



Weekly Law Resume

A Newsletter published by Low, Ball & Lynch
Edited by David Blinn and Mark Hazelwood



WEEKLY LAW RESUME™

Issue By: DIRK D. LARSEN

August 4, 2011

Civil Rights—Municipal Liability: Jury Instructions on "Custom and Practice" under *Monell* Doctrine

Robert E. Hunter, D.V.M., et al. v. County of Sacramento, et al. United States Court of Appeals, Ninth Circuit (July 26, 2011)

Under the doctrine the U.S. Supreme Court set forth in *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978), a municipality sued for a deprivation of federal civil rights pursuant to 42 U.S.C. § 1983 may only be liable if a municipal policy, custom or practice resulted in the alleged deprivation. In *Hunter v. County of Sacramento*, the Ninth Circuit Court of Appeals addressed whether § 1983 plaintiffs are entitled to jury instructions detailing factual circumstances that may constitute a municipal custom or practice, where the Circuit's own Model Instructions employ a much more general definition.

Plaintiffs Robert Hunter and Howard Eley alleged that deputies employed by the County Sheriff's Department used excessive force against them while the plaintiffs were in pre-trial detention at the County's jail. The defendants moved for summary judgment, which the district court granted on all causes of action except the *Monell* claim against the County.

The district court's denial of summary judgment on the *Monell* claim rested primarily on the declaration of plaintiffs' expert, Lieutenant Twomey, a former employee of the Sacramento County Sheriff's Department. Lt. Twomey declared that there were 40 to 50 "major incidents" of excessive force at the jail from 2000 to 2005, and that jail officials repeatedly failed to investigate the incidents, discipline the guards or take other action to address the problem. The district court found that this evidence created a material issue of fact as to whether the County had a custom or practice of using excessive force.

San Francisco Office

505 Montgomery Street, 7th Floor | San Francisco, CA 94111 | Phone: 415-981-6630 | Fax: 415-982-1634

Monterey Office

2 Lower Ragsdale Drive, Suite 120 | Monterey, CA 93940 | Telephone: (831) 655-8822 | Fax: (831) 655-8881

Web: www.lowball.com



Weekly Law Resume

A Newsletter published by Low, Ball & Lynch
Edited by David Blinn and Mark Hazelwood

Prior to trial, the district court issued a set of proposed jury instructions. Its proposed *Monell* instruction set forth the generic elements of a *Monell* claim but did not define "practice or custom." Both parties filed objections to the proposed instructions. The County suggested that the *Monell* instruction include the definition of "practice or custom" found in Ninth Circuit Model Civil Jury Instruction 9.4: "'practice or custom' means any permanent, widespread, well-settled practice or custom that constitutes a standard operating procedure of the defendant."

The plaintiffs' proposed *Monell* instructions listed a number of factual situations that the Ninth Circuit had previously held to constitute a custom or practice. At issue on the appeal was the plaintiffs' proposed instruction stating that the jury may infer an unconstitutional custom or practice from the failure to properly investigate prior uses of excessive force and to discipline the employees involved.

The district court rejected the plaintiffs' proposed additional instructions and instead gave the Ninth Circuit's Model Instruction. The jury found in favor of the County. Plaintiffs moved for a new trial based on the court's failure to give the proposed instructions. The district court denied the motion, and the plaintiffs appealed.

The Ninth Circuit reversed. In addressing the merits of the proposed instructions, the Ninth Circuit set forth the following principles from prior decisions: (1) jury instructions must fairly and adequately cover the issues presented, must correctly state the law, and must not be misleading; (2) use of a model jury instruction does not preclude a finding of error; (3) each party is entitled to an instruction about her theory of the case if it is supported by law and has foundation in evidence; and (4) if the error in the jury instruction is harmless, it does not warrant reversal. Applying these principles to the plaintiffs' proposed instruction regarding evidence of prior excessive force that resulted in no investigation or discipline, the Ninth Circuit found that the district court committed reversible error.

The Ninth Circuit first found that the Model Instruction defining "practice or custom," which the district court actually gave to the jury, was a correct statement of the law. However, the court stated, "it is far from a complete statement of our caselaw." The plaintiffs' proposed instruction used language taken directly from a prior Ninth Circuit decision, and was thus also a correct statement of the law. Moreover, their instruction was key to their theory of the case, as supported by the testimony of Lt. Twomey. In addition, the proposed instruction stated a principle that cannot be readily deduced from the Model Instruction's definition, rendering the Model Instruction an incomplete and incorrect statement of the law in the context of this case. Accordingly, it was error for the district court to refuse to give the proposed instruction.

San Francisco Office

505 Montgomery Street, 7th Floor | San Francisco, CA 94111 | Phone: 415-981-6630 | Fax: 415-982-1634

Monterey Office

2 Lower Ragsdale Drive, Suite 120 | Monterey, CA 93940 | Telephone: (831) 655-8822 | Fax: (831) 655-8881

Web: www.lowball.com



Weekly Law Resume

A Newsletter published by Low, Ball & Lynch
Edited by David Blinn and Mark Hazelwood

The Ninth Circuit then held that the error was prejudicial. Noting that the County bore the burden of demonstrating the likelihood that the jury would have reached the same verdict if it had been properly instructed, the court found that the combination of Lt. Twomey's testimony and the plaintiffs' proposed instruction might well have swayed the jury to reach a different result. Accordingly, the Ninth Circuit vacated the judgment in favor of the County.

COMMENT

Read narrowly, *Hunter* stands for the proposition that a § 1983 plaintiff is entitled to jury instructions setting forth factual situations that have been held to constitute a *Monell* "custom or practice," if based on actual evidence. The case thus highlights the need for law-enforcement policymakers to be familiar with those situations and to prevent them from occurring in their agencies. From a broader perspective, *Hunter* is a reminder to legal practitioners not to rely on form jury instructions, but to propose instructions that combine prior case law and existing evidence in order to maximize the likelihood of a favorable verdict.

For a copy of the complete decision see:

[HTTP://WWW.CA9.USCOURTS.GOV/DATASTORE/OPINIONS/2011/07/26/09-15288.PDF](http://www.ca9.uscourts.gov/datastore/opinions/2011/07/26/09-15288.pdf)

This content is provided for informational purposes only. The content is not intended and should not be construed as legal advice.

Visit our [website](#) for a fully [searchable archive](#) of past editions of the Weekly Law Resume and other Low, Ball & Lynch publications.

The Weekly Law Resume TM is published fifty-two times a year, and is a complimentary publication of Low, Ball & Lynch, Attorneys at Law, a Professional Corporation, with offices in San Francisco and Monterey, California. Information regarding this and other Weekly Law Resume TM articles is available at www.lowball.com.

San Francisco Office

505 Montgomery Street, 7th Floor | San Francisco, CA 94111 | Phone: 415-981-6630 | Fax: 415-982-1634

Monterey Office

2 Lower Ragsdale Drive, Suite 120 | Monterey, CA 93940 | Telephone: (831) 655-8822 | Fax: (831) 655-8881

Web: www.lowball.com