

# YOUR DEPARTMENT IS ONLY AS STRONG AS YOUR WEAKEST SUPERVISOR

By Eric Daigle

As new officers, our first taste of supervision was likely through a sergeant. Young and green, most of us looked at the sergeant and said to ourselves, “That’s a good job.” I remember my supervisor saying, “Don’t bother me unless someone dies.” That was 20 years ago. Unfortunately, as we have all worked to rise at our agencies, the sergeant’s job has changed. We have learned after years of litigation that the sergeant is possibly the department’s most important protector against liability. For the past few years, while department budgets have been shrinking, chiefs have been asking how to protect their departments with less. Our response is that departments must ensure that sergeants have the training and tools to be the first line of protection.

There are multiple key factors that help avoid agency liability. Three of these factors are:

- Developing clear policies to govern the operations of the department;
- Training on core tasks and scenarios that officers regularly face and, more particularly, training on the department’s policies; and
- Effective supervision.

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Ensuring close and effective supervision of the officers working for the department is extremely important. If you have a sergeant who is not holding officers accountable, is looking the other way, or is more concerned about being liked than being a supervisor, your department is wide open to the imposition of agency liability.

Many department administrators are lulled into a false sense of security by ensuring that the written, official policies of the department are well within constitutional parameters. The disconnect can occur when supervisors neglect to enforce the policy. More importantly, do they even know what the policy says? Departments find themselves in trouble, however, when a plaintiff is able to point to an unconstitutional practice or custom. A plaintiff can establish municipal liability by proving that the department maintained a practice so consistent and widespread as to impute constructive knowledge of the practice to policymaking officials. Therefore, the question we must ask is, who in your department is best able to protect you from a claim of an unconstitutional practice or custom? Supervisors must work to ensure that they are not deliberately indifferent to policy violations or unconstitutional conduct.

To establish the existence of a municipal custom, the plaintiff must prove: (1) the existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entities’ employees; (2) deliberate indifference to or tacit authorization of such conduct by the governmental entities’ policymaking officials after notice to the officials of that misconduct; and (3) the plaintiff’s injuries were caused by acts pursuant to the governmental entities’ custom; for example, proof that the custom was the moving force behind the constitutional violation.<sup>1</sup>

Deliberate indifference is demonstrated when the “inadequacy is so obvious, and . . . so likely to result in the

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violation of constitutional rights, that the policymakers . . . can reasonably be said to have been deliberately indifferent.”<sup>2</sup> Municipal liability for an established practice or custom may be established under various theories, including failure to supervise or discipline;<sup>3</sup> failure to investigate;<sup>4</sup> and failure to train.<sup>5</sup>

To establish supervisor liability a plaintiff must show the following:

- The supervisor had actual or constructive knowledge that his subordinate was engaging in conduct that posed “a pervasive and unreasonable risk” of constitutional injury;
- The supervisor’s response was so inadequate as to show a deliberate indifference or tacit authorization of the alleged offensive practices; and
- That there was an affirmative link between the supervisor’s inaction and the constitutional injury.

One case that nicely illustrates the theory of supervisory liability is *Shaw v. Stroud*.<sup>6</sup> In this case, Officer Alfred Morris was a seven-year veteran of his police department when he shot and killed Sidney Bowen, whom he had stopped in Bowen’s driveway on suspicion of driving while intoxicated. Sgt. C.I. Stroud was Morris’ supervisor from the time he first joined the department in 1983 until late November 1988. Approximately 15 months prior to the Bowen shooting, Stroud was transferred and Sgt. J.M. Smith replaced him as first sergeant. During Stroud’s tenure as Morris’ supervisor, he received multiple complaints against Morris of pervasive violent propensities and harassment and reports of excessive force. Stroud ignored the complaints and on some instances, it was reported that Stroud openly mocked the complainants.

When Smith took over as Morris’ supervisor, he received no information from Stroud regarding any complaints against Morris. In May 1989, a district court judge in Columbus County contacted Sgt. J.A. White (who was Morris’ first-line supervisor) regarding concerns over Morris’

conduct. The judge reported that “over the past 18 months, he had seen case after case involving the use of excessive force by Morris on defendants.”<sup>7</sup> White filled out a complaint form and left it on Smith’s desk. White also counseled Morris regarding the judge’s telephone call, and informed Smith of the counseling. Smith decided to monitor Morris’ performance and conduct more closely and, as a result, he accompanied Morris on patrol on at least two subsequent occasions. Smith further assigned an officer to attend a trial in which a defendant claimed that Morris had used excessive force. No evidence of any improper conduct by Morris was brought forward. Smith took no further action on the matter.

After a lawsuit was filed against Stroud and Smith for supervisory liability, both defendants filed motions for summary judgment on the grounds of qualified immunity. Even though the alleged incident occurred after Stroud was no longer Morris’ supervisor, the court denied the sergeant’s claim of qualified immunity on the grounds that Stroud exhibited deliberate indifference because he ignored allegations and complaints against Morris, and that Stroud’s behavior amounted to tacit approval of Morris’ allegedly unlawful conduct. This behavior allowed Morris’ misconduct to continue, which ultimately led to the Bowen shooting. The court, however, granted qualified immunity to Smith (the supervisor at the time of the incident) because, although he could have done more, he pursued complaints against Morris, even though they were not formally filed, and therefore, did not exhibit deliberate indifference.

Cases such as *Shaw v. Stroud* demonstrate the importance of having strong first-line supervisors. A department’s first-line supervisors, most often its sergeants, are the best protection against liability. The department, however, is only as strong and protected as its weakest supervisor. Whether your department is small or one of the country’s largest, your protection starts with your sergeants. They are the gatekeepers against a finding of departmental liability.

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**CASE STUDY**

In 2012, the East Haven, Connecticut, Police Department found itself under scrutiny from the Department of Justice (DOJ). On Nov. 20, 2012, it entered into an agreement for effective and constitutional policing (often referred to as a consent decree). The unique aspect of the East Haven agreement is that the DOJ concluded that the majority of the problems in the department arose from supervisory issues. The East Haven agreement placed a tremendous amount of its focus on supervisors, specifically what they should and should not be doing versus what they actually were doing.

The agreement, like others, requires that the East Haven Police Department ensure that supervisors have the knowledge, skills and ability to provide close and effective supervision to each officer under the supervisor's direct command; provide officers with necessary direction and guidance; and identify, correct and prevent officer misconduct. Specifically, the agreement provides that the department: "[S]hall ensure that EHPD supervisors provide the close and effective supervision necessary for officers to improve and grow as police officers; to police actively and effectively, and to identify, correct and prevent misconduct."<sup>8</sup>

One of the key terms found in this portion of East Haven agreement is "close and effective supervision." This approach, once frowned upon and thought of as micro-management within police departments, is now becoming the status quo or current status of supervision. To achieve close and effective supervision, the East Haven agreement requires the department to implement certain specific mandates. The agreement specifically provides: "Close and effective supervision requires that supervisors: (a) respond to the scene of certain arrests; (b) review each arrest report; (c) respond to the scene of uses of force; (d) investigate each use of force . . . ; (e) confirm the accuracy and completeness of officers' written reports; (f) respond to each complaint of misconduct; (g) ensure officers are working actively to engage the community and increase public trust and safety; and (h) provide counseling, redirection, support to officers as needed and are held accountable for performing each of these duties."<sup>9</sup>

The East Haven agreement also focused on the accountability of supervisors. Specifically, the agreement provided that the department "shall hold commanders and supervisors directly accountable for the quality and effectiveness of their supervision, including whether commanders and supervisors identify and effectively respond to misconduct, as part of their performance evaluations and through non-disciplinary corrective action, or through the initiation of formal investigation and the disciplinary process, as appropriate."<sup>10</sup>

**RECOMMENDATIONS**

Of great importance to a department's protection against liability is the manner in which supervisors respond to misconduct. Often, sergeants may exhibit difficulties investigating the actions of those officers they have worked with for years and with whom they have developed social and professional friendships. As applicable case law and the scrutiny of DOJ have made clear, supervisors may be held liable if they fail to conduct adequate investigations into the actions of those under their supervision.

Close and effective supervision, however, need not always come in the form of investigations of misconduct. Departments have various tools or methods available to them that may be utilized to identify and address officer actions that do not involve possible punitive implications. A department may, for example, utilize performance evaluations, which can serve a dual purpose: (1) to present the opportunity to review behavior and correct certain actions before they become a disciplinary issue; and (2) to offer praise in those areas in which an officer is performing in an exemplary fashion. Evaluations provide departments an additional non-disciplinary tool to correct bad or inappropriate behavior and praise and encourage good behavior.

Departments must also be mindful of their policies regarding span of control and unity of command. When addressing span of control, departments must ensure that an adequate number of supervisors are deployed in the field to provide supervision consistent with generally accepted professional standards. Typically, an adequate supervision ratio is 1-8 or 1-10. When addressing unity of command, departments must ensure that supervisors of field operation, investigation and specialized units provide daily field presence and maintain an active role in unit operations.

Many police departments find themselves in a position where funds are low and budgets are tight. The tough questions arise: "What is the best way to spend the money?"

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and “How can I best protect my department and officers?” As we stated above, the answer is always the same — proper policies are first and training of your first-line supervisors is second. It is imperative that supervisors are properly trained on all aspects of their position, including investigating officer conduct and discipline.

Departments must establish solid and effective policies regarding supervisor duties and responsibilities in the various areas of the department. Departments, however, must also follow through and provide effective training on the substance and requirements of the policies. If training is weak, unfocused or nonexistent, then the policy will not be followed.

Department administrators must also be willing to remove supervisors from their position if, after the department provides its supervisors with detailed and ongoing training and guidance regarding effective and close supervision, it finds that certain supervisors are not up to the task. A strong and solid line of supervisors will shore up the department’s defenses against attacks under a § 1983 action. ■

## ENDNOTES

1. *Mettler v. Whitedge*, 165 F.3d 1197, 1204 (8th Cir. 1999).
2. *Graham v. Sauk Prairie Police Commission*, 915 F.2d 1085, 1100 (7th Cir. 1990).
3. Liability may attach if there is sufficient evidence that a custom or policy encouraged the officer to believe that he or she could commit acts with impunity and, thus, have the explicit or tacit approval of the city or its policymakers.
4. Supervisors may be held liable if they fail to conduct complete and objective investigations of the actions of officers under their command.
5. The plaintiff must identify the particular deficiency in the training program of the police department or how that alleged deficiency caused his injury. The alleged deficiency in the training must be closely related to the alleged injury.
6. 13 F.3d 791 (1994).
7. *Id.* at 796.
8. *United States v. Town of East Haven, et al.*, Case No. 3:12-CV-1652 (AWT), Agreement for Effective and Constitutional Policing dated 11/20/2012, ¶ 161.
9. *Id.* at ¶ 162.
10. *Id.* at ¶ 165.

## ABOUT THE AUTHOR

**Eric P. Daigle, Esq.** practices civil litigation in federal and state court with an emphasis on defending municipalities and public officials. Mr. Daigle acts as legal adviser to police departments in Connecticut and across the country. He is general counsel for the FBI Law Enforcement Executive Development Association and a member of its instructor cadre.



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