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Officers Must Intercede, When They Can, If Other Officers Behave Badly!

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This edition of the LEAF Newsletter discusses an issue that affects all law enforcement officers as they go about performing their job tasks. The issue is an officer's responsibility to intercede if they are confronted with a situation in which another officer uses excessive force, makes a false arrest, or demonstrates deliberate indifference to the needs of a subject.

Sixth Circuit Court Rulings

The Sixth Circuit has identified criteria for evaluating officer responsibility for this specific area in three cases. In the first, the court stated that "a law enforcement officer can be liable under Section 1983 when by his inaction he fails to perform a statutorily imposed duty to enforce the laws equally and fairly, and thereby denies equal protection to persons legitimately exercising rights guaranteed them under state or federal law." *Bruner v. Dunaway*, 684 F.2d 422, 426 (6th Cir. 1982). In the second, the court ruled: "This court has held . . . that a police officer who fails to act to prevent the use of excessive force may still be held liable where (1) the officer observed or had reason to know that excessive force would be or was being used, and (2) the officer had both the opportunity and the means to prevent the harm from occurring." *Floyd v. City of Detroit*, 518 F.3d 398, 406 (6th Cir. 2008). In the third, the court explained that "... officers cannot be held liable under this theory if they do not have "a realistic opportunity to intervene and prevent harm." *Ontha v. Rutherford Cnty., Tenn.*, 222 F. App'x 498, 507 (6th Cir. 2007).

An officer's responsibility to protect the civil rights of an individual that they have come in contact with or are taking into custody is pretty clear. Less clear, however, is determining when an officer must take action if another officer's actions are excessive, unfair, discriminatory, illegal, or a violation of department policy or rules. In most circumstances, if an officer just does not think what has happened or is happening is right, then they have to speak up! If an officer does not intervene or report inappropriate or illegal behavior, they risk, at a minimum, a departmental sanction and maybe even action as severe as civil liability and/or arrest.

Example of When It Goes Bad

The December 2008 edition of the LEAF Newsletter titled *Knowing When to Say "Hold It"* presents a case that illustrates the type of officer behavior -- in this case, excessive force -- that should have led other on scene

officers to speak up in order to stop the force that was being used against a subject. In the case, a subject who parked construction equipment on a freeway, creating the risk of a serious accident, fled on foot when an officer confronted him. The officer gave chase and used pepper spray in an attempt to stop the subject. Although the officer tries to gain control, the subject pulled away and fled along a road. When another officer arrived on scene, the subject fled back toward the original officer, was tackled, and then struggled with two officers. Three more officers arrived and before they could subdue the subject, he broke away and fled into a swampy area pursued by all five officers. He was tackled on the edge of a swampy pond and rolled in. The fight was on. One officer struck the subject many times with a baton and then another used an Electronic Control Weapon (ECW) multiple times. Because the officers were focused on trying to control the subject and handcuff him behind his back, they didn't notice that the subject was forced underwater. The subject subsequently drowned. During the entire encounter, the subject said nothing to the officers. The officers described the subject as lethargic --almost Frankenstein-like. He was oblivious to the surroundings and did not respond to requests for his name or to demands to give up and to come out of the water. All of the officers reported that they did not feel the subject was armed.

The Sixth Circuit Court ruled the officers' actions were clearly unreasonable and violated the subject's constitutional rights. The Court took exception to the amount of force the officers used and ruled that the officers violated a clearly established constitutional right when they struck the subject with the baton 10 times, a frequency that was more than was reasonably necessary. The Court also found that the officers used the ECW more than was necessary on a subject who presented no threat, and who was standing in water surrounded by officers. Additionally, the court commented on the fact that the officers using the ECW had received instructions that they should not use the ECW in a wet environment during their training. The Court also found that the officers acted in an unreasonably dangerous manner when they jumped the subject submerging his head in muddy water. The Court ruled that all the officers at the scene were responsible because each of them had the means and opportunity to prevent the harm to the subject.

Standard of Review

LEAF's Legal Advisor, Audrey Forbush, Plunkett Cooney PC, said that in evaluating the actions of the officers in force situations, the "reasonable officer" standard is applied. In quoting *Graham v. Connor*, 490 U.S. 386, 394, 109 S.Ct. 1865, 1871, 104 L.Ed. 2d 443 (1989), Audrey explained: The "inquiry in an excessive force case is an objective one: the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to underlying intent or motivation." *Graham*, 490 U.S. at 388.

Forbush continued that reasonableness is evaluated under a totality of the circumstances approach. This approach requires that the court consider the following factors: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Every MCOLES licensed officer in the State of Michigan should be familiar with this concept since training in the use of force is part of the annual training in the Firearms Standard.

She said that the reasonableness of use of force is directly related to the resistance encountered. When officers do not de-escalate the amount of force used when the subject's resistance declines, the officers' actions may be considered excessive. This is when other officers who were present and have observed or have reason to know that excessive force would be or is being used have both the opportunity and the means to prevent the harm from occurring. If they do not, they can be held responsible for failing to intervene and stop the excessive activity. (*Turner v. Scott*, 119 F.3d 425, 429 (6th Cir., 1997)). In the case above, the subject's resistance was passive non-compliance when officers used most of the force. In addition, all the

officers were present and none of the officers did anything to stop the baton blows, the use of the ECW or to keep the subject above water, even though any one of them could have.

Did the Officer Have the Means or Opportunity to Intercede?

According to Forbush, the Sixth Circuit has ruled that just because an officer was present when excessive force was used does not always mean they are responsible for a civil rights violation. The second case discussed in the *Knowing When to Say "Hold It"* LEAF Newsletter involved two officers who were notified of a suspicious vehicle in a parking area along a freeway. In the course of their investigation, the officers dealt with a subject who would not follow one of the officer's commands and was not acting in what the officers felt was a rational manner. The suspicious vehicle driver was slowly driving away with one of the officers walking beside the vehicle yelling for the person to stop. The second officer pulled his patrol vehicle with lights flashing in front of the suspicious vehicle, which stopped. The driver rolled down his window and said he wasn't doing anything and was going to leave. One of the officers sprayed pepper spray in the slightly open window causing the driver to cry. He then revved the engine and spun the wheels in an attempt to drive away. In doing so, the suspicious vehicle bumped the push bumper of the blocking patrol vehicle without damaging the vehicle or causing alarm to the second officer who was standing at the door of the patrol vehicle using the radio. The officer standing beside the suspicious vehicle pulled his gun and shot the driver dead. No weapons were found in the suspicious vehicle and the entire incident took less than five minutes.

This incident, according to Forbush, is an example of a second officer being present at the incident when excessive force was used but presumably had no inkling that it might happen. The officers acknowledged that they had drawn their weapon as a precaution because of the erratic behavior of the suspicious vehicle driver. They also said that they thought the incident had the potential for an unseen or unknown threat that might require the need for a deadly force response. The second officer standing at the patrol vehicle using the radio, based on the deposition cited by the court, had no idea that the other officer was going to or would shoot.

Forbush again pointed to *Turner* where the court established a two-point test by ruling: "Generally speaking, a police officer who fails to act to prevent the use of excessive force by another officer may only be held liable when (1) the officer observed or had reason to know that excessive force would be or was being used, and (2) the officer had both the opportunity and the means to prevent the harm from occurring." In the instant case, it is apparent by the discussion in the case that the second officer did observe the use of force but had no reason to think the other officer would fire the shots and did not have the opportunity or means to prevent the harm since it happened so fast.

She said that in *Ontha v. Rutherford Co.*, 222 F. Appx. 498, 506, 207 W.L. 776, 898 (6th Cir. 2007) the Sixth Circuit noted that the courts have been unwilling to impose a duty to intervene where an entire incident unfolds "in a matter of seconds." In *Ontha*, a Deputy Sheriff captured a fleeing subject by intentionally striking him with his patrol vehicle. A partner in the vehicle was accused of failing to intercede to stop the driver from intentionally hitting the fleeing suspect. The court ruled that in order to intercede, the partner "would have had to **both** glean the nature of the Deputy's actions **and** decide upon and implement preventative measures within a short time span of six to seven seconds".

These cases clarify why officers must understand their responsibility and culpability for failing to intercede to stop the use of excessive force. The consequences for not recognizing the need to say "Hold It!" can be personal liability through criminal charges or charges of civil rights violations. Forbush said that while the most frequent claim for failure to intercede is excessive use of force, it is not the only situation in which the failure to intercede can have an impact on an officer.

Not Just In Use of Force Situations

Forbush cautioned us not to focus the discussion solely on officers' failures to intercede in situations of excessive use of force alone. She points to the originating Sixth Circuit case *Bruner v. Dunaway*, 684 F.2d 422 (6th Cir. 1982) where the court set the benchmark that law enforcement officials have a duty to intervene to protect the *constitutional rights of citizens from infringement by other law enforcement officers*. In *Bruner* the court ruled: "An officer who fails to intervene is liable for the preventable harm caused by the actions of the other officers where that officer observes or has reason to know: (1) that excessive force is being used; (2) that a citizen has been unjustifiably arrested; or (3) that any constitutional violation has been committed by a law enforcement official."

Forbush said that attention must also be given to the other areas listed in *Bruner* for they are broad in their scope. Specifically the court has listed unjustifiable arrest as an actionable offense against a non-arresting officer. This places a heavy burden on officers who are assisting at an incident or are present when a subject is arrested.

There are plenty of examples of officers becoming frustrated with having to deal with repetitive incidents such as reoccurring domestic conflicts, loud parties, obnoxious drunks, or hangout locations. Sometimes it seems that the best solution to end the problem is to lock somebody up or take action that moves people on! In these types of situations, officers need to measure their comfort level with the action being taken and the treatment of the subjects involved. For example, officers must intervene during arrests for "contempt of cop" or when there is no obvious probable cause for an arrest or reasonable suspicion to enter or search. In those instances, it is time to say "Hold It" and re-evaluate those decisions that led to the action being or about to be taken.

If things happening in an incident "just don't feel right", officers involved in the incident need to speak up. This is the time to review the circumstances of the incident to ensure that the action taken is supported by probable cause, reasonable suspicion, or meets exigent circumstances. If the actions are not supported, officers must stop, release anyone taken into custody, and explain to them the reason for detainment. If necessary, they should apologize for the inconvenience. The officer's report of the incident should contain all the facts of the incident including what led to the decisions made and how the incident was resolved.

If other officers refuse to take the appropriate action based on the actual facts of the incident then the assisting officer is obligated to report their concern to a commanding officer of their own department and should consider voicing their concern to a commanding officer of the originating department. In all cases where there is a dispute over the facts of the incident or action taken by an officer, an incident report should be written that specifically describes the reporting officer's observations and the actions taken while involved in the incident.

Any Constitutional Violation

Forbush added that the third benchmark in *Bruner* is a broad category that covers many police activities such as entering areas that officers should have known they shouldn't enter without consent or exigent circumstances, improper searches, discriminatory actions leading to unfair or biased treatment of subjects, deliberate indifference to a serious medical need, denying services to an individual who has limited English proficiency or has an obvious disability or is part of a protected class, releasing information that is private or regulated such as social security numbers or information from a driver's license or record. As preposterous as some of these examples sound, Forbush stated that they can all be considered a foundation for a charge of

violation of constitutional rights and even a statutory violation if the facts of the incident don't meet the measure of law.

Forbush cautioned that officers still are judged against the requirement of: (1) the officer observed or had reason to know that constitutional violation would be or was happening, and (2) the officer had both the opportunity and the means to prevent the harm from occurring. She commented that this standard is good protection for those officers who are at a scene and do not really have any involvement or knowledge of the events that are being alleged to have been a constitutional violation. They are damning to the officer who did know or should have known and failed to intervene.

Forbush continued that the Sixth Circuit in *Northrup v. City of Toledo Police Dep't*, 785 F.3d 1128 (6th Cir. 2015) said that "If it is appropriate to presume that citizens know the parameters of the criminal laws, it is surely appropriate to expect the same of law enforcement officers—at least with regard to unambiguous statutes." She said the statement was made in the context of an open carry case where an officer made a stop based solely on a dispatcher's statement that there was a report from an alarmed citizen because a subject was walking his dog with his family while openly carrying a firearm as allowed by Ohio statute. The officer immediately challenged the subject and demanded identification, (also not allowed by statute), disarmed the subject, cuffed him and placed him in the patrol vehicle when the subject refused to provide his concealed carry license, (not required by law), and arrested the subject because the officer was angry at the perceived non-compliance.

Forbush said the court's comment about knowledge of the law, underscore the importance of officers' responsibility to know and understand the parameters of the Constitution, particularly the Fourth Amendment as it relates to search and seizure as well as the meaning of state laws and the statutes of the municipal entity they work for. Forbush emphasized that the court is clearly saying if the public is expected to follow the law, then officers must know the law and enforce it as it is intended, and not manipulate their interpretation to fit a desired outcome. (See LEAF Newsletter, March 2008, *Cops Can Practice Catch and Release*)

You Have Heard It Before Because It Is True, How to Make Sure Officers Know

Pointing to *Canton v Harris*, 109 S.Ct. 1197 (1989), Forbush remarked that police departments are responsible to ensure their officers receive training in those job tasks that the officers are regularly expected to perform. The training does not have to be the best that is available but it must give guidance and reflect management's expectations for officer performance and behavior while carrying out their job tasks.

Forbush stated that it is considered industry standard for departments to have current policy and rules that require compliance and provide guidance to officers in doing their job tasks. The foundation and purpose for the development of the directives is to guide the department so it operates in a fair and impartial manner. To avoid allegations of civil rights violations and inappropriate behavior by officers, a department must provide regular training in the requirements of the law, department policy and rules, the mechanical skills needed to use the equipment provided and the expectations for officer behavior in performing their job. Additionally, Forbush recommends that supervisors be trained in their responsibility and accountability to supervise and coach those they supervise to ensure compliance with management's expectations.

Forbush remarked that in the Sixth Circuit, a municipality can only be held liable under Section 1983 "if the plaintiff demonstrates that the injury suffered was a direct result of the city's official policy or custom." *Slusher v. Carson*, 540 F.3d 449, 456-57 (6th Cir. 2008). The court has indicated that a plaintiff can show that a municipality has an illegal policy or custom by demonstrating one of the following: "(1) the existence of an illegal official policy or legislative enactment; (2) that an official with final decision making authority ratified

illegal actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom of tolerance or acquiescence of federal rights violations." *Burgess v. Fischer*, 735 F.3d 462, 478 (6th Cir. 2013).

To help ensure the department is in line with expectations, Forbush recommends adopting an audit process that reviews the activity of the department to ensure professional standards and expectations are being met. Most importantly the audit should demonstrate that the department is doing what it says it is. (See June, 2015, LEAF Newsletter, *The Normalization of Deviance and Officer Created Jeopardy: Two Terms to Remember When Auditing Department Activity*). The LEAF Manual For Law Enforcement Risk Control, Chapter 11, *Rules* has several examples requiring equal treatment of people and regulations that require officers be fair and impartial and to intercede and report inappropriate behavior. Chapter 21, *In-Car, Body Worn Camera and In-Custody Interrogation Recording*, has both audit language and resources that will help to guide in establishing an audit process.

Tough Language But More Truth!

It is an officer's duty to protect the civil rights and well-being of those they come in contact with. Officers are faced with tough decisions all the time and being confronted with what to do in a situation that they "just don't think is right", is just one more tough decision. Officers must be assertive and place themselves in the uncomfortable position to challenge a peer, maybe in an aggressive and even hostile environment, to stop a potential wrong. If an officer cannot do that, it is time to do something else for a living. It takes bravery and fortitude to intercede but if you don't, that decision can have some long term consequences!

Are you a MML Insurance Program Member?

Go to the League's online Law Enforcement Risk Control Manual, **now compatible with any browser**, to establish a new account using the streamlined login process. Go either to <http://www.mml-leaf.org/> or <http://www.mml.org>, under the Insurance tab/LEAF. Click the green Member Login box. At the Login screen click "Don't Have an Account". To add to the ease of use, the manual now contains a complete keyword search function.

LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the Michigan Municipal League's, Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

While compliance to the loss prevention techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our readers are encouraged to consult with their attorneys for specific legal advice.

LAW ENFORCEMENT ACTION FORUM (LEAF) is a group of Michigan law enforcement executives convened for the purpose of assisting loss control with the development of law enforcement model policy and procedure language for the Manual of Law Enforcement Risk Reduction. Members of the LEAF Committee include chiefs, sheriffs, and public safety directors from agencies of all sizes from around the State.

The LEAF Committee meets several times yearly to exchange information and ideas relating to law enforcement issues and, specifically, to address risk reduction efforts that affect losses from employee accidents and incidents resulting from officers' participation in high-risk police activities.

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