RISKY BUSINESS

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COUNSELOR'S COMMENTS

When Private Conduct Can Be "State Action" Under Section 1983 Public Officials as Private Citizens:

By Justin M. Burns, Esq, Dinsmore & Shohl, LLP

Public service is demanding. In addition to demands inherent in public work, public officials must also balance their public duties with their private lives. This balance is more demanding when the public views a public official as always available or always acting on behalf of his or her constituents. Herein lies the dilemma: When do a public official's duties end such that his or private actions do not create liability for the public entities they serve?

Articles

This question is often raised within the Section 1983 context. Section 1983 is a federal law that creates a private cause of action against government officials who violate a person's rights. A cause of action exists if the official violated another's rights while engaged in "state action" and acting under "color of law." In other words, there must be "state action" to create a Section 1983 claim; a private citizen, who is not typically bound by the Constitution's limitations, cannot be sued under Section 1983. Accordingly, the question arises whether a public official engaged in purely private pursuits can be said to have engaged in "state action" to create Section 1983 liability.

The line between private and state action is blurry at best. Consider an off-duty police officer, dressed in plain clothes, who was enjoying private time with friends at a local tavern. Based on the officer's training and experience, he identified another patron who was intoxicated and, based on that patron's actions, showing a propensity for violence. After the patron made threatening movements against a bartender, the off-duty officer snapped into action, tackled the patron, and pinned him to the ground in an attempt to diffuse the situation and prevent an attack. If that officer had been on-duty, one might file a Section 1983 claim for excessive force. Could that same claim exist here, when the office was not on-duty and not in uniform, but simply enjoying time away with friends? What if the officer relied upon his police training to take the patron down? Could the municipality be liable if it did not have a policy regulating off-duty conduct? It depends.

Counselor's Comments...Continued

The problem is that the tests used to decide these questions are not built to address these situations. The tests arose out of situations in which courts considered whether ordinary, private citizens acted in a way that could be attributed to the government. *See Lindke v. Freed*, 37 F.4th 119 (6th Cir. 2022) (discussing tests). But here, the opposite exists – a person who is ordinarily a public official is acting as a private person, and the question is whether a public official sufficiently divested himself of his public office such that the private person was truly "private" at the time.

This area of law is evolving – but cases testing that line happen quite often. For example, in *Gomez v. Galman*, an off-duty police officer harassed another patron at a tavern, and later, ordered the patron to stop and placed the patron in a "police hold" while calling for backup from on-duty officers. *Gomez v. Galman*, 18 F.4th 469 (5th Cir. 2021). On these facts, it would be reasonable to conclude that the officer was not acting as a police officer at the time – he was, apparently, acting out of contempt for the patron, and after apparently nothing wrong occurred, he acted out violently. But yet, the Fifth Circuit held that the patron had a potential Section 1983 claim because there was an "air of authority" about the officer that created a dynamic such that the patron could have believed the person was a police officer. The officer issued a directive to stop and later called for backup officers, which is something a private citizen cannot ordinarily do.

The blurred line also exists outside of law enforcement. For example, it is not uncommon for public officials to have social media accounts for communicating public information. But when those officials "block" constituents from those accounts and delete negative messages, that action could be considered a violation of the First Amendment if done by the government. Under these facts, courts have reached varying conclusions about whether state action exists. *Compare Garnier v. O'Connor-Ratcliff*, 41 F.4th 1158 (9th Cir. 2022) (holding school board members engaged in state action under a "nexus test" when blocking citizens on social media) *with Lindke v. Freed*, 37 F.4th 1199 (6th Cir. 2022) (holding the "nexus test" inappropriate and concluding city manager was not engaged in state action under a "state-official test" for similar conduct).

In an attempt to clarify, the Sixth Circuit (which covers Ohio and surrounding states) recently announced a new test for these situations. Under this new test, the decision focuses on two factors: (1) whether the public official acting in his private capacity "cloaked" himself with government authority to give the appearance of state action, and (2) whether that official was attempting to carry out that person's governmental duties. *Lindke*, 37 F.4th at 1203.

For example, in *Lindke*, the Sixth Circuit examined whether a city manager's blocking of a constituent from a Facebook page constituted "state action." The Sixth Circuit held that under the circumstances, the blocking was not state action because, among other things, maintaining the page was not part of his government duties, the page did not belong to the government, and no government resources were used to maintain it. *Id.* at 1205–1206. Because the page "neither derives from the duties of his office nor depends on his state authority," there was no state action. *Id.* at 1204.

Counselor's Comments...Continued

The Sixth Circuit's test is not yet one-year old, and it is not clear how lower courts will apply that test in different situations. But the lessons from *Lindke*, *Gomez*, and other cases suggest now is the time for a municipality to consider whether its policies adequately address "off-the-clock" conduct. A municipality should have clear rules about when public officials can use government resources when "off-the-clock" and whether policies could inadvertently require a public official to take state action when acting as a purely private person. *See, e.g., Lindke*, 37 F.4th at 1204 (observing the "use of state resources" is a consideration in whether state action occurred). For example, in *Hyun Ju Park v. City & County of Honolulu*, which involved an intoxicated off-duty officer mishandling his department-issued firearm that severely injured another person, the Ninth Circuit questioned whether a department policy requiring officers to carry firearms at all times, even when not scheduled for work, converted private action into state action. 952 F.3d 1136 (9th Cir. 2020). One judge thought so. *See id.* at 1144 (opining that the policy was typically enough to "find action under color of law").

Now is also the time to ensure that all public officials understand that it is patently unreasonable for a public official to invoke his public office to obtain a personal goal. Even clearly private conduct could, under the Sixth Circuit test, become state action if a public official invokes his public office while committing that conduct. Public officials must understand that it is never appropriate to "cloak" themselves in this public authority while acting in private, because in addition to raising professional and ethics concerns, doing so could also transform that private conduct into state action such that the municipality now faces liability for that private conduct.

FYI – Claims Reporting

By Tom Judy

I would like to take this opportunity to review the pool's claim reporting guidelines.

The criteria for determining which claims to report are as follows:

1. All third-party claims, i.e., claims for actual or alleged injuries to third parties or damages to their property, are to be reported to MVRMA regardless of the dollar amount.
2. First-party property claims, i.e., damages to the City's property, including auto physical damage, if the loss exceeds or potentially exceeds $2,500.
3. All lawsuits in which the plaintiff is seeking monetary damages.

Timely reporting of claims is essential to ensure efficient processing and/or defense of the claim or suit. Lawsuits are to be reported within forty-eight (48) hours of receipt. Other claims should be reported as soon as possible, but not less than 10 days from receipt. Failure to report a lawsuit or claim within these timeframes may result in the loss of coverage through the pool.

Members are also encouraged to report any incident or occurrence which may reasonably be expected to ultimately result in the filing of a claim or lawsuit against the member or the Association. Mark these submissions as "incident or event (for information purposes only)".

To file a claim, first complete a First Report of Loss or Injury form. This form can be found on the MVRMA website or by request from a staff member. Email the form, along with documents such as police reports, incident reports, and estimates to Gallagher Bassett at the email address shown on the First Report of Loss form. Copy tjudy@mvrma.com and smartkworth@mvrma.com on the email.

Please contact a MVRMA staff member with any questions concerning filing a claim.

Loss Control Lowdown…

Starr Markworth

Employment Practices

In today's litigious society, ongoing employment practices training and policy review are crucial for public sector entities. It is essential to ensure that all employees, managers, and supervisors are aware of the current laws and policies concerning harassment, discrimination, and other personnel issues.

According to the Equal Employment Opportunity Commission (EEOC), there were over 76,000 charges of workplace discrimination filed in 2019 alone, resulting in more than $346 million in settlements and verdicts. Public sector entities and cities are not immune to these charges and may face significant liability and reputational damage if found to have violated the law.

In Ohio, for example, a 2019 report showed that the state paid out over $12 million in settlements and legal fees related to employment practices claims. The report also revealed that most of these claims arose from issues related to discrimination, harassment, and retaliation.

To mitigate the risk of costly lawsuits and settlements, cities should regularly review and update their employment policies to ensure they are compliant with federal and state laws.

Best practices for employment practices training and policy review in the public sector and cities include:

1. Managers and supervisors should receive specialized training to ensure they understand their responsibilities and can identify and address potential issues before they become problems.

2. Conducting regular audits of policies and procedures: Regular audits of policies and procedures should be conducted to ensure they are up-to-date and comply with federal and state laws.

3. Cities should consider hiring an employment law attorney to assist with employment practices claims and cases. An employment law attorney can provide expert advice and can guide cities on risk management strategies to reduce the frequency and severity of claims.

To assist member cities, Employment Practices Legal Consultation Helpline is available to MVRMA members. The Helpline is a resource to provide members with access to expert legal advice prior to taking employment actions that could potentially result in employment practices claim or litigation.

MVRMA has contracted with Mazanec, Raskin & Ryder to provide attorneys with knowledge and experience in employment practices law to provide services under the program. By contacting these attorneys before taking adverse employment actions, MVRMA members may be able to reduce the likelihood of a claim occurring or provide for a successful defense in the event a claim occurs.

Loss Control Lowdown…Continued

The program encompasses employment matters arising under the Americans with Disabilities Act (ADA), Fair Labor Standards Act (FLSA), Family Medical Leave Act (FMLA), Age Discrimination in Employment Act (ADEA), Title VII (discrimination on the basis of race, color, religion, sex or national origin) and other similar laws, as well as employment matters involving wrongful termination, harassment, retaliation and hostile work environment.

The program does not cover benefit plan disputes, collective bargaining issues or union-related matters except as they are tangential to a permissible matter. The Helpline does not include appearances by the contracted legal counsel in legal proceedings. Program attorneys will not defend the members in a claim or suit and their opinions will not be used in coverage determinations.

The Helpline is designed to supplement the members' existing legal services. It is not intended to replace the members' law director, solicitor, or labor counsel.

Members should access the program when considering an employment-related action that may result in litigation. It is important that the member consult the program attorney well before a final decision is made and before it is conveyed to the employee.

Members may receive up to three (3) hours of legal consultation per issue at no cost to the member. After that, the members may retain the program attorney's services at the members' cost.

To access the Helpline, contact one of the following Mazanec, Raskin & Ryder attorneys:

David Sipusic, 440-424-0016 (Direct); 440-248-7906 (Main); dsipusic@mrrlaw.com
John McLandrich, 440-287-8298; jmclandrich@mrrlaw.com

Please contact MVRMA staff if you have questions about the Helpline.

Broker's Beat

Hardest property market 'in a generation,' industry paper warns

By Erin Ayers, *Advisen*

Insurance buyers face the hardest property insurance market in a generation, with historic inflation and skyrocketing natural disaster losses causing "significant pressure," according to a new report from the American Property Casualty Insurance Association (APCIA).

"The U.S. property casualty insurance industry is facing significant pressure from rising economic inflation, legal system abuse, supply chain constraints, increasing catastrophic weather driving up losses, and historic cost increases for reinsurance and other forms of capital," said Karen Collins, APCIA vice president, property and environmental, in a statement. "The combined effects are resulting in the hardest market cycle in a generation. Commercial and personal property lines customers, particularly those in high-risk regions, may feel the effects of recent, elevated cost trends."

In the paper, titled "Hard Market Cycle Arrives: Inflation, Natural Disasters, and More Straining Property Insurance Markets," APCIA and Dr. Robert Hartwig, PhD, CPCU, of the University of South Carolina outlined the challenges for the market and urge loss mitigation for homes and properties.

2022 marked the eighth consecutive year where the U.S. experienced at least 10 catastrophes causing over $1 billion in losses, according to the paper. Preliminary estimates suggest the property market's combined ratio will reach nearly 108% for the year and the personal lines market faces a $34.9 billion underwriting losses, a five- year high. The overall industry is expected to see a $26.9 billion underwriting loss for 2022.

"Adding to the industry's financial woes, significant losses since 2017 have pushed the cost of capital to levels not seen since the 2001-2006 period if not before – a cost that is rippling through catastrophe-exposed markets," the authors stated. These factors drove the cost of property catastrophe reinsurance up by 30.1% at the start of the year after a 14.8% increase in 2022, according to reinsurance broker Guy Carpenter.

Broker's Beat...Continued

These challenges will likely mean continued rate adjustments in the personal and commercial property lines and potentially "stricter underwriting," APCIA warned. Loss mitigation through smart technology, disaster-resistant materials, and up-to-date building codes can be "the key to easing the pressure on costs for everyone," the authors of the report added.

Research shows that every $1 spent on natural hazard mitigation in new code construction can save $11 in disaster repair and recovery costs, they noted, citing reports from the U.S. Federal Emergency Management Agency (FEMA) and the National Institute of Building Sciences (NIBS). Additionally, FEMA research found that if all new construction followed modern building codes, the U.S. would save more than $600 billion by 2060.

"Insurers believe communities must begin to adapt to growing climate impacts now, by adopting and enforcing stronger building codes in high-risk areas … As more communities are hardened, this should result in a meaningful decrease in losses, which should translate to more affordable and available coverage for consumers," said APCIA. Evidence of this could be seen post- Hurricane Ian, according to the report. Communities that rebuilt after 2004's Hurricane Charley experienced much less damage in the 2022 storm.

From an insurance perspective, APCIA advised property owners to consider adding automatic inflation guard coverage, ordinance and law coverage, and extended replacement cost coverage to boost their financial protection. They also recommended that consumers – and their brokers – fully assess policies to determine if they have replacement cost coverage (which does not include depreciation and offers more financial recovery) or actual cash value cover.

2021 Risk Management Performance Awards

At the March 2023 board meeting members were recognized for their loss control successes.

The Standard of Excellence Award is earned by member cities who incur claims losses less than $100 per full-time employee for the year. The 2021 Standard of Excellence Award winners were Blue Ash, Madeira, Montgomery, Tipp City, Vandalia and West Carrollton. The city of Wyoming received special recognition as Overall Winner.

Members' departments with zero losses for the year receive recognition in the form of a breakfast or other celebration. A total of 49 of our members' departments qualified for this award.

Special recognition is given to departments with three ore more consecutive years with zero losses. These departments are presented with a plaque commemorating this achievement. Departments so recognized were:

CITY DEPARTMENT	CONSECUTIVE YEARS ZERO LOSSES
Bellbrook Fire	6
Springdale Fire	3
Troy Fire	5
Wilmington Fire	8
Englewood Parks / Rec	4
Indian Hill Parks / Rec	8
Springdale Parks / Rec	3
Madeira Parks / Rec	6
Tipp City Parks / Rec	3
Wyoming Parks / Rec	13
Bellbrook Streets / Refuse / PW	4
Tipp City Streets / Refuse / PW	7
Bellbrook Water / Wastewater	9
Englewood Water / Wastewater	4
Tipp City Water / Wastewater	3
Vandalia Water / Wastewater	5

Calendar of Events

Upcoming Training Events

5/9/23 & 6/1/23 Police Driver Training—Kettering

5/16 & 5/19 Driver Training

5/30/23 Driver Training

6/2/23 Driver Training

6/9/23 Driver Training

6/15 & 6/16/23 Driver Training

Upcoming Board Events

Committee Meetings - Via Zoom:

Risk Management - May 25th- 10:00 AM
Finance - May 25th - 1:30 PM
Personnel and Compensation -May 30th -10:00 AM

Board Meeting

June 20th, 9:30 AM, location to be determined

From The Board Room

March 20, 2023

- Approved 2021 Standard of Excellence and Zero Loss Awards