## Excessive Force: Off Duty Officer Who Assaulted Other Driver Was Not Acting Under Color of State Law; No Section 1983 Action Against City

## *Fate v. Harper,* No. 13-2219 (3d Cir. Mar. 5, 2014).

A Third Circuit decision has upheld a district court jury determination that, despite brandishing a police firearm, pursuing and stopping a motorist and demanding to see the driver's registration and license, an off-duty police officer was not acting "under color of law."

In May 2010, Jarret Fate and Detective Bradley Walker were involved in a car collision just outside of Pittsburgh. Walker was off-duty, wearing plainclothes, and driving his private vehicle. After both cars pulled to the side of the road, Walker approached Fate's vehicle, stuck his hands through the window, grabbed Fate and began choking him. Fate drove away, but Walker pursued him, and eventually pulled his car in front of Fate's vehicle to block his escape. Walker then got out of his car, drew his police-approved firearm, and approached Fate, vehicle screaming profanities and threatening to shoot. At no point did Detective Walker identify himself as a police officer.

Walker instructed Fate to exit his vehicle and to produce his license and registration, but Fate refused to move. At this point, Walker, acting in what an observer described as an "extreme fit of rage," punched and shattered Fate's windshield and driver's side window, sending glass into Fate's face. Detective Walker then began to kick and punch the side of Fate's vehicle, declaring that he was "teaching [Fate] a lesson."

Eventually, Detective Walker forced open the driver's side door and Fate began to exit the car. As Fate was exiting, Walker noticed a crowd of people stopped in their cars, observing the incident. Still holding his weapon, Detective Walker turned to the onlookers and screamed, "What the f___ are you looking at?" He then slammed his gun on the roof of Fate's car and once again demanded Fate's license and registration. Fate complied with the request; Detective Walker scribbled down the information, threw the documents back in Fate's car, and left the scene.

The City's Office of Municipal Investigations later reviewed the incident. Charges were brought against Walker for conduct unbecoming of a police officer and he was terminated. Additionally, the Commonwealth of Pennsylvania brought criminal charges against Detective Walker and, in 2011, he was convicted in state court of assault, reckless endangerment, criminal mischief, and harassment. He was ordered to pay restitution.

A copy of Walker's disciplinary record revealed more than thirty complaints of excessive force that predated the incident with Fate. After reviewing the complaints, the Office of Municipal Investigations determined that most were unfounded or unsubstantiated. A few episodes, however, were more credible and serious, including claims that Detective Walker choked and hit his own wife and son, that he unnecessarily slammed a woman's hand in a door five or six times, and that he had used his police authority to threaten another driver following a collision that occurred while he was off-duty. Despite the fact that several complaints were sustained, Detective Walker received only minor discipline. Indeed, he never received more than a one-day suspension.

After being assaulted, Fate brought suit under Section 1983 against the City of Pittsburgh and two of Detective Walker's supervisors, Chief Nathan Harper and Commander George Trosky. Fate alleged that defendants were deliberately indifferent to the risk that Detective Walker would continue engaging in unnecessarily violent conduct. Further, he contended that the City's had a policy of failing to investigate or discipline officers like Detective Walker, which contributed to Walker's assault on Fate.

At trial, the district court entered judgment as a matter of law in favor of the police Chief and Commander, finding that they could only consider the handful of verified complaints against Walker, and their failure to act upon these did not rise to the level of "deliberate indifference." However, the district court refused to grant the defendants' motion for summary judgment on the issue of state action, concluding that a reasonable jury might find, based on Walker's actions in displaying his weapon, demanding to see Fate's driver's license and registration and the like, that he was acting as a police officer under color of law. The jury subsequently returned a verdict in favor of the City, finding that Walker had not been acting in an official capacity when the assault occurred. Fate appealed.

**HELD:** The Third Circuit upheld the results from the court below.

**DISCUSSION:** On appeal, the Circuit Court focused primarily on the Fate's contention that the district court erred by requiring the jury to find—as a prerequisite for his claims against the City—that Detective Walker acted under color of law. Fate had argued that the jury should only be instructed to determine whether the defendants "caused" Detective Walker's assault. The District Court, however, had rejected this argument, and instructed the jury that "Plaintiff must prove . . .: First, [that] former Detective Walker acted under color of law."

The Third Circuit found no error in the district court's instruction. Section 1983 affords a remedy for constitutional deprivations brought about by state actors. Here, however, the jury determined that Detective Walker was acting as a private citizen when he assaulted Fate. Without state action, there could be no constitutional deprivation. And if Detective Walker did not violate the constitution, "it is inconceivable that [the City] could be liable to [Fate]." *City of Los Angeles v. Heller,* 475 U.S. 796, 799 (1986). Moreover, the Supreme Court has been clear that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *DeShaney v. Winnebago County Dep't of Social Services,* 489 U.S. 189, 197 (1989).

Fate had relied on *Stoneking v. Bradford Area School Dist.,* 882 F.2d 720 (3d Cir. 1989), but the Circuit Court found this to be misplaced. In *Stoneking,* a former high school student sued her school district and its officials under Section 1983 and the Fourteenth Amendment for failing to protect her from a band teacher who sexually assaulted her over a period of years. But in *Stoneking,* there was no question that the band teacher was acting under color of law when he sexually assaulted the plaintiff--much of the abuse alleged in the complaint "occurred in the course of [the band teacher's] performance of his official responsibilities, such as during school-sponsored events and trips, and sometimes on school property." *Stoneking,* 882 F.2d at 724. As a result, the Court did not directly confront the situation we face— where the state employee's wrongful conduct was unquestionably not under color of law.

Because Detective Walker was not acting under color of law, there was no basis for a municipal liability claim against the City. And because Detective Walker's conduct was not attributable to

the state, there was no state action depriving Fate of his constitutional rights, and no supervisory liability against the police officers.

http://www2.ca3.uscourts.gov/opinarch/132219np.pdf (last accessed Mar. 6, 2014).

## RLUIPA: Wyoming Prison's Refusal to Allow Inmate Access to Prison's Sweat Lodge Due to Security Concerns Is Not Viable Under RLUIPA

## *Yellowbear v. Lampert*, No. 12-8048 (10th Cir. Jan. 23, 2014).

The Tenth Circuit recently reversed a lower court decision which had upheld a prison's refusal to accompany an Arapaho inmate across prison quadrants to the institution's sweat lodge, finding that the state failed to show a compelling governmental interest or a least restrictive solution.

Andrew Yellowbear, a member of the Northern Arapaho Tribe, is incarcerated for life in a Wyoming penitentiary for murdering his daughter. He sought access to the prison's existing sweat lodge to facilitate his religious exercises. The prison refused because the sweat lodge is located in the general prison yard and Yellowbear is housed in a special protective unit (because of threats against him). Prison officials insisted that the cost of providing the necessary security to take Yellowbear from the special protective unit to the sweat lodge was "unduly burdensome." Yellowbear sought relief under RLUIPA. The district court entered summary judgment in favor of the state, and Yellowbear appealed, seeking to allow the case to go to trial.

**HELD**: Reversed and remanded. The state failed to show that the burden it would incur outweighed plaintiff's free exercise rights under the Constitution and RLUIPA.

**DISCUSSION**: Judge Gorsuch, writing for the Tenth Circuit in an exceptionally readable decision, first laid out RLUIPA's bare essentials. It requires an inmate to show that his (1) religious exercise is (2) substantially burdened by prison policy. At the heart of RLUIPA is the necessity of a "sincerely held religious belief":

Of course, trying to separate the sacred from the secular can be a tricky business — perhaps especially for a civil court whose warrant does not extend to matters divine. But at least one feature of the statute's "religiosity" requirement often proves relatively unintrusive in its application and not infrequently dispositive: the question of sincere belief. RLUIPA does not offer refuge to canny operators who seek through subterfuge to avoid laws they'd prefer to ignore. Like those who set up "churches" as cover for illegal drug distribution operations. Or those who, facing the difficult realities of prison life, are tempted to seek special dispensations through fraudulent assertions of faith. But in suggesting we may ask whether a claimant truly holds a religious belief isn't to suggest we may decide whether the claimant's religious belief is true. After all, "Faith means belief in something concerning which doubt is still theoretically possible." William James, *The Will To Believe* 90 (1897).