Touro Law Review

Volume 15 | Number 4 Article 25

1999

Supervisory Liability in Section 1983 Cases

John Boston

SUPERVISORY LIABILITY ISSUES IN SECTION 1983 CASES

*John Boston**

Honorable George C. Pratt:

We now turn to John Boston who is the project director of Prisoners' Rights Project for the Legal Aid Society.

John Boston:

I am going to discuss some of the practical problems and decisions that can arise in the course of trying to litigate a Section 1983[1] action, in connection with supervisory liability issues.[2] The most fundamental such question is: Why bother? What does supervisory liability get you?

One thing that we know about supervisory liability claims is that, almost without exception, they buy plaintiffs' attorneys a great deal of work and a substantial amount of collateral motion practice that is only indirectly related to whether or not somebody violated a client's constitutional rights.

For example, if there are several members of the clergy who witnessed a police officer banging a client over the head with a nightstick for no discernible reason, one might ask: "Do I really

---

* Project Director of the Prisoners' Rights Project of the Legal Aid Society.

[1] 42 U.S.C. § 1983 (1994). Section 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

[2] *See generally* MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES §§ 7-19 (3d ed.1997).

need to get into whether the precinct commander, or someone higher up in the hierarchy, knew about this police officer's propensity to use excessive force?" In that case, the answer might be relatively clear. But, few cases present such a clear-cut issue of liability of the main defendants. Even when they do, there may be other factors independent of the merit of the underlying claim that may, or should, inform one's decision. The following are some fundamental questions that need to be asked and how to approach them.

The first question is: Is an attorney really confident that he or she can do without a supervisory claim because that lawyer knows the case well enough to be absolutely sure where the responsibility for the constitutional violations lie? Sometimes an attorney is, sometimes not. Sometimes attorneys may think they do at the early stages of the case and then discover later on that what they thought they knew was not really the case. That may be an argument for casting the liability net wider, though within the limits of Rule 11[3], than it might otherwise be cast. It is also important to make sure that all options are preserved within the period of the statute of limitations; that constraint may counsel joining defendants who may be dismissed later as the case develops.

One may ask: Apart from the general conservatism of preserving all of one's options, will supervisory liability help to prove a particular case?

There are several subsidiary issues to think about. One of them is the issue in any kind of multi-defendant situation, supervisory or not, of avoiding the "offstage fall guy."

That can arise in a variety of ways. For example, a subordinate may say: "Yes, I did it. I was following orders. Go after the one who gave me the orders."

There can be a lot of knee-jerk rhetoric about "I was just following orders." I think that how one looks at questions of that nature depends on what the orders are and in what context they were given. It is entirely possible that the Court might find that a line defendant is not liable for carrying out facially proper orders

[3] FED. R. CIV. P. 11 (providing for sanctions for submissions to court lacking a basis in law or fact).

by a supervisor. One example is a case in which medical personnel in a prison conducted a digital body-cavity examination. This was done at the order of a correctional supervisor, according to the ordinary procedure of the prison. There was, however, an insufficient basis for such an intrusive search. The court said that under these circumstances, the people who actually performed the search were not appropriately held liable. The person who should be held liable was the individual who gave the order and who was in the position of making the judgment as to whether such a search was justified.[4]

The issue of "following orders" will also, under some circumstances, present an issue of qualified immunity. The answer to that question will differ depending on whether one is talking about a line defendant or a supervisor. In general, courts are likely to hold low-level staff to a less demanding standard of knowledge of the law and give them some latitude to rely on what seem to be the normal procedures of the agency or institution.[5] These are circumstances where one may have a powerful reason for pleading supervisory liability. One may not have a case without it.

Another, less obvious concern is that pleading and attempting to prove supervisory liability may make an underlying case more plausible. One example is the standard police abuse or correctional officer abuse case. One of the things that practitioners in this area know from their experience is that, very often, juries have a hard time comprehending how it is that this wholesome-looking family man sitting at the defense table could have done the horrible things that the plaintiff prisoner or former criminal defendant asserts. How can this be true?

If one provides a context for the behavior of that person, by showing that there is a widespread practice endorsed or tolerated by superiors in the police precinct, the police department, the prison, or particular area of the prison, then it becomes more comprehensible to people how an otherwise fantastic scenario might actually be true. It is like reading a newspaper article about how a

[4] Hill v. Koon, 732 F.Supp. 1076, 1084 (D. Nev. 1984).

[5] *See, e.g.*, Thornburg v. Dora, 677 F. Supp. 581, 588-89 (S.D. Ind. 1988).

twenty-two year old college student died after consuming a fifth of whiskey in five minutes. One might ask: "How could anybody be so stupid?" However, if one reads further and sees that the incident took place at a fraternity party, the question is answered. The social context of the behavior makes it easier to understand.

There is another agenda that a claim to supervisory liability may serve. Everybody is going to have a slightly different story in the nature of things, and many people will have different stories because they have something to hide. The more people's stories there are in a defendants' case, the more likely it will be for such conflicts to arise. There is nothing the plaintiff's lawyer likes more than having defendants pointing fingers at each other.

The Second Circuit has held that when a plaintiff's lawyer creates that situation by joining defendants with conflicting interests, sometimes it is the plaintiff's lawyer's obligation to call to the Court's attention that there is such a conflict.[6]

There is also a sort of moral concern that arises with decisions about supervisory liability. Ultimately, are not the people who are in charge of the agency responsible for running the agency in a lawful fashion? One might think that this is an unrealistic kind of concern, and depending on what an individual's agenda as a practitioner is, and what the client's agenda is, one may or may not be interested in it. But often, people are vastly more sensitive than one would assume to the fairness, regularity and integrity of public institutions. That can be true of people serving time for crimes, people who have been in trouble with the law and the police on many occasions, and other people that one might unthinkingly assume were not too concerned about these issues.

Another very important pragmatic question is: Will pursuing supervisory liability help to collect any judgment that one might happen to recover? Rule number one for attorneys in private practice is to have a solvent defendant in the case. This gets complicated by rules of indemnification because by hypothesis, when there is an indemnification scheme in effect, any defendant is solvent because no matter whom the judgment nominally runs

[6] Dunton v. County of Suffolk, 729 F.2d 903, 909 (2d Cir. 1984), *amended on other grounds*, 748 F.2d 69 (2d Cir. 1984).

against, one will ultimately collect it from the entity that employs them.

This may present a problem because indemnification schemes generally have provisions that permit the entity to refuse to indemnify and represent.

However, the entity's decision whether or not to cut somebody loose from the protection of indemnity is not necessarily made at the beginning of the case; in fact, it may well be made only after plaintiff's counsel has diligently shown the entity's lawyers what a lousy case they have and what a rotten apple they are defending. Then, once that work is done, one may be put in a situation where one will not be able to recover from the entity for that person's misconduct. The reward for that labor will be an uncollectible judgment. In that situation, a viable claim against the public entity is a necessity.

This is a consideration that is most prominent when talking about whether or not to plead municipal liability. But even if one does not have municipal liability, a supervisory liability claim will at least bring better paid defendants into the case. Then there will be a better chance of collecting any judgment one may obtain.

There is a related question that is a hybrid of collection and proof which is: Will a supervisory liability claim help to get a judgment in the first place, independent of the actual merits of a case? Civil rights practitioners know that many juries are not willing to fix a great amount of financial liability on a poorly paid, lower-level civil servant, even one who has committed a constitutional violation. The fact of indemnification cannot generally be disclosed to the jury.[7] Having a solvent defendant not only in the case, but visible to the jury, can be extremely important.

In addition, having people higher up the food chain in the agency, assuming there is a viable claim against them, may be extremely helpful in settling cases. Government agencies and their lawyers frequently do not care very much about liability being imposed on their line staff. They are willing to throw these people to the wolves.

---

[7] *See, e.g.*, Larez v. Holcomb, 16 F.3d 1513, 1518-21 (9th Cir. 1994).

When one starts moving up the ladder to show the condonation of misconduct at higher levels of the agency, the people who run the agency start to get uncomfortable as scrutiny gets closer and closer to them. Then, the "well, we always had a few rotten apples" defense begins to sound less and less plausible.

Also, the higher up one goes in the chain of command in any agency, the more likely the people one will be dealing with are going to have some friends at even higher levels. These higher-ups often decide what happens in litigation, and they generally do not want to see their friends embarrassed. They are less likely to care about people who are out on the street or in the cellblock doing day-to-day work.

These are factors that will help to bring pressure to bear as a strategic matter to get a meritorious case settled, as opposed to having to try that case.

Nonetheless, with all this said, bringing, pursuing, and discovering supervisory liability claims is a pretty burdensome affair. In addition, many of these claims get dismissed either on the pleadings or on summary judgment. Sometimes one just cannot get the evidence quickly enough, given the restrictions on discovery that then exist in connection with a qualified immunity defense; or for that matter, people might cover their tracks extremely well.

One of the things to do that will mitigate some of these problems, which might in an attorney's judgment substitute for supervisory liability, is to be sure that there is a state law respondeat superior claim in the case. This can be done only if state law permits such a claim to be brought, which is generally the case in suits against employees of municipalities. It is usually not the case for a variety of reasons when one is suing state employees and officials.[8]

The respondeat superior claim means essentially that if a police officer has abused your client, one can sue the city for the police officer's tort, in addition to suing the officer for civil rights violations. Usually the city can be sued by name. The jury will

[8] The primary reason is that such a claim would be against the state or its agencies and could not be entertained by a federal court without the state's consent. U.S. CONST. amend. XI; *see* Alabama v. Pugh, 438 U.S. 781 (1978).

know that the entity is in the case and, as to the respondeat superior claim, the jury should be instructed that if the officer committed the tort, the city is responsible. Even if the evidence showed that a different police officer beat up the plaintiff, one could recover under the respondeat superior claim.

This kind of claim may be particularly useful when the entity attempts to cut defendants loose and not indemnify them. Generally, the rule in these indemnity schemes is that people who are not acting within the scope of their employment do not have to be indemnified and represented.[9] Respondeat superior liability is also generally linked to scope of employment. However, the court or the trier of fact in a respondeat superior case may independently determine what the scope of employment is. Thus, the city may say: "He was acting outside the scope of his employment and we are not going to pay." But that decision may not bind the court or the trier of fact in determining whether or not to fix liability on the city. This is an issue of state tort and government liability law.

The factor of time is also an important factor to recognize in these instances. There are statutes of limitation that vary from jurisdiction to jurisdiction, and the statute of limitations on federal constitutional claims is not the same for state and federal claims. For example, in New York, the Section 1983 statute of limitations is three years.[10] The statute that governs claims against municipalities, or claims against the State in the Court of Claims (claims which cannot be brought into federal court), is one year and 90 days.

In the ideal world, a client walks in the day after an incident with bandages all over his head and says, "This is what happened." A plan of litigation is laid out, and everything is taken care of within a reasonably short period of time.

Reality is often very different. Many Section 1983 cases are litigated by lawyers who are appointed by the court. Often, a long period of time passes before the court does anything about a request

---

[9] *See, e.g.*, Harris v. Rivera, 921 F. Supp. 1058, 1060 (S.D.N.Y. 1995) (applying New York law).

[10] Owens v. Okure, 458 U.S. 235 (1989) (adopting New York's three-year limitations period in § 1983 cases).

for appointment of counsel. In fact, there is a practice in many jurisdictions of not even considering appointment of counsel until dispositive motions have been survived; a practice of which the Second Circuit has explicitly disapproved.

The point is this: The clock is running. Most of the time, even if one has a private client, the person will not walk in the door the day after the incident.

The very first thing that one must do when one of these cases presents itself is to address the state law claims. Make a decision whether or not to bring such a claim. Most of the time the decision will be yes. Next, figure out what the jurisdictional prerequisite is, for example, a notice of claim filing. Simply get that taken care of right way.

The next thing to do is to think about the statute of limitations and think about it in terms of all of the supervisory liability concerns. One of the realities of this practice is that getting discovery out of public agencies and their employees is often difficult. Sometimes it is an issue of people being overburdened. Sometimes it is an issue of purposeful "foot-dragging." Other times neither private practitioners nor government lawyers really understand how the agency keeps information. So sometimes, even when there is good faith and diligence on both sides, discovery is delayed for long periods. A practitioner is then continuing the chase for a substantial period of time after he or she has gotten into the case and started actually litigating it.

The problem that this causes is that the statute of limitations may run while one is still trying to figure out who the defendants are. One may then be precluded from adding those defendants.

There is a provision in Rule 15(c) of the Federal Rules of Civil Procedure that says that under certain circumstances, allegations in an amended complaint may relate back for limitations purposes to the filing of the original complaint.[11] Do not rely, under any

[11] FED. R. CIV. P. 15(c). Rule 15(c) provides in pertinent part:

> An amendment of a pleading relates back to the date of the original pleading when . . . (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

circumstances, on being able to have an amended complaint adding new parties relate back for purposes of the statute of limitations. Application of this rule has not been favorable to plaintiffs joining new defendants.[12]

One wants to be very sure; one wants to watch the clock; and one wants to pursue discovery immediately. If the statute of limitations is approaching, then go to court sooner rather than later. This is important because if this "footdragging" exceeds the limitations time, one may be out of court. In *Byrd v. Abate,*[13] government attorneys, the Corporation Counsel of the City of New York, delayed producing records until after the statute of limitations had run.[14] When the plaintiff's lawyer tried to add the defendants whose identities were revealed by that discovery, they claimed that the claims against them were time-barred.[15] The District Court said that because of defendant's conduct in delaying discovery, they were equitably estopped from raising the limitations' defense.[16] But do not count on getting this result. Seek discovery quickly and

---

> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by rule 4(m) for service of the summons and complaint, [120 days], the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Id.

[12] *See, e.g.*, Baskin v. City of Des Plains, 138 F.3d 701, 703-04 (7th Cir. 1998); Soto v. Brooklyn Correctional Facility, 80 F.3d 34, 36-37 (2d Cir. 1996) and cases cited.

[13] 964 F. Supp. 140 (S.D.N.Y. 1997).

[14] *Id.* at 145 (despite promising discovery upon bifurcation of the trial, Corporation Counsel delayed revealing the name of the officer on duty at the time of Byrd's assault an additional 7 months, which was 3 months after the statute of limitations had run).

[15] *Id.* at 143.

[16] *Id.* at 147 (reasoning that Corporation Counsel certainly knew that officer Hults would have been named as a defendant well before the limitations period ended, but for plaintiff's inability to obtain this information from Counsel).

leave yourself time within the limitations period to enforce discovery rights. Thank you.