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## Excessive Force: Use of Taser Which Causes Only *De Minimis* Injury To Detainee Does Not Constitute Excessive Force

### *Hollingsworth v. City of St. Ann*, No. 14-1583 (8th Cir. Sept. 3, 2015).

**SUMMARY:** In an action alleging excessive force when a police officer tased plaintiff after she refused to put on a jail jumpsuit, the Eighth Circuit has found it was reasonable to use some force to cause plaintiff to comply; it was not clearly established at the time that use of a Taser, resulting in only *de minimis* injury, was an unconstitutional use of force, and the officer was entitled to qualified immunity--and qualified immunity also shielded others accused of an unreasonable failure to intervene. Further, the City's Taser policy was not unlawful on its face and plaintiff did not present evidence that the City was deliberately indifferent to her Fourth Amendment rights.

**FACTS:** Danelle Hollingsworth was detained for booking at the police station in St. Ann, Missouri (City), after an arrest for stealing wine coolers from a convenience store. When she refused a directive from police and corrections officers to change from her street clothes into an orange jumpsuit, a police officer stunned her with a Taser to exact compliance. Hollingsworth brought an action against the police officer, two corrections officers, and the City of St. Ann, pursuant to 42 U.S.C. § 1983. She alleged that the police officer violated her Fourth Amendment rights by using excessive force. She also claimed that the corrections officers violated her constitutional rights by failing to intervene and that the City was liable for the violations because its policy regarding the use of Tasers was unconstitutional. The district court granted summary judgment for defendants on all claims, concluding that the officers were entitled to qualified immunity, and that the City's Taser policy did not violate Hollingsworth's rights. She appealed.

**HELD:** The Eighth Circuit affirmed on all counts, concluding that although the actions of one or more officers might have been unreasonable, their conduct did not violate clearly established law at the time of the incident.

**DISCUSSION**: The Circuit Court cited current law on excessive force: An officer's use of force violates the Fourth Amendment if it is objectively unreasonable in light of the facts and circumstances of the particular case, as "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865 (1989). In § 1983 actions, qualified immunity shields government officials from suit unless their conduct violated a clearly established right of which a reasonable official would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727 (1982). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034 (1987).

The issue here was whether the officer, having justification to use some force to cause Hollingsworth to change into an orange jumpsuit, violated her clearly established rights by deploying the Taser rather than employing other means such as physical restraint and forcible removal of clothing. It was critical to the decision that Hollingsworth had not sustained any material injury from the Taser. The Eighth Circuit has held that use of a Taser does not, without additional evidence, establish more than *de minimis* injury; therefore, the police officer's action was not an unconstitutional use of force and the corrections officers had no complicity.

The Circuit Court also agreed with the district court's determination that, even if the officer had acted unreasonably, the City's Taser policy was not the cause of that action. The officer testified that he used the Taser in order to ensure compliance with a safety protocol, which was not part of the City's policy. Furthermore, Hollingsworth did not present evidence that the City was deliberately indifferent to her Fourth Amendment rights as required under *Monell*. The City's policy on the use of a "stun type device" was not unlawful on its face and did not compel unconstitutional action.

LINK (last accessed Sept. 10, 2015).

## FLSA: Firefighters Not Entitled to Additional Pay for Time Spent Retrieving Gear When Volunteering for Service at Other Stations

## *Balestrieri v. Menlo Park Fire Protection District*, No. 12-15975 (9th Cir. Sept. 9, 2015).

**SUMMARY:** Based on last year's Supreme Court guidance in *Integrity Staffing Solutions*, firefighters who volunteer for overtime duty at other fire stations are not entitled to compensation for the time required to retrieve their gear from their "home"

station—that additional time spent is not "integral and indispensable" to their duties because they could have brought the gear home with them.

**FACTS:** The Menlo Park Fire Protection District (District) spans 30 miles of San Mateo County, California. Firefighters there are stationed at "home" fire stations, but sometimes take shifts at other stations. There are a variety of ways this can occur, but the two at issue are when firefighters sign up for voluntary overtime shifts and when they get to their home station early and get assigned to a different station short-staffed for a one reason or another.

All District firefighters are issued special protective equipment, inclusive of fire-resistant pants and coats. The District permits firefighters to take this equipment home with them or leave it at their home station. Given that the equipment is bulky, heavy, and may contain unhealthy material or particulates, many firefighters prefer to leave it at their station. However, if a firefighter has to work at a different fire station from the "home" one, given the distance to stations, it can be time consuming to get the equipment and then get to the station. The firefighters are not compensated for the time it takes to pick up their equipment before their shift begins in either of the scenarios set forth above. The firefighters thus sued the District under the Fair Labor Standards Act, arguing that they should be paid overtime for the time it takes to obtain their equipment before the shift begins and to drop it off after the shift ends. The district court granted summary judgment to the District, holding the firefighters were not entitled to overtime pay for this time.

**HELD**: The Ninth Circuit affirmed the district court.

**DISCUSSION**: The Portal to Portal act amended the Fair Labor Standards Act in 1947, clarifying that commuting time and activities that are "preliminary" and "postliminary" to the "principal activities" of the employee are not compensable work. The firefighters posited that they should be paid for the work-related activity of getting and dropping off their mandatory protective equipment before and after a shift. The District countered that firefighters are free to take their gear home with them and therefore are not required to stop, before or after, at any particular location in order to get or drop off their equipment. The Court looked to *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513 (2014) to resolve the dispute. There the Supreme Court held that whether an employer requires something and whether it is done for the benefit of the employer are not the determining factors for whether it is compensable. Rather, the Court said "an activity is integral and indispensable to the principal activities that an employee is employed to perform—and thus compensable under the FLSA—if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities."

Applying this standard to the scenario where a firefighter voluntarily signs up for overtime, the Court noted the person can then just take the equipment home and go straight to the necessary station for the volunteer shift, negating any need to stop at the "home" station. It held in this situation the time not indispensable. In the second

scenario, the firefighter is at the "home" station early, which is time that would have been spent commuting to work for the shift anyway, and therefore was not indispensable or intrinsic to the employment. The firefighters thus lost the appeal.

LINK (last accessed Sept. 9, 2015).

## Search and Seizure: Requiring Officers to Provide Buccal Swabs Without A Warrant Does Not Violate Fourth Amendment

## *Bill v. Brewer*, No. 13-15844 (9th. Cir. Aug. 31, 2015).

**SUMMARY:** The Ninth Circuit has upheld a lower court finding that no constitutional rights were violated where police officers at a Phoenix crime scene were required to provide buccal swabs because unknown DNA had been found at the scene—even though the officers were not suspects and no warrant had been obtained.

**FACTS:** In October 2010 a sergeant in the Phoenix police department was found dead from a gunshot wound in his vehicle. More than 100 emergency personnel were on the scene, including roughly 50 police officers. Detective Warren Brewer and Detective Heather Polombo headed up the investigation, during which they discovered there was unknown DNA on the sergeant's vehicle and weapon. In order to ensure, and ultimately prove, that the crime scene was not contaminated during the investigation the detectives requested the DNA of all emergency personnel. All but five officers consented to providing their DNA. Polombo met with the non-consenting officers and ensured them they were not suspects, since their digital communication data provided an alibi for each, and that the DNA sample would only be used to eliminate each as the source of the unknown DNA. The officers continued to refuse, however. The detectives thus sought and received a court order for the officers' buccal swaps under Arizona Revised Statute § 13-3905. The swabs were taken.

In 2012 the five officers filed suit under § 1983 claiming the detectives violated the Fourth Amendment by obtaining, analyzing, and retaining their DNA. The district court dismissed the case for failure to state a claim upon which relief could be granted. The officers appealed.

**HELD**: The Ninth Circuit affirmed the district court, holding that the buccal swabs were a search that did not violate the Fourth Amendment.

**DISCUSSION**: The officers argued that since the detectives failed to obtain a warrant and failed to show any individualized suspicion that they engaged in criminal wrongdoing, taking their DNA samples without an exception to the warrant requirement violated the Fourth Amendment. The Court first noted that although Arizona Revised Statute § 13-3905, through which the detectives obtained the court order for the buccal swabs, appeared to only require "less than probable cause" for such an order, Arizona Supreme Court precedent describes such orders as warrants to be issued with probable

cause. As a result, the Court applied the more demanding Fourth Amendment standard in reviewing whether the order was appropriately granted. It easily found that two of the three requirements for a valid search warrant were met in the case – the court order was issued by a neutral magistrate and it particularly described the thing to be seized and place to be searched.

The officers focused their efforts on arguing there was no probable cause for the order since it did not seek *evidence of a crime* – they pointed out they were told, and the detectives repeatedly argued, that they were not suspected of any wrongdoing. The Court disagreed with this narrow view of the Fourth Amendment, however. It held probable cause "concerns the connection of the items sought with crime and the present location of the items," not that the person to be searched is suspected of a crime. In this case, the detectives demonstrated the nexus between the thing to be seized and the criminal behavior because they showed that there was a homicide, that all who entered the crime scene universally needed to be excluded as depositors of an unknown DNA sample found at that homicide scene, and that these officers were at the homicide scene. Whether these officers were already excluded as suspects was immaterial to the nexus between the evidence and the crime since excluding each emergency worker as the depositor of the unknown DNA negated any contention of scene contamination, and thus clearly "aided in" the investigation and conviction of the real defendant.

Second, and alternatively, the officers argued that the search was unreasonable, despite the valid warrant, since it intruded on personal privacy to an extent disproportionate to the benefit sought. The Court disagreed because buccal swabs are so minimally invasive, involve no pain or trauma, and the plaintiffs were police officers. While the Court was clear that people do not abandon their constitutional rights upon becoming officers, the government's interest in the integrity of the police force does justify "some intrusions on the privacy of police officers which the fourth amendment would not otherwise tolerate." It thus affirmed the lower court.

LINK (last accessed Sept. 9, 2015).

## Takings: Limit on Mobile Home Park Rental Increases Does Not Overly Interfere with Owner's Investment-Backed Expectations

## *Rancho de Calistoga v. City of Calistoga*, No. 12-17749 (9th Cir. Sept. 3, 2015).

**SUMMARY:** A mobile home park operator has unsuccessfully challenged a city ordinance limiting rental increases, despite the fact that it acquired the park before any such ordinances were on the books; under *Penn Central*, it would not be reasonable for the owner to assume that it could raise rents indefinitely, without restriction.

**FACTS:** A Calistoga, California (City) mobile home park rent control ordinance is intended to stabilize mobile home park rent prices, and "[p]revent exploitation of the shortage of vacant mobile home park spaces, … excessive and unreasonable . . . rent increases, [and r]ectify the disparity of bargaining power" between park owners and mobile home owners. To that end, the ordinance permits a yearly rent increase equal to the lesser of 100% of the percentage change in the Consumer Price Index or 6% of the current base rent. It does provide an alternative mechanism to increase the rents above this standard through an administrative process as well.

In 2010 the City noticed that Rancho de Calistoga, a mobile home park in Calistoga, intended to increase rent from $471.39 to $625.00 per month. While the park owners characterized this as "slightly below market," an administrative hearing officer rejected it and allowed an increase only to $537.59. Rancho de Calistoga appealed this decision and simultaneously filed suit against the city in federal court, arguing the mobile home park rent control ordinance violated the Takings Clause of the Fifth Amendment. The city moved to dismiss and the district court obliged without prejudice. Rancho de Calistoga filed an amended complaint, but the district court found it failed to state a claim and dismissed the case. Rancho de Calistoga appealed.

**HELD**: The Ninth Circuit affirmed the lower court, rejecting the regulatory Takings theories of Rancho de Calistoga.

**DISCUSSION**: Rancho de Calistoga first posited an as-applied challenge to the ordinance, claiming that the rent control law takes property from it and the city should therefore pay Rancho de Calistoga a subsidy to make up the difference between the rent controlled price and what Rancho de Calistoga should be able to charge. The Court rejected this, noting that the Supreme Court has long and consistently held that States have broad powers to regulate the landlord-tenant relationship without paying for economic injury.

It looked to *Penn Central* to determine whether a regulatory taking had occurred – e.g. whether the City's regulation of mobile home park rent regulated actions so much that it was the functional equivalent of a classic taking. The factors it looked to, citing *Penn Central,* included "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations" and "the character of the governmental action—for instance whether it amounts to a physical invasion or instead merely affects property interests through some public program adjusting the benefits and burdens of economic life to promote the common good."

The Court found the economic impact factor clearly favored the City, given the Supreme Court's consistent rule that diminution in value – even severe diminution – is insufficient to prove a taking. As for investment-backed expectations, the Court held that Rancho de Calistoga cannot reasonably expect that it will be unhampered by government regulation. Rancho de Calistoga countered that since it had owned the mobile home park since before the first rent control ordinance took effect in 1984 it could expect to be

regulation-free, but the Court flatly rejected this, saying it was the equivalent of a homeowner expecting his/her tax rate to remain the same as the day s/he bought the home. Lastly, Rancho de Calistoga argued it could reasonably expect a "fair return," but this fared no better since the ordinance, according to the Court, provides just that – it allows two alternate rent increases and provides an administrative process to set higher increases. In sum, the Court found simply that "[t]he City has designed a system aimed at giving park owners a fair return while still furthering the goals of rent control. Rancho [de Calistoga] may disagree with the specific rent prices authorized by the ordinance, but this disagreement does not give rise to a constitutional taking nor is a mobile home park owner entitled to unilaterally impose its own formulation of "excessive" or "monopolistic" as the standard necessary for a taking." The City thus prevailed in the appeal.

LINK (last accessed Sept. 9, 2015).

## Trials: Challenge to Jury Composition Must be Based on Reasonable Probability That Outcome Would Have Been Different

## *Ambrose v. Booker*, No. 14-1780 (6th Cir. Sept. 4, 2015).

**SUMMARY:** Despite evidence that a computer glitch excluded African Americans from his jury pool, a Michigan man could not demonstrate "actual prejudice" in his robbery trial unless he established a "reasonable probability that the outcome of his trial would have been different" with a differently-constituted jury.

**FACTS:** In 2001 Joseph Ambrose was convicted of armed robbery. He had a jury trial and he did not object to the racial composition of the jury at the time. By July of 2012 Ambrose had exhausted his direct appeals. That same month, however, a local newspaper ran an investigative story about a computer glitch in the county software that had systematically excluded African Americans from the jury pool between April 2001 and early 2002. Ambrose thus filed for post-conviction relief, arguing his Sixth Amendment right to a fair-cross section had been violated. The state courts rejected this motion given Ambrose's failure to object to the jury composition at the time of trial. Ambrose thus filed a habeas petition under 28 U.S.C. § 2254 in federal court. The district court conditionally granted it and, in 2012, the Sixth Circuit remanded the case to the district court for a determination of whether there was actual prejudice. The district court found Ambrose showed there was actual prejudice that excused his procedural default, thus establishing a prima facie violation of his Sixth Amendment right. The government appealed.

**HELD**: The Sixth Circuit reversed the district court.

**DISCUSSION**: On the Sixth Circuit's first hearing of this case it remanded, holding that "having shown cause [to excuse his procedural default, Ambrose] must also show actual prejudice" to excuse the default. The Court stated that the appropriate standard for remand was *Strickland*, which required Ambrose to show that "with a properly selected jury, there was a reasonable probability that the outcome of his trial would have been different." The district court, as required, held an evidentiary hearing, but did not apply *Strickland* to the facts – it applied the less demanding standard of *Hollis* from the Eleventh Circuit, asking only whether there was a "reasonable probability that a proper jury would have been less likely to convict." The Circuit thus found the incorrect standard had been applied.

The Circuit Court then reviewed the evidentiary hearing testimony and facts and, applying *Strickland*, found that the lower court should not have relied on the testimony of a primary witness because it did not support a showing that a different jury would have a reached a different result, but only that a properly selected jury would have been *less likely* to convict Ambrose. It also rejected the testimony since it was not based on an individualized assessment of the evidence in the case against Ambrose, but rather relied on general racial characteristics. After reviewing these faults with the lower court review, the Court noted the "most important aspect to the actual prejudice standard is the strength of the case against the defendant," and on this front the Court's review of the facts disfavored Ambrose. Simply put, the Court found the plain evidence against Ambrose "very strong" and Ambrose's defense "weak." Thus, "[u]ltimately, under the stricter *Strickland* standard, and without consideration of [the witness] testimony, Ambrose … failed to show actual prejudice to excuse his procedural default." The Sixth Circuit reversed.

LINK (last accessed Sept. 9, 2015).

## THIS JUST IN: From the Meyers Nave "Labor Buzz" blog

## California Court of Appeal Invalidates Requirement That Employees Reimburse Training Costs If They Terminate Employment Early

Under a new decision by the Fourth District Court of Appeal, employers can no longer seek reimbursement for mandatory training from employees who leave their jobs before a specified period of time.

In *In Re Acknowledgment Cases*, the Court reversed a lower court decision which awarded the City of Los Angeles ("City") prorated training costs from 43 police officers who left the Los Angeles Police Department ("LAPD") less than 60 months following graduation from the Los Angeles Police Academy.

The police officers in this case had signed an acknowledgment which required them to reimburse the City a prorated portion of the cost of their training at the academy if: (1) they voluntarily left the LAPD after serving less than 60 months following graduation and

(2) went to work for another law enforcement agency within one year after terminating employment. The trial court found that the officers were liable to the City because the acknowledgment was an enforceable agreement.

On appeal in the case, the officers contended that the acknowledgment fails as a contract for lack of consideration, but that even if there was a contract, it is unenforceable as contrary to multiple state and federal laws. The Court of Appeal agreed that the acknowledgment violated Labor Code Section 2802. The Court stated that under the particular circumstances of this case, the acknowledgment was entirely void.

This is the first case that interprets Labor Code Section 2802 to mean that the costs of employee training are to be borne by the employer. Labor Code Section 2802(a) provides that "[a]n employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties." The Court stated that "it is established that the broad purpose of Labor Code Section 2802 is to require an employer to bear all of the costs inherent in conducting its business and to indemnify employees from costs incurred in the discharge of their duties for the employer's benefit."

Under this precedent, employers may not create contracts which require reimbursement for costs of training that are employer-mandated; employers must bear those costs regardless of how long the employee remains. The court did distinguish, however, licenses (such as an EMT certification or a Class A driver's license) that are required for the job. Employers are not responsible for the expense of obtaining and maintaining such licenses for employees.

In light of this decision, employers may wish to review their training requirements and reimbursement policies.

LINK (last accessed Sept. 10, 2015).