Worth Police Department ("police department") as a civilian employee. There, she obtained by means of the computer she used in her work personal and confidential information about Khaled and Laurie, including their home address, unpublished home telephone number, and Khaled's full name, which

she provided to her son, Duncan Walker ("Duncan"), Laurie's ex-husband and the father of Marcus and Sarah. On October 19, 1997, Duncan used this information to locate the home of Khaled and Laurie. Duncan then murdered Khaled using an 8-10" folding pocket knife that Shirley had stolen from the police department evidence room and given to Duncan. Laurie and the children witnessed the murder. Thereafter, Duncan attacked Laurie, Marcus, and Sarah.

'Plaintiffs assert their claims against defendants pursuant to 42 U.S.C. § § 1983 (" § 1983") and 1988 ("§ 1988") for violations of the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution, and also assert a right of action under the Texas Tort Claims Act, and negligence, gross negligence, bystander recovery, and negligent infliction of emotional distress claims pursuant to Texas law. Plaintiffs seek to recover actual damages, punitive damages, and attorneys' fees.'

RULING: This is one of those cases where it appears an overzealous lawyer attempted to turn a personal tragedy into a windfall. There is little evidence to support any of the claims against the City, yet the case ended up in Federal Court in Fort Worth nonetheless. As discussed above in the *Keenan* case study, above, an official policy must usually be the moving force behind the constitutional deprivation. Obviously, Fort Worth does not have an official policy of allowing its police department employees to use their position to carry out hits on their enemies.

However, the Supreme Court in *Monell*, *supra*, also held that a well-established custom of the governmental entity in question can also suffice to impose liability under § 1983, if that custom is the cause or "moving force" behind the constitutional deprivation. The aggrieved family in this case tried to argue that Forth Worth PD has a history or custom of laxity in hiring, training, and supervising its employees. The City defended by showing that there was nothing in the background of this woman to indicate that if she was hired, the "plainly obvious" result would be that she would misuse her access to information and then steal a weapon from the evidence room, give it to her son, and allow him to murder someone. Nor was there anything in her employment relationship with the City to indicate that she needed additional training or supervision to avoid such a tragedy. Finally, Plaintiff did not establish, on the record before the court, that there was some custom or long-established practice of the Department to indicate to the City Council or her superiors that such actions would be acceptable or tolerated.

To the contrary, the City showed it performed the relevant background checks on this employee, which showed nothing unusual. The City showed it had policies in place, which had been identified and given to Ms. Walker, that prohibited misuse of computers and other equipment for personal reasons. The City showed that it had policies in place to keep items stored in the evidence room, including a policy of periodically cataloguing the contents of the evidence room to ensure that nothing had been removed without going through proper channels.

In the face of these policies, which were in place and followed, there was simply no opportunity for the family of the murdered victim to try and show custom or practice that contravened the policy. Thus, the court dismissed the suit, and was upheld in doing so by the Fifth

Circuit.

LESSONS LEARNED: It is essential to have effective policies in place. Not only do they tell employees what to do and how to do it, they can also be used to disprove the existence of customs or policies that could lead to risk of liability. Compliance with these various policies should also be demonstrated, to show that any deviation from the policies is not approved of or tolerated within the organization. In this way, it will be difficult indeed for anyone to make out a § 1983 claim.