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The Local Government
Liability Beat

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Eleventh Circuit Holds No Violation When Guard Read Mail to Attorney

By Brian S. Batterton, Attorney, PATC LLRMI

On January 22th, 2016, the Eleventh Circuit Court of Appeals decided *Williams v. Russo et al.,*[i] which serves as instructive concerning Fourth Amendment protection in a prison inmate's mail that is addressed to, but not yet mailed, to the inmate's attorney. The relevant facts of Williams, taken directly from the case, are as follows:

> Mario Williams brought suit against Defendants alleging that Defendants Humphrey, Bishop, and McMillan ordered Defendant Russo to open, read, and take attorney-client privileged mail addressed to him from prisoner Miguel Jackson's prison cell. Specifically, Williams alleged that between August 8, 2012 and August 11, 2012, Russo opened, read, took, and kept privileged mail from Jackson's prison cell that belonged to Williams because it was addressed to him and marked "legal mail" and "attorney-client privileged." Williams further alleged that because Humphrey, Bishop, and McMillan failed to turn over the privileged mail to Williams and failed to discipline Russo for his actions (which were in violation of prison rules), that supervisory liability under § 1983 applied to the three "Supervisors."
>
> Williams argued that he had a reasonable expectation of privacy and a property interest in the contents of the two envelopes labeled attorney-client privileged, which were addressed to him and located in Jackson's prison cell. Williams argued that Russo and the Supervisors violated Georgia Department of Corrections' policies and procedures in place regarding mail, and violated Williams' Fourth Amendment right to be free from the unlawful search and seizure of mail addressed to him.[ii]

Williams, the attorney for the inmate who wrote and addressed the letter, Jackson, filed suit and alleged that when Russo removed the mail from Jackson's cell, the mail was considered "mailed" under the "mail box rule" and therefore, Williams, as the addressee had a Fourth Amendment right to privacy in the mail. The district court agreed and denied the defendant's motion to dismiss and qualified immunity.

The defendant appealed the denial of qualified immunity to the Eleventh Circuit Court of Appeals. There were two issues before the court. The first issue was whether the district court erred in determining that Williams had a protected Fourth Amendment right in mail addressed to him and taken from a client's prison cell. The second issue was, if the court determines that the Williams did have such a right, was that right clearly established such that a reasonable prison official should have known that his conduct was unconstitutional.

The court then set out to determine if Williams had Fourth Amendment protection in mail addressed to him from his client when the prison guard removed the mail from the client's cell. The district court applied the mailbox rule to determine that Williams did have such a protection. The court of appeals noted that the mailbox rule was created to help inmates who were pro se (representing themselves) in court. This rules, simply put, states that court filings from pro se inmates in jail are considered "filed" for court purposes the moment the inmate loses control of the filing by turning it over to prison officials to be mailed. The purpose of this

rule was to put inmates who were acting pro se on the same footing as those represented by counsel regarding filing court documents.

Regarding application of the mailbox rule to mail addressed to an attorney by an inmate, the court of appeals stated:

> Defendants assert, and we agree, that no case has applied the prison mailbox rule to find that a letter or package had been "mailed" for purposes of creating a Fourth Amendment right, and the district court erred in doing so here. The mailbox rule only applies to (1) court filings (2) submitted by pro se prisoners. Neither element exists here. Jackson was represented by Williams and was not proceeding pro se, and the envelopes were not alleged to contain court filings. The mailbox rule does not apply.[iii] [emphasis added]

Further, the court of appeals also stated:

> [T]he Fourth Amendment does not apply to the contents of a prison cell. *Hudson v. Palmer,* 468 U.S. 517, 526, 104 S.Ct. 3194, 3200 (1984). In *Hudson,* the Supreme Court held that "society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell."[iv] [emphasis added]

Thus, the court of appeals held the district court improperly applied the mailbox rule in Williams' case, as the letter had not yet been placed in the mail. Further, inmates do not have Fourth Amendment protection in a prison cell regarding searches. Therefore, Williams did not have Fourth Amendment protection in the mail at the time it was opened and read.

Since the court held that there was no Fourth Amendment violation in this case, they did not need to examine whether the law was clearly established.

The decision of the district court denying the motion to dismiss was reversed.

Note: Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.

Citations

i. No. 15-10277 (11th Cir. Decided January 22, 2016 Unpublished)

ii. Id. at 1-3

iii. Id. at 8

iv. Id. at 10

Managing Law Enforcement Liability Risk

By Jack Ryan, J.D.

Prior to examining case law defining the parameters of governmental liability one should first be familiar with the process and the mechanisms for risk-reduction and risk avoidance. A clearer understanding of these principles allows the reader to judge the cases against the backdrop of these principles. The reader should be encouraged to consider how the principles of risk management may have reduced the liability exposure in a particular case.

The attack of the plaintiff's attorney: When an attorney reviews the incident at 2:00 a.m. and contemplates filing a lawsuit against the officer, (s)he or she begins by looking at the facts surrounding the arrest. While some arrests may lead to liability, the incident at 2:00 a.m. is not the brass ring sought by the attorney. In order to get the brass ring, the attorney must get over the brick wall and attack the agency in order to establish agency liability. As we will see when reviewing agency liability, the only way to get into the deep pockets of the agency is through some policy, custom, lack of supervision or discipline or training that leads to a foreseeable violation of a federally protected right.

The incident in question becomes secondary in many of these cases to the focus which shifts to the agency. Although the plaintiff's attorney must prove some underlying violation by the government employee, ultimately the plaintiff's attorney will put the agency on trial. It should also be noted that a court may find an underlying constitutional violation but then grant qualified immunity to the offending officer. If, following this grant of qualified immunity for the individual officer, a court finds that the violation was the result of some policy or training issue; the agency may still be liable.[i]

With this in mind one can see how an agency can take steps to avoid liability; simply strengthen policy, training, supervision and discipline. This may sound like a simple fix; unfortunately law enforcement has not been quick to move unless threatened with significant liability. Unfortunately there are not enough law enforcement executives who seek to improve the performance of their agency for the sake of a better agency rather than as the result of some liability.

Gallagher's Rule #1

"What raises the level of professional standards lowers the chances for liability and what lowers

the chances for liability raises the professional standards of the organization."

An agency that strives to reduce liability must begin by examining the five-part attack that a plaintiff would take in a lawsuit and assess the agency's performance in those areas that would expose the agency to liability. In doing so, it should be noted that a proactive approach is essential.

One may consider agency liability along a time line in order to have a clear view of the proactive means of avoiding liability.

Policy in Place before Police Action	Proactive
Training Conducted before Police Action	Proactive
Supervisor on Scene of Police Action	Active
Discipline as the Result of Police Action	Reactive

With this timeline in mind, one should consider Patrick Gallagher's "Six-Layered Liability Protection System."

Policy and Procedure

Agencies must develop sound policy based upon professional thinking, court decisions and statutes. "Furthermore, it is based on the principle of foreseeability that calls for the executive or the policy-maker to provide this guidance to the agency's officers in anticipation of the tasks to be assigned."

Gallagher's Rule #6

"Policy is to be developed and issued in anticipation of the foreseeable field incidents that officers can reasonably be expected to encounter."

"Corollary: Policy that is subsequent and in reaction to a series of events encountered by officers is more likely to be deficient and is issued in the face of a growing organizational pattern of conduct contrary to the substance of that policy."

Training

Once policy is issued, those expected to act in accord with the policy must be trained in the substance of the policy. A recommended method of training policy is through the use of hypothetical scenarios that would implicate the policy being trained. An officer's response to the hypothetical would exhibit the level of understanding as well as any deviation in interpretation of the policy.

Gallagher's Rule #7

"Policy is only as effective as the training in the substance and requirements of that policy. If training is weak, unfocused or non-existent, then the policy will not be followed. Training must cover the full range of tasks which officers are expected to perform."

Supervision

Supervision at this level should take a positive approach. Officers who are observed following policy should be commended. Supervision's focus should be on "supporting superior performance rather than trying to catch someone doing something wrong."

Gallagher's Rule #8

"There is no factor more important to the avoidance of liability and the upgrading of the agency's professional performance and attainment of its standards than the quality of supervision."

Performance Management

"Performance management requires a total commitment to the selection of qualified personnel, initial and continuous attention to performance planning and then to regular performance evaluation." If these items are in place and successful, then the need for discipline is diminished. However supervisors must discipline when they discover that a "properly trained" employee has violated policy.

Gallagher's Rule #9

"Discipline in its reactive mode is in essence a failure on the part of the proactive components; policy, training and supervision, to achieve the desired results and might result from the absence of performance planning."

Review and Revision

A department must constantly review internal as well as external information in order to ensure quality performance and liability avoidance. Internal information concerning items such as internal affairs investigations, civilian complaints, lawsuits, officers subject to an early warning system, use of force and injury patterns, and patterns of unsatisfactory performance of officers would all be relevant for policy and training review. In addition, policy-makers must stay abreast of changes in the law, by case or statute as well as contemporary research and literature relating to policing.

Legal Counsel and Legal Update

An informal survey of police policy-makers leads one to quickly conclude that this step is the weakest link in the 6 layered chain of liability avoidance. One of the reasons lies in the fact that many agencies do not have the resources for its own legal advisor. Agencies may be forced to rely on a generalist assigned to represent local government on a variety of matters and thus has little knowledge in the area of police liability. A second reason is the time-gap between the development of the law through cases and legislation and the time the police policy-makers become aware of the change. Once a law is clearly established by a court decision or legislative enactment, agencies within the jurisdiction of the court will be charged with knowledge of the new law.

Citations

i. See Eg. *Kuha v. City of Minnetonka,* No. 02-1081 (8th Cir. 2003).

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