The Bill Blackwood
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Reducing Civil Liabilities Arising from Negligent Retention

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ABSTRACT

Negligent retention is one of a large number of problems facing today's law enforcement leaders and the agencies that employ them. Negligent retention occurs when an employer becomes aware of the inadequacies of an employee to perform his or her job and the employer fails to take the appropriate action necessary to rectify the problem. If ignored, negligent retention can lead to costly civil suits and litigation. For this reason, it is necessary to find steps that can be taken by law enforcement leaders to help reduce the costs of civil suits and litigation that can result from negligent retention.

In order to evaluate the impact of negligent retention suits on law enforcement agencies in Texas, a survey was prepared and distributed to officers from twenty-two departments across the State ranging in size from less than fifty to over one thousand officers. The survey results showed that only one department out of twenty-two had been involved in a suit arising from negligent retention. This suit was dismissed as unfounded. Research into the problem of negligent retention showed an agreement among the reference authors that two steps could be taken by law enforcement leaders to avoid negligent retention suits. These two steps are: 1) quality training throughout an officer's career, and 2) the termination of employees who fail to meet or maintain minimum job performance skills and those who have habitual misconduct problems.

It is concluded that Texas law enforcement leaders are already taking the necessary steps to reduce the costs of civil suits and litigation by avoiding negligent retention.

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INTRODUCTION

There are numerous problems facing law enforcement leaders today. Some of these problems can lead to costly civil suits and litigation. These suits are harmful to individual officers, law enforcement leaders, the governmental entities that employ them and ultimately the pockets of the citizens. One of these numerous problems is negligent retention.

The question arises, what is negligent retention? Merriam-Webster Online Dictionary (October, 2004) defines negligent as: adj. – 1) marked by or given to neglect especially habitually or culpably 2) marked by a carelessly easy manner. The same dictionary defines retention as: n. – 1) the act of keeping in possession or use, 2) the power of holding secure or intact. Based on these definitions, negligent retention can best be described as habitually, culpably or carelessly keeping certain employees whose continued employment could create grounds for civil liability.

Unfortunately some departments may be negligently retaining certain problematic employees. This negligent retention increases the risk of civil liability for individual officers, law enforcement leaders and the governmental entities for which they work. The purpose of this research is to show possible steps that can be taken by law enforcement leaders to protect themselves, individual officers, the governmental entities for which they work and ultimately the citizens' pockets from civil liability. The research will address this question; what steps can be taken by law enforcement leaders to avoid civil liabilities and litigation arising from negligent retention?

The methods of inquiry for this research will include the use of books, articles and Internet references on the subject of police civil liability. A survey of various sized law

enforcement agencies will be used to determine the extent this problem exists across the State of Texas. This survey will be conducted during the LEMIT Module II class in July of 2005.

It is anticipated the research will show at least two steps that can be taken by law enforcement leaders to avoid civil liabilities and litigation arising from negligent retention. The first likely step is quality training. Quality training throughout their career will provide officers with the best skills and knowledge possible to perform their duties. The second likely step is termination of employees who fail to meet or maintain minimum job performance skills or exhibit continual misconduct problems.

One anticipated benefit of implementing quality training and termination of problematic employees is the reduction of civil liabilities for individual officers and law enforcement leaders. Another anticipated benefit is the reduction of civil liabilities for governmental entities. A final anticipated benefit is the savings of citizen tax dollars by avoiding the litigation of civil suits that can result from negligent retention.

REVIEW OF LITERATURE

Civil suits and litigation based on negligence got their beginning when Congress passed "The Ku Klux Klan Act of 1871." According to Barrineau III (1987), this law was originally designed to thwart the activities of the Ku Klux Klan and similar post-Civil War groups because of "the inaction and/or powerlessness of the states to control such activities" (p. 7). Section I of this act was later codified into what is now referred to as Title 42 United States Code, Section 1983. Title 42 USC, 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States

> or any other person within the jurisdiction thereof to 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.

After lying virtually dormant for nearly a century, 42 USC, 1983 was applied to law enforcement officers in the case of Monroe v. Pape (1961). In this case the plaintiffs sued sixteen Chicago police officers and the City of Chicago alleging that the officers, "under color of law," violated the plaintiff's Fourth Amendment right to be free of unreasonable searches. Although the individual officers and the city were sued, only the law enforcement officers involved were tried for liability. The Supreme Court held that 42 USC, 1983 applied to persons, not municipalities, and therefore allowed the City of Chicago to retain absolute immunity.

Sixteen years later, in the case of Monell v. Dept. of Social Services (1978), the Supreme Court overruled its' previous decision of upholding absolute municipal immunity by stating:

> Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom Section 1983 applies.

However, the question of whether governmental entities should be afforded some form of official immunity in Section 1983 cases was not answered. (Barrineau III, 1987). In the case of Owen v. City of Independence (1980), the Supreme Court answered this question when it ruled that governmental entities have "no immunity from liability under 1983 flowing from [their] constitutional violations and may not assert the good faith of [their] officers as a defense to such liability."

Barrineau III (1987) suggested that the deep pockets of local governments were opened up to the lucrative business of negligence suits by two factors. First, was the Congressional

passage of the *Civil Rights Attorney's Fees Awards Act of 1976 (Title 42 U.S.C. Section 1988),* and second, by the Supreme court decisions in Monell v. Dept. of Social Services (1978) and Owen v. City of Independence (1980).

As pointed out by Barrineau III (1987), "there are numerous areas in which negligence can lead to a cause of action under Section 1983" (p. 59). One of these areas is that of negligent retention. While normally included with other allegations of negligence, such as negligent assignment, negligent supervision and negligent training, negligent retention is clearly aimed at the deep pockets of the governmental entity because the governmental entity retains the employee.

The allegation of negligent retention is based on the Common Law principal of *respondeat superior*. The term *respondeat superior* is Latin for *let the superior make answer* and Black's Law Dictionary (1999) defines it as:

> The doctrine holding an employer or principle liable for the employee's or agents' wrongful acts committed within the scope of the employment or agency.

Support for this definition can be seen in the case of Jones v. Stoneking (2005). In its' opinion the United States District Court for the District of Minnesota said:

> Negligent retention occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated his unfitness and the employer fails to take further action such as investigating, discharge or reassignment.

An early example of a negligent retention suit is the case of Murray v. Murphy (1977). In 1977 Murray filed suit alleging constitutional rights violations arising out of 42 USC, Section 1983. Murray's suit alleged that Officer Murphy used excessive and abusive force against him

in the course of his (Murphy) duties as a Philadelphia police officer. Murray brought supervisors Rizzo and O'Neil, as well as the City of Philadelphia, into the lawsuit alleging that all three were aware of at least seven prior incidents in which Murphy had used excessive and abusive force. Murphy's suit also alleged that Rizzo, O'Neil and the City of Philadelphia, despite knowledge of these prior incidents, "condoned and justified the police officer's conduct by their failure to relieve him of his duties as a law enforcement agent or take any disciplinary measures against him."

Motions were made to dismiss the claims against Rizzo, O'Neil and the City of Philadelphia stating that the plaintiff failed to state a cause of action against the three. The City of Philadelphia was also seeking dismissal based on a lack of court jurisdiction. The City of Philadelphia alleged that it was not a "person" under 42 USC Section 1983 and should therefore be released from the suit. The Federal District Court for the Eastern District of Pennsylvania, referencing Monroe v. Pape (1961) and several other cases, denied the City of Philadelphia's motions, as well as those of Rizzo and O'Neil, and remanded the case back to the lower court.

In his book, Police Civil Liability: Supreme Court Cases and Materials (Waveland Press, 2002), Victor E. Kappeler noted many of the same ideas as Barrineau III (1987). Kappeler (2002) agreed that Monroe v. Pape (1961) started 42 USC, 1983 cases against police officers and the municipalities for which they work. Kappeler (2002) suggested, "had this precedent (municipal immunity) remained the state of the law, all possibility of municipal liability would have been foreclosed" (p. 16). Kappeler (2002) also agreed that Monell v. Dept. of Social Services (1978) and Owen v. City of Independence (1980) opened the pockets of municipalities to suits brought under 42 USC, 1983.

No matter how good police officers perform their job, the exposure to civil liability and the potential of civil litigation does exist. These suits can be filed under 42 USC, 1983 as constitutional rights violations or under State Tort Laws alleging intentional or unintentional wrongdoing (negligence). (Payne, 2002). Payne (2002) states, "Personal observations over the past fifteen years and two hundred such cases reveal an emerging social philosophy in such matters, which the author calls the Somebody Has to Pay Syndrome" (p. XV). It is a widely accepted fact that individual police officers do not have the financial deep pockets governmental entities have. From this it can be reasoned that governmental entities are brought into civil suits as the "somebody" who has to pay because there is a greater likelihood of actually obtaining any monies awarded by the courts. (Payne, 2002).

Payne (2002) states, "Negligent retention occurs when a police department fails to take appropriate disciplinary action and, perhaps, fails to appropriately re-train an officer who has demonstrated unsuitability for the job to a degree of dangerousness to the public" (p. 10). When these conditions exist and a department knowingly retains a problematic employee, this action could be considered negligent and leaves the department susceptible to civil liability. (Payne, 2002). However, when a department does what is necessary to correct these problems (i.e. termination, retraining, or reassignment) and the department is over-ruled by civil service or collective bargaining, the department could be left with the potential of liability and/or internal strife with other officers. (Payne, 2002).

In October of 2004, in a personal communication with Deputy Chief Floyd Simpson, it was learned that the Dallas Police Department had such a case. This was the case of Frank Hasty. Hasty worked for the Dallas Police Department for fourteen years during which he was officially disciplined twenty-five times and fired twice (Dallas Morning News, July 31, 2004).

Hasty was first employed with the Dallas Police Department as a civilian Public Service Officer hired to do support work. Hasty applied numerous times to the department for a police officer position and was denied each time because of a past charge of Unauthorized Use of a Motor Vehicle. Finally, Hasty was admitted to the police academy. Even after showing up late numerous times and being caught asleep in class, Hasty finally passed his academy training. Hasty managed to make it through the Field Training Officer Program and was assigned to a patrol division. Some time passed during which Hasty had numerous write ups for disciplinary problems and was passed from station to station. Approximately three years after being assigned to patrol, Hasty got arrested for Unauthorized Use of a Motor Vehicle and, after an Internal Affairs Investigation, was terminated. Civil Service intervened and Hasty was given his job back. The next ten years saw more problems and disciplinary actions. Hasty was again arrested. This time the arrest alleged that Hasty took a bribe from a police informant posing as a drug dealer. Hasty's case again went before the Civil Service Board. According to an article in the Dallas Morning News on April 12, 2005, Hasty was terminated and, on a plea of guilty, was assessed a $1,500.00 fine, eight years probation and permanent surrender of his peace officer license. This case is a prime example of negligent retention and how it can be very frustrating to good employees and unnecessarily expose a department to civil liability.

Two activities tend to show an increase in police civil liability. One is the growing number of civil suits involving police officers and the other is the large amount of money being paid out in court judgements. (Archbold, 2004). A survey done in 1981 by Bates, Cutler and Clink for the National Institute of Municipal Law Officers (now known as the International Municipal Lawyers Association) showed that there were in excess of $4.3 billion in civil liability claims pending against only 215 municipalities. Bates, Cutler and Clink (1981) took this

information to the extreme and showed that, if these statistics were applied to the currently existing 39,000 local governments, there would collectively be about $780 billion in outstanding civil suits against police agencies. According to Human Rights Watch (1998), between the years of 1991 to 1996, the cities of Los Angeles and New York paid out in excess of $70 million in settlements arising from suits for police misconduct. An article in the Cincinnati Enquirer on May 22, 2003 reported that the City of Cincinnati would be paying out $4.5 million, the largest recorded legal settlement in the city's history involving the police department, to settle 16 lawsuits involving its' police officers.

In chapter eleven, under the title of "Lawsuit Prevention," Barrineau III (1987) lists several general principles that aid in lawsuit prevention. One of these listed principles is proper training. According to Barrineau III (1987), "…all personnel must be properly trained in all aspects of their job" and "…simply meeting state-mandated minimum standards may not be enough…" (p. 83). Proper training must meet the following criteria: it must be necessary; it must be conducted by qualified persons; it must be documented that it was properly conducted and did take place; and it must be up-to-date and as state-of-the art as possible. To ensure that the employee has acquired and maintains the skills necessary to be considered qualified, a knowledge or skills assessment measuring the mastery of the subject must be given; additional or remedial training must be provided when necessary; and, finally, the employee's training progress must be continually monitored. (Barrineau III, 1987).

In 2001 the Public Risk Management Association (PRIMA) published a guide for law enforcement agencies to help them reduce the potential for civil liabilities. It stressed that law enforcement leaders should constantly monitor training. The PRIMA (2001) guide closely followed the criteria recommended by Barrineau III (1987). The guide suggested that all police

officers should meet the following criteria: they should be certified prior to citizen contact; their basic academy training should exceed state minimums; they should be trained in all aspects of their job; they should be given legal training both before and during their career; and they must participate in a Field Training Officer (FTO) Program. Official records must be kept of the successful completion of the FTO program, the competency of the officer during the probationary period and subsequent in-service training. (PRIMA, 2001).

Recruits attending a police academy are required to meet and maintain a certain level of both academic and physical skills. (Schultz, 1984). If a recruit fails to meet the minimum standards of training during the academy, the Chief Administrator or representative must be notified and the appropriate action taken. (Schultz, 1984). This action could be termination; time limited remedial training or continuance of training with disregard to the deficiency. (Schultz, 1984). Schultz (1984) indicated that it would be difficult to ignore deficiencies in areas where there are state mandated minimum standards that affect academy grades. However, as there are no minimum standards to meet, the potential exists to ignore other deficiencies. Schultz (1984) states, "A personal problem on the part of the recruit demonstrating aggressive actions, inability to make decisions, etc…" must also be reported to the Chief Administrator or representative (p. 17). If an agency retains an employee with these types of deficiencies, the agency could be placing itself in a bad position to defend against future civil liability suits. (Schultz, 1984).

While Shultz' (1984) statements referenced academy cadets, the same principles can be applied to rookie officers in the Field Training Officer Program. Field Training Officers should be watching for these same types of personal problems in their trainees (e.g. aggressive actions or behavior and inability to make decisions). The Field Training Officer should handle the

situation in the same manner as an academy instructor. The Field Training Officer should report the problem to the Field Training Supervisor who then passes the report up the line until it reaches the Chief Administrator or designee. At that point the same decisions (e.g. the need for termination, time limited remedial training or continued training with disregard to the deficiency) would need to be made.

Subsequently, Shultz' (1984) principles can also be applied to veteran officers. Supervisors need to be attentive to changes in their subordinates' mental and emotional conditions. Observance of a subordinate's psychological well being would detect changes in behavior pattern or decision-making abilities that could not only place the public in danger, but position the officer, his supervisors and the department at risk for civil liability. The previously referenced case of Murray v. Murphy (1977) is an example of this. Murphy, a veteran officer, was alleged to have a propensity toward aggressive behavior that was known, or should have been known, by his supervisors. The inaction of the supervisors, as well as the City of Philadelphia, to retrain, reassign or terminate Murphy, placed all parties at risk for civil liability.

METHODOLGY

The question being researched is: what steps can be taken by law enforcement leaders to avoid civil liabilities and litigation arising from negligent retention? To help answer this question, a survey was drafted in the form of a questionnaire containing nine questions with Yes or No and multiple choice type answers. The survey looks for information on department size, familiarity with the term Negligent Retention, whether the answering department has had problems with negligent retention or changes that have been made to the department as a result

of civil suits arising from negligent retention. A copy of the survey instrument is contained in the appendices.

The survey was administered to the LEMIT Module II class of July 2005. The twenty-three class participants represented twenty-two agencies located across the State of Texas. The respondents were members of State, County and Municipal agencies ranging in size from less than fifty employees to greater than one thousand employees. The respondents ranged in rank from Patrol Sergeant to Chief of Police. Only twenty-two of the surveys were used since two of the twenty-three class participants worked for the same agency.

FINDINGS

After reviewing some of the reference material used in this research, two trends can be seen. One trend is an increase in the number of civil liability suits being filed against individual officers, law enforcement leaders and the governmental entities that employ them. The second trend is the increase in dollar amounts being awarded in these civil suits.

When this research began it was anticipated that the problem of negligent retention would be used as the basis for a large number of civil suits and litigation. However, as the research progressed, it was discovered that this was not the case. It was found that the basis for most civil suits involving police are alleged civil rights violations such as excessive use of force or illegal searches and seizures. Negligent retention, as well as other forms of negligence, is usually specified as causative factors for these civil rights violations.

Research also showed an agreement among the reference authors that there are at least two steps that can be taken by law enforcement leaders to help reduce their exposure to civil liabilities arising from negligent retention. These two steps are: 1) quality training throughout an

officer's career, and 2) the termination of employees who fail to meet or maintain minimum job performance skills and those who have habitual misconduct problems.

The survey instrument used in this research came back with some surprising results. The question was asked, are you familiar with the term negligent retention? Seventy three percent of the respondents answered yes. Eighteen percent of the respondents were not familiar with the term, but provided departmental contact information so that the survey could be completed. Nine percent failed to complete the survey or provide departmental contact information. After completing or attempting to complete the surveys of the eighteen- percent who were not familiar with the term negligent retention, the survey results were totaled.

The question, has your department ever been sued for negligent retention, was asked. The survey results showed that: 1) eight-one percent of the departments had not been sued for negligent retention 2) five percent [one respondent] of the departments had been sued for negligent retention, and 3) fourteen percent failed to complete the survey.

The question, has your department ever terminated an employee to avoid the civil liability of negligent retention as a result of a) failure to meet or maintain minimum job performance skills; b) habitual misconduct problems, was asked. The survey results showed that: 1) twenty seven percent of the departments had terminated employees for both reasons 2) twenty seven percent of the departments had not terminated employees for either reason 3) eighteen percent of the departments had terminated employees for habitual misconduct problems only 4) fourteen percent of the departments had terminated employees for failing to meet or maintain minimum job performance skills only, and 5) fourteen percent of the departments failed to complete the survey. All other survey questions were nullified since the only suit that was filed had been dismissed as unfounded.

DISCUSSION

In the beginning it was believed that the problem of negligent retention would be found as the basis of numerous civil suits against law enforcement officers, law enforcement leaders and the governmental entities for which they work. The question was asked: what steps can be taken by law enforcement leaders to avoid civil liabilities and litigation arising from negligent retention? The purpose of the research was to answer this question by finding steps that could be taken by law enforcement leaders to avoid civil liabilities arising from negligent retention. It was anticipated that quality training throughout an officers' career and termination of certain problematic employees would be two steps that could be taken by law enforcement leaders to avoid potential civil liabilities arising from negligent retention.

As previously stated, the referenced authors agree that quality training throughout an officers' career can help law enforcement leaders and agencies avoid civil liabilities arising from negligent retention. The list of training criteria stated by Barrineau III (1987) and the PRIMA (2001) guidebook closely resembled each other in relation to quality training of officers. The training should be necessary, taught by qualified personnel, up to date, as state of the art as possible, presented in an academy as well as an FTO program and throughout the officer's career. Documentation of the training is also necessary to prove that the training took place and met the proper criteria. By documenting proof of quality training, law enforcement leaders can effectively avoid civil suits involving negligent retention and possibly keep costly litigation to a minimum.

Shultz (1984) pointed out that when Chief Administrators or their designees are faced with personnel who fail to meet or maintain minimum job performance skills, a decision must be

made affecting that persons continued employment. The decision for time limited remedial training, termination or continuance of training with disregard to the deficiency must be made based on individual situations. Some officers, both rookie and veteran, may respond well to remedial training while others may not. Termination should occur when deficiencies cannot be overcome within the training period or within the time allotted for remedial training. At no time should training deficiencies be neglected. Neglecting training deficiencies coupled with continued employment is what puts law enforcement leaders and governmental entities at risk of civil suits. Payne (2002) suggested that reassignment could be an option to termination. Should reassignment be made, it would need to be to an area where the officers' deficiencies would not be an issue.

Cadets, rookies and veteran officers should all be closely monitored for misconduct problems. These problems can manifest themselves in such forms as aggressive behavior or abuse of power. There is counseling and re-training available for these types of behavior problems. However, upon completion or release from these programs, the officer should be closely monitored for any signs of recurrence. Should there be recurrence; appropriate action should be taken to see that the problematic behavior does not continue otherwise a position of civil liability could arise for both the law enforcement leader and the governmental entity that employs them. A good example of this is the previously cited case of Murray v. Murphy (1977).

The previously cited survey results would indicate that most Texas departments are already working to avoid civil suits and costly litigation by terminating those employees that could be considered potential civil liabilities. However, twenty seven percent of the departments surveyed had not terminated employees for either failing to meet or maintain minimum job performance skills or habitual misconduct problems. This could mean that the departments have

always had exceptional employees or just had odds in their favor that no civil suits or litigation have arisen from the retention of problematic employees.

When quality training is performed and documented, it can help prevent or minimize the cost of civil suits and litigation. When problematic employees are dealt with in the appropriate manner, this too can help prevent or minimize the cost of civil suits and litigation. By implementing these two steps to avoid negligent retention, civil liability can greatly be reduced for law enforcement leaders, their governmental agencies and lessen the cost of litigation to the taxpayer.

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APPENDIX 1

Please circle the best answer

1) What is the size of your department?
   a) Less than 50 employees
   b) 50 to 200
   c) 201 to 500
   d) 501 to 1000
   e) Greater than 1000

2) Are you familiar with the term Negligent Retention?
   a) Yes
   b) No

If your answer is no, please provide me with the following information and return the survey;

Name of your department: _____
A contact person who could answer these questions: _____
Phone number for this contact person: _____

3) Has your department ever been sued for Negligent Retention?
   a) Yes
   b) No

4) Which of the following best describes the reason for the suit?
   a) Employee incompetence (ie; somebody that's been kept around even though it's obvious they don't know what they're doing)
   b) Employee with past history of disciplinary problems
   c) Other: _____

5) What was the disposition of the suit?
   a) Dismissed
   b) Dropped
   c) Settled out of court
   d) Trial

6) Was the outcome of the suit
   a) in favor of the department?
   b) in favor of the plaintiff?

7) If the findings were in favor of the plaintiff, which of the following were affected or created as a result of this outcome? Circle all that apply
   a) Hiring policies

b) FTO training and related policies
c) In-service training and related policies
d) Disciplinary policies
e) Termination policies
f) No changes were made
g) Other Please explain _____

_____
_____
_____
_____
_____
_____
_____
___

8) Who controls employee termination within your department?
a) Department head (ie; Chief, Sheriff, Constable, Marshall etc.)
b) Committee (that can over-ride the department head)
c) Committee (that can be over ridden by the department head)
d) Civil Service
e) Other: (ie City Manager, City Administrator etc.) _____

9) Has your department ever terminated an employee to avoid the civil liability of negligent retention as a result of;
a) failure to meet or maintain minimum job performance skills?
Yes _____ No_____
b) habitual misconduct problems?
Yes _____ No _____