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IN PRACTICE

"Failure to Train" Lawsuits against Departments of Human Services

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Of the legal theories pursued against state departments of human services and their child welfare agencies,[1] "failure to train" theories are often pled but rarely prevail. The theory is often raised in boilerplate negligence-based allegations borrowed from analogous state law actions.

However, many plaintiffs discover that human services departments are routinely documenting required training. When this reality is coupled with the often-nebulous causal connection between generalized training and any specific outcome, plaintiffs face hurdles when pursuing such claims.

This article focuses on case law and statutory requirements for establishing federal 42 U.S.C.S. § 1983 liability against departments of human services under a failure to train theory.

Section 1983 Pleading Requirements and State Action

Plaintiffs seeking to impose liability on departments of human services under § 1983 must prove that action taken under an official policy caused their constitutionally-protected injury.[2] To prevail on a §1983 claim, a plaintiff must show a person acting under color of state law deprived them of a right protected by the Constitution or laws of the United States.[3] A private party may be deemed a "state actor" if the party's actions are "fairly attributable to the state."[4] Each federal circuit differs in how it determines if a defendant is a state actor. The Sixth Circuit, for example, applies three tests:[5] (1) "public function" test; (2) "state-compulsion test"; and (3) "nexus" test.[6]

When a government agency is sued, the state action analysis is straightforward. When suing departments of human services, plaintiffs frequently argue the department's inadequate training or failure to train directly or indirectly caused their injury.[7] To effectively pursue such a theory, a plaintiff must identify an official policy that violated the plaintiff's constitutional rights. This type of a claim represents the polar opposite of a negligence claim. In a negligence claim, the plaintiff identifies a standard of care and sets about proving the agency delivered substandard care. In a § 1983 claim, however, it is the defendant's proper observance and compliance with the official policy that gives rise to the cause of action.

Thus, in a failure to train situation, a plaintiff would try to show an official policy of the department of human services was constitutionally inadequate. Put another way, a constitutional violation for which redress is sought must have occurred because department employees followed its official policy.

Weaknesses

Whenever a tragedy happens to a child in the child welfare system, an attorney evaluating legal options must consider whether those responsible for the child's well-being were adequately trained. For example, following an injury to or death of a foster child, a foster licensing agency may be accused of failing to train its employees or the foster parent. If a child suffers harm when a CPS worker is involved in the child's case, one aspect of evaluating

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whether the CPS worker acted appropriately is examining whether the worker was properly trained to handle the harmful situation.

The "failure to train" argument fails or is not seriously pursued in litigation for several reasons:

Ample Training Records. Records of department employees' training are often required for other purposes, such as justifying expenses and ensuring audit readiness. When produced, these records tend to show, contrary to a plaintiff's position, the agency provided significant preservice and ongoing training, various teaching methods were used, and that training records were retained.[8] Such records inject inconsistency into a plaintiff's case, as the phrase "failure to train" suggests a lack of diligence, while producing meticulous training records proves otherwise.[9]

Proving Causation. Causation is also a serious problem when a plaintiff cannot identify training deficiencies or evidence showing how different training would have prevented the alleged constitutional violation. To the contrary, a plaintiff would be required to show the official policy of the agency somehow caused employees to systematically obtain inadequate training, while at the same time acknowledging the same employees were receiving some training.

As one court noted, "[M]ore than a caseworker's omission in a single instance is necessary, however, to establish a policy or custom of inadequate training."[10] As the U.S. Supreme Court[11] noted: "[A]dequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable."

In another § 1983 case, the Supreme Court held that "…a municipality's failure to train its employees in a relevant respect must amount to deliberate indifference to the rights of persons with whom the untrained employees come into contact. Only then can such a shortcoming be properly thought of as a city policy or custom that is actionable under § 1983."[12]

It can be extraordinarily difficult to show an agency was deliberately indifferent when the agency required employees to receive training and tracked it by keeping records. This argument is not persuasive because it amounts to a subjective judgment concerning the amount or type of training rather than suggesting the policy is constitutionally inadequate.

Proving State Action. Finally, whether a private corporation or individual is a state actor for § 1983 purposes can be hard to prove. With the current trend toward privatizing many services previously delivered by government agencies, courts have been inconsistent.[13] Because state action is an essential element of the cause of action under §1983, an adverse finding on the state action element is likely to deprive the U.S. District Court of subject matter jurisdiction[14] and result in either dismissal or remand to the state court.

Strengths

Theories based on a "failure to train" are strongest when it is clear the department did not adopt a training program. In such cases, the department was deliberately indifferent to the possibility of a constitutional violation and the lack of training clearly caused the constitutional violation.[15] In other words, a plaintiff must be prepared to prove department staff were aware of a problem that should have been the subject of training but consciously chose to disregard that need.

Justice White, in *City of Canton v. Harris,* wrote: "…it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and that inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need (at 390)."

Practice Tips

Gather Training Records

Because of the tension between competing liability theories that tend to pit negligence against § 1983, it is important to gather as much training information pre-suit as possible. Although subpoena power is frequently not available before filing suit,[16] there are other ways to obtain training records.

FOIA requests. If the case involves a true state entity, as most do, an attorney can issue a Freedom of Information Act [FOIA] request and attach a release for private information to avoid redacting the documents. Even if FOIA does not directly apply to the individual or agency involved, the agency may be required to provide proof of training to a state entity, thereby allowing an attorney or investigator to obtain this information.

Training materials. Some agencies have affiliations with accreditation organizations that may use certain contractors or programs for their training. Consider visiting the Web page of the training organization and purchase materials or copies of indexes or tables of contents, thereby establishing what training agency workers may have received.

Weigh Whether to Pursue Action

After analyzing information on training, a decision must be reached early about whether to pursue the failure to train theory. If there is substantial evidence of training and continuing education, it will be less likely there is a constitutionally inadequate official policy giving rise to the failure to train. Advise the client about the findings; the § 1983 failure to train claim should be either abandoned or put on the back burner. However, if ample evidence of an official policy supporting the failure to train exists, the theory should be further pursued during discovery.

Pursue Suitable Claims

If a § 1983 failure to train claim is

ultimately worth pursuing, it is important to frame the elements of the § 1983 claim throughout the litigation. Because the failure to train must be the result of an official, adopted policy, it is important early in discovery to obtain a copy of all training policies or, at the very least, testimony from an employee affirming the terms of a training policy. It is crucial to distinguish between a policy that was simply neglected or overlooked with a policy that is constitutionally inadequate.

To survive summary judgment, a plaintiff must gather enough evidence during the discovery process to support the argument that the policy was inadequate to protect from violations of the plaintiff's constitutional rights. Obviously, if discovery shows a policy was in place, but not followed, then a negligence claim should be pursued instead.

Conclusion

A plaintiff must take care to ensure a failure to train theory has a basis in the provable facts of the § 1983 case. A deliberate indifference case based on an inadequate policy leading to lack of training can stand on its own. However, pleading multiple alternate state law theories can present inconsistencies that weaken the plaintiff's ability to persuade a judge or jury. Losing the state action issue can result in a costly and time-consuming setback if the federal court concludes it lacks subject matter jurisdiction, which would require the plaintiff to refile the case in state court. Maximizing a favorable outcome depends on how effectively these issues and inconsistencies are analyzed and reconciled before filing the case.

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Endnotes

1. Over the last decade, numerous failures by state departments of human services have resulted in seven and eight figure settlements or verdicts. *See, e.g.,* www.gainesville.com/article/20070929/NEWS/709290332?p=1&tc=pg ($14 million settlement with Florida Department of Children and Families).

2. 42 U.S.C.S § 1983 establishes a cause of action for any person who has been deprived of rights secured by the Constitution or laws of the United States by a person acting under color of state law. A plaintiff must prove that (1) the conduct was committed by a person acting under color of state law, and (2) that as a result of this conduct plaintiff was deprived of rights, privileges or immunities secured by the Constitution or the laws of the United States. *See* Monell v. Department of Social Services of the City of New York, 46 U.S. 658, 694 (1978) (holding that governments could be "persons" under § 1983. Such liability could not be based on a *respondeat superior* basis; rather, for liability to attach against a governmental entity, the federal claim must have resulted from a policy or custom of the government that was the "moving force" behind the violation); *also see* Pembaur v. Cincinnati, 475 U.S. 469, 480; 106 S. Ct. 1292, 1298; 89 L.Ed.2d 452 (1986) ("[M]unicipal liability may be imposed for a single decision by municipal policymakers.").

3. Boykin v. Van Buren Twp., 479 F.3d 444, 451 (6th Cir. 2007).

4. Lugar v. Edmonson Oil Co., 457 U.S. 922, 937 (1982); Black v. Barberton Citizen's Hosp., 134 F.3d 1265, 1267 (6th Cir. 1998).

5. Chapman v. Higbee Co., 319 F.3d 825, 833 (6th Cir. 2003); S.H.A.R.K. v. Metro Parks Serving Summit County, 499 F.3d 553, 564 (6th Cir. 2007) (recognizing that the United States Supreme Court's decision in Brentwood v. Tennessee Secondary School Athletic Ass'n, 531 U.S. 288, 295-96 (2001) applied a case-by-case "normative and fact-bound" inquiry).

6. S.H.A.R.K., supra.

7. A related cause of action is failure to supervise. To properly plead a failure to supervise theory, a plaintiff must plead the existence of an official policy that gives rise to the state-sanctioned conduct causing the constitutionally protected right.

8. Charmaine Brittain. "Child Welfare Training: The Next Frontier." *Protecting Children* 19(3), 2004, 2–3. Brittain identifies some notable achievements in child welfare training over the last 25 years, including "a calculated approach to training development focusing on competencies, multi-layered training evaluation, and inclusion of transfer activities to enhance integration and skill development."

9. In 2000, the Administration for Children and Families, U.S. Department of Health and Human Services (DHHS) began the Children and Family Services Review (CFSR) process. One of the seven systemic factors it measures is staff and provider training. In addition, there is a Program Improvement Plan (PIP) component, developed by the state to address areas in which efforts need to improve to meet the national standards. Consequently, no child welfare department is wholly missing a significant training curriculum.

10. Phelan v. Mullane, No. 12-509-cv, United States Court of Appeals for the Second Circuit, 2013, U.S. App. Lexis 3702.

11. City of Canton, Ohio v. Harris, 489 U.S. 378, 391; 109 S. Ct. 1197 (1989).

12. Connock v. Thompson, 131 S. Ct. 1350 (2011) (a district attorney's office may not be held liable for a failure to train district attorneys on their duty to disclose exculpatory evidence under Brady v. Maryland, 373 U.S. 83 (1963).

13. *See, e.g*. West v. Atkins, 487 U.S. 42, 50 (1988) (a private, contracted physician providing services to prisoners is a state actor); Rayburn v. Hogue, 241 F.3d 134, 1348 (11th Cir. 2001) (foster parent not a state actor); Malachowski v. City of Keene, 787 F.2d 704, 710-11 (1st Cir. 1986), *cert. denied* 107 S. Ct. 107 (1986) (private, nonprofit that made foster care recommendations and made foster care available held not to be a state actor).

14. Jurisdiction is conferred either by 28 U.S.C. § 1343(a)(3) (*see* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 615–20 (1979)) or by 28 U.S.C. § 1331.

15. Noted that deliberate indifference requires a showing of conscious recklessness considerably greater than negligence or gross negligence. *See, e.g.,* Canton, 498 U.S. at 389.

16. A practitioner may argue in the probate court that an estate has a right to evaluate whether a potential lawsuit and ensuing recovery could be an asset of the estate. To this end, some courts will grant limited rights to issue subpoenas and take limited discovery, treating the matter as analogous to a creditor's rights proceeding.