N E B R A S K A

JAIL BULLETIN

AUGUST/SEPTEMBER 1997 **NUMBER 136**

The ***Jail Bulletin*** may be used as a supplement to your jail in-service training program. If officers study the material and complete the attached "open book" quiz, they may receive **one hour of credit**. The bulletin and quiz may be reproduced for staff use as necessary. ***We welcome any material you would like to contribute to the "Jail Bulletin".***

CIVIL LIABILITIES, UNCONSTITUTIONAL JAIL AND PLANNING OF NEW INSTITUTIONS PART II

III. LEGAL LIABILITY OF PUBLIC OFFICIALS AND EMPLOYEES

Inmate Lawsuits: The Astounding Figures

In some inmate and prison lawsuits, the inmates seek a court order that the city, county or state improve the jail or prison conditions. For example, courts have ordered reduction of inmate population, improved sanitation, heat and lighting, and increased protection for non-violent inmates, to name only a few things.

However, an injured or ill-treated inmate often seeks damages from the county or city or from the public official or employee involved. The figures are astounding, as the following examples show:

, $2,000,000 - contempt fines issued against county commissioners who failed to comply with a court order to reduce population at their county jail. (Mobile County Jail Inmates v. Purvis, 581 F. Supp 222 (S.D. Ala, 1984)).

, $706,845 - former director and assistant warden personally liable for injuries and deaths ensuing from prison riot in Pontiac. (Walker v. Rowe, 80-C-5-310 (N.D. Ill. 1985)).

, $576,064 - awarded a man who was sexually assaulted by three other men in a drunk tank at a jail. A jury found that the jailers acted with "deliberate indifference" and "callous disregard." (Lickliter v. Riverside County, reported in Jail and Prisoner Law Bulletin (March 1985)).

, $502,000 - county liable for failure to train a deputy at a jail. The deputy did not immediately cut down an inmate who had hung himself with a bed sheet. (Condon v. Ventura Co., U.S. Dist. Ct. (S.D. Cal. 1983)).

, $210,000 - county liable to inmates of county jail, which the court found was a "terrible facility" that "exceeded permissible constitutional limitations" because of overcrowding, poor sanitation and understaffing. (McElveen v. County of Prince Williams, 725 F. 2d 954 (4th Cir. 1984)).

, $33,000 - settlement by a Tennessee county in a suit contending that a sheriff failed to segregate an inmate from two dangerous prisoners, who raped him, A chief deputy said that the jailers made every effort to segregate dangerous prisoners from others, but it was difficult in a poorly designed and overcrowded jail. (reported in Jail and Prisoner Law Bulletin (March 1985))

, $32,500 - two guards and three high-ranking officials found personally liable because the guards had used brutality (water hoses, tear gas, billy clubs) against an inmate. (Slakan v. Porter, 737 F. 2d 368 (4th Cir. 1984)).

, $23,500 - police chief liable for failure to train a police officer who used excessive force during an arrest. (Billings v. Vernal City, U.S. Dist. Ct. (D. Utah 1982)).

, $10,000 - sheriff and staff liable when someone pressed a button on an electric jail door, which slammed the inmates' neck and back.

(McIntyre v. Griffin, reported in Jail and Prisoner Law Bulletin (April 1985)).

Official Versus Personal Liability

As the above examples show, liability can run to the county or city, or to the public officials and employees directly. "Official liability" (see "Terms to Know", above, Part II), results when a public official or employee is found liable in his official capacity. In such a case, the governmental unit he represents is liable for damages and attorney fees. Brandon v. Holt (1985).

On the other hand, if found liable as an individual, the public official or employee can be held personally liable for damages and attorney fees. Whether the governmental unit he represents will indemnify or reimburse him for the damages and attorney fees varies from state to state. For example, Alabama will pay up to $100,000, provided the official does not act unlawfully or with gross negligence. Williams v. Bennett (Ct. App. 1982).

Furthermore, even when a public employee is found officially liable, he may be found personally liable for any punitive damages awarded. The governmental unit he represents is not obligated to pay punitive damages on his behalf. City of Newport v. Fact Concerts, Inc. (1981). Many state laws do not require (one does not allow the governmental entity to pay punitive damages, since the purpose of punitive damages (to deter future wrongs) is defeated if the public employee is indemnified by the government.

"Good Faith" Immunity: The Shield Against Personal Liability

When sued as an individual, a public official or employee has qualified immunity: the official is not personally liable for a violation of inmate rights if he acted in good faith. Until recently, lack of "good faith" could be proved only by evidence that the public official acted with malicious intent to injure the inmate or deprive him of his constitutional rights.

The new rule, as enunciated by the U.S. Supreme Court in Harlow v. Fitzgerald (1982), is that a public official is personally liable if:

(1) The official violates clearly established statutory or constitutional rights;
(2) of which the official knew or should have known.

This new rule is objective. Even if the official did not actually know that he was violating constitutional rights, he is liable if a judge determines the official should have known. "Clearly established" constitutional rights include the prisoner's rights mentioned in the previous section–the prohibition of cruel and unusual punishment, the right to safety,

the right to worship, and the right to an attorney, etc. These rights, as they relate to jail facilities, are discussed more in the next section, "Unconstitutional Jail Facilities."

Deliberate Indifference: Loss of the Personal Liability Shield

A public employee can, of course, lose his good faith immunity if his violation of an inmate's clearly established constitutional rights is intentional. However, even if the violation is not intentional, the employee or official may still be personally liable if he acted with "deliberate indifference" or "callous disregard" of the inmate's rights.

For example, in Smith v. Wade (1983), an inmate in a Missouri reformatory for youthful first offenders was harassed, beaten, and sexually assaulted by his cell mates. He brought a section 1983 action against a prison guard, asserting that the guard knew or should have known that an assault against him was likely. The jury found that the guard acted in deliberate indifference to the inmate's rights. The Supreme Court upheld an award against the guard of $25,000 in compensatory damages (official liability) and $5,000 in punitive damages (personal liability). The guard was required to pay the $5,000 out of his own pocket because of his "deliberate indifference" to the constitutional rights of inmate Wade.

the principal here is affirmative duty. First, know what the inmate's clearly established constitutional rights are (in Smith, the right to reasonable protection from violence). Second, do something about it.

The definition of deliberate indifference is:

1. The administrator/employee/elected official knew or should have known

2. of a pattern of gross abuse*; and

3. after having such knowledge, the administrator/employee/elected official did nothing.

* A single brutal incident may qualify as a section 1983 action, if the training program was so grossly inadequate as to constitute "deliberate indifference" by itself. Oklahoma City v. Tuttle (1985)

Defenses to Inmate Suits

A. Valid Defenses

A public official or employee can defend a prison or jail conditions lawsuit by claiming he acted in "good faith." As discussed above, good faith qualified immunity is lost if the inmate proves that the public official acted with deliberate indifference or callous disregard of the inmate's clearly established constitutional rights.

To preserve his good faith defense, the public official or employee can do one of the following:

1. DO SOMETHING – BEFORE THE LAWSUIT

The official or employee will likely recognize that action is needed, such as a new facility, remodeling, medical facilities, providing additional training to employees, moving an inmate to another cell, or reducing the jail population. If they have the needed resources and authority, the official or employee should act. If they do not have the resources or authority, they must notify in writing someone who does. Youngberg v. Romeo (1982).

Example: A non-holder-of-the-purse strings (NHPS) notifies a holder-of-the-purse-strings (HPS) that funds are needed for staffing, facilities, training, etc. Funds are denied. NHPS has a valid good faith defense. HPS may be found deliberately indifferent. See Youngberg v. Romeo (1982): Williams v. Bennett (Ct. App. 1982). But, the HPS people have a good faith defense if they initiate Step 2 below.

2. SOME ACCEPTABLE BEGINNING–BEFORE THE LAWSUIT

An acceptable beginning to remedy unconstitutional jail conditions will require these steps:

a. Evaluate the jail;
b. Prioritize the deficiencies on a life threatening basis;
c. Develop a master plan to correct the deficiencies; and
d. Implement the master plan.

However, public officials may be liable for plaintiff's attorney fees if they did not begin "pro-active" action before the lawsuit was filed, even if they complete the four activities above and make an out-of-court settlement. Maher v. Gagne (U.S. S.Ct. 1980).

3. VALID OFFER OF SETTLEMENT

Make a valid offer of settlement early in the litigation. The inmate's attorney cannot collect attorney fees beyond that point if, after proceeding to litigation, the award is the same as or less than the amount offered. Marek v. Chesny (U.S. S.Ct. 1985)

If inmates have already won a lawsuit and obtained a court order to improve jail conditions, failure to comply forecloses jail officials' good faith defense that jail conditions did not clearly violate the inmates' rights. Williams v. Bennett (Ct. App. 1982). If the inmates bring a contempt proceeding to enforce the order, jail officials, the county, or county commissioner may be liable for attorney fees required to bring the proceeding regardless of their subsequent good faith compliance, Rutherford v. Pitchess (Ct. App. 1983). Today a contempt proceedings could be labeled deliberate indifference (personal liability) by the courts. Newman v. Alabama (1983).

In addition to the above, an indicator of good faith recognized by the courts is reliance on the advice of an attorney. For example, in McElveen v. County of Prince William (Ct. App. 1984), the Virginia State Board of Corrections was sued because it failed to relieve overcrowding of a county jail by transferring jail inmates to a state penitentiary. The court found the Board of Corrections not liable. One indicator of its good faith was that the Board consulted its attorney, who advised the Board to take no action to relieve the jail overcrowding, but rather to seek a court order that the county build a new jail. However, the U.S. Supreme Court recently ruled that judges and attorneys no longer have absolute immunity in such matters if they violate clearly established law. Pulliam v. Allen (1984).

What should be done after a lawsuit is filed? Even then, initiate Step 2, "Some Acceptable Beginning," above, and make reasonable offer of settlement.

B. Invalid Defenses

Several seemingly good defenses have been conclusively rejected by the courts:

BUDGETARY DEFENSE

A city or county cannot claim "We do not have the funds available to build a constitutional jail." The courts have rejected this defense with very strong language:

> **"If the State cannot obtain the resources to detain persons awaiting trial in accordance with minimum constitutional standards, then**

the State will simply not be permitted to detain such persons." Hamilton v. Love (Dist. 1971).

"Let there be no mistake in the matter, the obligation of the respondents' government to eliminate existing unconstitutionalities does not depend on what the legislature may do, or upon what the governor may do, or indeed upon what the respondents may actually be able to accomplish. If Arkansas is going to operate a penitentiary system, it is going to have to be a system that is countenanced by the Constitution of the United States." Finney v. Arkansas Board of Corrections (Ct. App. 1974), affirmed by the U.S. Supreme Court in Hutto v. Finney (1978).

"I DIDN'T KNOW" DEFENSE

The public official or employee cannot claim that he didn't know that a statutory or constitutional right was being violated. As discussed earlier, he is liable if the typical official would have known of the right. Of course, the right must be clearly established, such as by statute, by a decision of the U.S. Supreme Court, or by a rule or precedent accepted by all the lower federal courts. The principle here is affirmative duty–to know and to do.

GOOD FAITH DEFENSE FOR MUNICIPALITIES

A county or city cannot claim a "good faith" defense for a judgment against a public official in his official (rather than individual) capacity. Brandon v. Holt (1985). A suit against a public official in his official capacity is actually a suit against the governmental entity he represents.

ATTORNEY FEES: THE DANGEROUS HITCHHIKER

Attorney fees are paid by the losing party in a section 1983 action, in addition to any damages he must pay. In recent years, cities, counties, and public officials have paid astronomical attorney fees:

$1,600,000 - Ruiz v. Estelle (Ct. App. 1983)
$ 800,000 - Ramos v. Lamm (Ct. App. 1983)

$2,000,000 - Cherco V. Sonoma County (1985 - out-of court settlement)

Liability for attorney fees is analogous to liability for damages. If a public official or employee is found liable in his official capacity, then the governmental unit he represents will pay the attorney fees. However if he is found personally but not officially liable, he will pay for the attorney fees out of his own pocket, unless the governmental unit has indemnified him by statute. Kentucky v. Graham (1985). This personal liability for attorney fees does not require that the public employee or official act maliciously or in bad faith; it is sufficient that if there was deliberate indifference to the Harlow standard, i.e., violates clearly established statutory or constitutional rights of which they knew or should have know. Also see McNamara v. Moody (Ct. App. 1979).

VICARIOUS LIABILITY: THE ADMINISTRATOR'S NIGHTMARE

A public administrator can be held liable for the misconduct of his subordinates. McClelland v. Facteau (Ct. App. 1979). This "vicarious" liability arises when the official has a duty to train or supervise his subordinates, and fails to do so. Monell v. Dept. of Social Services. Furthermore, the administrator is personally liable when:

FAILURE TO TRAIN

The administrator's failure to institute proper training programs is so severe as to constitute "gross negligence" or "deliberate indifference" to a victim's constitutional rights. Owens v. Hass (Ct. App. 1979).

FAILURE TO SUPERVISE

The administrator is personally liable if he:

1. had a duty to supervise;
2. knew or should have known of
3. a pattern of gross abuse;
4. and did nothing.

NOTE: A single incident of misconduct is not sufficient, by itself, to prove a pattern of gross abuse. Oklahoma City v. Tuttle (1985). Also, simple negligence in failure to train and supervise is insufficient to impose liability. Hays v. Jefferson County (Ct. App. 1982).

The administrator's duty to train may be established by statute.

However, even where statute does not establish such a duty, failure to train may amount to gross negligence, resulting in personal liability. Billings v. Vernal City (Dist. 1982).

Material prepared by Lynn J. Lund, Mark J. Morrise and Alton Jordan for NIC. Reprinted with permission from the National Institute of Corrections, Longmont, Colorado. If you or your agency wish to contribute to the ***Jail Bulletin*** or have a special subject to be addressed through the bulletin, please contact: Jail Standards Division, P.O. Box 94946, Lincoln, Nebraska 68509-94946, Telephone 402-471-3710, FAX 402-471-2837.

QUIZ

Nebraska Jail Standards require that jail staff receive eighteen (18) hours of in service training each year. The Jail Bulletin may be used to supplement in service training if an officer studies the bulletin, completes the quiz, and this process is documented by the jail administrator for review during annual jail inspections.

AUGUST/SEPTEMBER 1997 **NUMBER 136**

SUBJECT: CIVIL LIABILITIES, UNCONSTITUTIONAL JAIL AND PLANNING OF NEW INSTITUTIONS PART III

NAME: _____

DATE: _____

1. If a public official or employee is found liable by the court as an individual, the governmental unit they represent will always indemnify and reimburse them for attorney fees and damages awarded.
   a. True
   b. False
2. According to the U.S. Supreme Court ruling in Harlow v. Fitzgerald (1982), a public official is personally liable if they:

   _____

   _____

   _____
3. A public official may lose "good faith" immunity from liability if they violate an inmate's constitutional rights by:
   a. acting without affirmative duty.
   b. acting without official liability.
   c. acting with good intent.
   d. acting with deliberate indifference.

4. According to Oklahoma City v. Tuttle (1985) a single incident did not reveal deliberate indifference regarding insufficient training.
   a. True
   b. False
5. If an employee recognizes that action is necessary to prevent liability, but does not have resources or authority to remedy the situation, what must they do to preserve their own "good faith" qualified immunity?

   _____

   _____

6. Action taken before a lawsuit is filed which recognizes an unconstitutional jail and addresses the problem is called:

    a. valid intent
    b. absolute immunity
    c. official duty
    d. acceptable beginning
    e. laughable pursuit

7. Inmates bringing a contempt proceeding to enforce a valid court order to improve jail conditions, may result in liability for:

    a. jail officials
    b. the county
    c. the county commissioners
    d. all of the above
    e. B and C only

8. Two unacceptable defenses, rejected by the courts as a valid reason for failing to remedy an unconstitutional jail are:

    a. _____
    b. _____

9. In McClelland v. Facteau (Ct. app. 1979), the court ruled that an official was liable for failure to train or supervise his subordinates.

    a. True
    b. False

10. According to Billings v. Vernal City (Dist.1982), an administrator is not required to provide training unless mandated by statute.

    a. True
    b. False

QUIZ

ANSWER SHEET

Nebraska Jail Standards require that jail staff receive eighteen (18) hours of in service training each year. The Jail Bulletin may be used to supplement in service training if an officer studies the bulletin, completes the quiz, and this process is documented by the jail administrator for review during annual jail inspections.

AUGUST/SEPTEMBER 1997 **NUMBER 136**

SUBJECT: CIVIL LIABILITIES, UNCONSTITUTIONAL JAIL AND PLANNING OF NEW INSTITUTIONS PART III

NAME: _____

DATE: _____

1. If a public official or employee is found liable by the court as an individual, the governmental unit they represent will always indemnify and reimburse them for attorney fees and damages awarded.
   a. True
   T b. False
2. According to the U.S. Supreme Court ruling in Harlow v. Fitzgerald (1982), a public official is personally liable if they:
   "violate clearly established constitutional or statutory rights which they knew or should have known."
3. A public official may lose "good faith" immunity from liability if they violate an inmate's constitutional rights by:
   a. acting without affirmative duty.
   b. acting without official liability.
   c. acting with good intent.
   T d. acting with deliberate indifference.
4. According to Oklahoma City v. Tuttle (1985) a single incident did not reveal deliberate indifference regarding insufficient training.
   a. True
   T b. False

5. If an employee recognizes that action is necessary to prevent liability, but does **not** have resources or authority to remedy the situation, what must they do to preserve their own "good faith" qualified immunity?

   Notify, in writing, someone who does.

6. Action taken before a lawsuit is filed which recognizes an unconstitutional jail and addresses the problem is called:

a. valid intent
b. absolute immunity
c. official duty
T **d. acceptable beginning**
e. laughable pursuit

7. Inmates bringing a contempt proceeding to enforce a valid court order to improve jail conditions, may result in liability for:

a. jail officials
b. the county
c. the county commissioners
T **d. all of the above**
e. B and C only

8. Two unacceptable defenses, rejected by the courts as a valid reason for failing to remedy an unconstitutional jail are:

a. Budgetary Defense
b. "I didn't know" defense

9. In McClelland v. Facteau (Ct. App. 1979), the court ruled that an official was liable for failure to train or supervise his subordinates.

T **a. True**
b. False

10. According to Billings v. Vernal City (Dist.1982), an administrator is not required to provide training unless mandated by statute.

a. True
T **b. False**