

## MUNICIPAL AND SUPERVISORY LIABILITY

### I. Municipal Liability Under Section 1983

- A. Under Section 1983, Municipalities are “persons” who can be sued. *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978), overrules the Court’s 1961 decision in *Monroe v. Pape*.
- B. Municipalities are not liable for the acts of their employees, but only for their own acts. No *respondeat* liability under Section 1983.
- C. Liability of a Municipality – can come about in four ways, generally. In all cases, the plaintiff must prove that the municipal policy, or municipal action, “directly caused” his/her injuries. “The word ‘policy’ generally implies a course of action consciously chosen from among various alternatives.” *Vives v. City of New York*, 524 F.3d 346, 350 (2d Cir. 2008) (quoting *Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985) (plurality opinion)).
  1. Official policy – facts of *Monell* involved the enforcement by a non-policymaking employee of an official, adopted City policy. Clear case of the municipality “causing” the violation through its own acts. “Local governing bodies ... can be sued directly under § 1983 ... where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers.” *Monell*, 436 U.S. at 690.
  2. Action by Policymaker with Authority to Bind the Municipality.
    - a. Liability under *Monell* also can be predicated upon a specific decision by a municipal official with policymaking authority under state law which causes harm to the plaintiff. See *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483-84 (1986) (plurality opinion).
    - b. The U.S. Supreme Court explained in *Pembaur*: “[A] government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations. If the decision to adopt that particular course of action is properly made by that government’s authorized decision-makers, it surely represents an act of official government ‘policy’ as that term is commonly understood.” *Id.* at 481 (footnote omitted).
    - c. In order to establish municipal liability based on the actions of a policymaker, the plaintiff must show “that the official had final policymaking power, ... [and that] the challenged actions [were] within that official’s area of policymaking authority.” *Roe v. City of Waterbury*, 542 F.3d 31, 37 (2d Cir. 2008), cert. denied, 558 U.S. 933 (2009). Plaintiff must also show that the decision made by the policymaker “directly caused the violation of his

[constitutional] rights.” *Pembaur*, 475 U.S. at 484 (emphasis added).<sup>1</sup>

- d. Emphasis on the policymaking official’s areas of authority and the nature of the decision. As noted above, plaintiff must show that “with respect to the conduct challenged, [the named official] [is] responsible under state law for making policy *in that area* of the municipality’s business.” *Jeffes v. Barnes*, 208 F.3d 49, 57 (2d Cir. 2000) (emphasis in original).
- e. Municipal employee’s title is not determinative – many high-ranking officials are not “policymakers” for purposes of establishing *Monell* liability. See, e.g., *Bernini v. City of St. Paul*, 665 F.3d 997 (8th Cir. 2012) (an officer who commanded approximately 500 officers and was the highest ranking official on-site at a large-scale demonstration was not a policymaker because state law did not confer authority on him); *Valle v. City of Houston*, 613 F.3d 536 (5th Cir. 2010) (tactical operations captain, although given responsibilities for determining when SWAT response is appropriate through written police procedure, was not a policymaker).

3. Unofficial custom, policy or practice. This type of claim has been articulated many times but is difficult to apply in specific cases.

- a. In *Monell*, the Court also held that a municipality could be liable for injuries caused by its own “customs” or “practices” even if not formally adopted as municipal policy: “[L]ocal governments, like every other § 1983 ‘person,’ by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental ‘custom’ even though such a custom has not received formal approval through the body’s official decisionmaking channels .... Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a ‘custom or usage’ with the force of law.” *Monell*, 436 U.S. at 690 (citation and internal brackets omitted).

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<sup>1</sup> In *Pembaur*, for example, the County Prosecutor, an official with authority under state law to direct the actions of county sheriffs, instructed two sheriff’s deputies to enter a doctor’s office to arrest witnesses pursuant to a court order. The challenged action violated the doctor’s Fourth Amendment rights. The Court held that in these circumstances, the actions of the County Prosecutor could fairly be said to represent the “official policy” of the municipality. *Pembaur*, 475 U.S. at 481.

- b. “A section 1983 action may be maintained based on a practice that was so persistent or widespread as to constitute a custom or usage with the force of law.” *Green v. City of New York*, 465 F.3d 65, 80 (2d Cir. 2006) (citations and internal quotes omitted). “The alleged custom or practice need not be embodied in a rule or regulation, [but] must be so manifest as to imply the constructive acquiescence of senior policy-making officials.” *Id.* (citations and internal quotes omitted).
- c. “Monell’s policy or custom requirement is satisfied where a local government is faced with a pattern of misconduct and does nothing, compelling the conclusion that the local government has acquiesced in or tacitly authorized its subordinates’ unlawful actions.” *Reynolds v. Giuliani*, 506 F.3d 183, 192 (2d Cir. 2007) (citations omitted). In order to establish the claim, plaintiff must plead and prove “deliberate indifference” by policymakers – a “stringent” standard of fault. *Id.* (citing *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)).
- d. “[W]here a policymaking official exhibits deliberate indifference to constitutional deprivations caused by subordinates, such that the official’s inaction constitutes a ‘deliberate choice,’ that acquiescence may ‘be properly thought of as a city policy or custom that is actionable under § 1983.” *Amnesty America v. Town of West Hartford*, 361 F.3d 113, 126 (2d Cir. 2004) (quoting *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)).
- e. Significantly, “evidence of one instance” in which municipal employees violated a citizen’s rights is not enough to raise a jury question as to whether the conduct “constitute[s] a practice so manifest as to imply the constructive acquiescence of senior policy-making officials.” *Green*, 465 F.3d at 81 (citation and internal quotes omitted).
- f. Deliberate indifference is a “stringent” standard of fault. As the Supreme Court has explained: “That a plaintiff has suffered a deprivation of federal rights at the hands of a municipal employee will not alone permit an inference of municipal culpability and causation; the plaintiff will simply have shown that the *employee* acted culpably.” *Board of County Commissioners v. Brown*, 520 U.S. 397, 406-7 (1997) (emphasis in original).
- g. Furthermore, “a plaintiff seeking to establish municipal liability on the theory that a facially lawful municipal action has led an employee to violate a plaintiff’s rights must demonstrate that the municipal action was taken with ‘deliberate indifference’ as to its

known or obvious consequences.” *Id.* at 407 (quoting *Canton*, 489 U.S. at 388).

- h. The dissent in *Brown*, likewise, recognized that “deliberate indifference” must be shown in order to establish municipal liability in any case not involving execution of an official municipal policy or a decision by a policymaker that directly causes constitutional injury: “Deliberate indifference is thus treated, as it is elsewhere in the law, as tantamount to intent, so that inaction by a policymaker deliberately indifferent to a substantial risk of harm is equivalent to the intentional action that setting policy presupposes.” *Id.* at 419 (Souter, J., dissenting).
- i. Query whether deliberate indifference would be required to support municipal liability where a municipality adopted a *de facto* custom or practice that was literally applied in every case, just as an official policy would be applied in every case.
- j. Application of the custom, pattern or practice standard in specific cases is difficult. How many instances of misconduct are sufficient, and how does a plaintiff go about proving a “pattern” at trial? [Discuss proof adduced at the *Newton* trial.]
- k. Is it enough for the plaintiff to show that employees’ conduct creates the risk of constitutional injury? (Second Circuit seemed to say yes in *Cash v. County of Erie*.)

#### 4. Failure to Train

- a. In *City of Canton v. Harris*, 489 U.S. 378 (1989) (plurality opinion), the U.S. Supreme Court held that a municipality’s failure to train its employees can, in certain circumstances, give rise to *Monell* liability. The Court reasoned that a municipality can be liable when the failure to train “can justifiably be said to represent city policy.” *City of Canton*, 489 U.S. at 390. In order to show that a failure to train represents city policy, the plaintiff must show that “the failure to train amounts to deliberate indifference to the rights of persons with whom the police [or other city officials] come into contact.” *Id.* at 388 (footnote omitted).
- b. The Court explained: “Municipal liability under § 1983 attaches where – and only where – a deliberate choice to follow a course of action is made from among various alternatives by city policymakers . . . . Only where a failure to train reflects a ‘deliberate’ or ‘conscious’ choice by a municipality – a ‘policy’ as defined by our prior cases – can a city be liable for such a failure under § 1983.” *Id.* at 389 (citations and internal quotes omitted).

- c. The state of mind required to make a “deliberate or conscious choice,” in turn, is “knowledge” that the conduct of subordinates will violate citizens’ constitutional rights. *Id.* at 390 n.10.
- d. The Court reasoned as follows: “It may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees. But it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.” *Id.* at 390.
- e. *Connick v. Thompson*, 563 U.S. 51 (2011) is the U.S. Supreme Court’s most recent case concerning failure to train claims. The Court held that “[a] pattern of similar constitutional violations by untrained employees is ‘ordinarily necessary’ to demonstrate deliberate indifference for purposes of failure to train.” *Id.* at 62 (citing *Brown*, 520 U.S. at 409).
- f. Discussion of *Connick*.

D. Ratification Doctrine – sub-species of failure to train/supervise and custom or practice claims.

- 1. A municipality can be held liable under Section 1983 if a policymaker “ordered or ratified the subordinates’ [unlawful] actions.” *Amnesty America*, 361 F.3d at 126. Typically, but not always, the ratification must occur at the time the unlawful conduct occurs, and thereby cause (or contribute to causing) injury. *See id.* at 127-28 (police chief on the scene at demonstration); *Weber v. Dell*, 804 F.2d 796, 803 (2d Cir. 1986) (sheriff who ordered strip searches).
- 2. Discuss Judge Block’s ruling in *Collins v. City of New York*, 923 F. Supp. 2d 462 (E.D.N.Y. 2013).

II. Supervisory Liability

- A. Law is unclear after *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).
- B. In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court held: “Because vicarious liability is inapplicable to ... § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.” *Id.* at 676. *See also Hogan v. Fischer*, 738 F.3d 509, 519 n.3 (2d Cir. 2013) (expressing “no view on the extent to which

the Supreme Court's decision in *Ashcroft v. Iqbal*[,] 'may have heightened the requirements for showing a supervisor's personal involvement with respect to certain constitutional violations[.]'" (quoting *Grullon v. City of New Haven*, 720 F.3d 133, 139 (2d Cir. 2013)).

- C. Discuss supervisory liability decisions from other circuits.
- D. Query: Are such claims viable after *Iqbal*, in light of the requirement of "personal involvement"?