



HOUSE OF REPRESENTATIVES

Joint Committee on Transparent Policing and Use of Force Reform
900 Court St, NE
Salem, OR 97301

July 9, 2020

Dear Senator Manning, Representative Bynum, and Members of the Joint Committee:

Thank you for the opportunity to submit testimony regarding qualified immunity reform in Oregon. As with all of our police reform proposals, I believe we should start with the proposition that the mission of the police is to protect and serve the population, not control it. In that context, abuses of authority and excessive force represent failures of that duty to protect and merit compensation. In this testimony, I will discuss why qualified immunity has become a barrier to fair compensation and suggest reforms that can restore us to a more just state of the law.

Defining the Problem. When a law enforcement officer uses excessive force on a member of the public, the injured party may generally proceed in state court under Oregon’s tort claim process or in federal court on a deprivation of civil rights theory under 42 USC 1983. Should the survivor (or survivor’s family) proceed in state court against the local government employing the officer, she will be subject to the local government total damages cap of about \$769,000 on personal injury or death damages, which can be inadequate to compensate a seriously injured person¹. Should she proceed in federal court, she is not subject to the cap, but faces significant barriers to recovery, including –

1. The requirement that she not have been convicted of any crime in connection with the incident that gave rise to her injuries, whether or not her crime has any relationship to the force used by the officer;
2. The requirement of proving that the officer’s conduct was intentional and not merely negligent; and
3. The requirement that the officer’s conduct must have violated “clearly established statutory or constitutional rights of which a reasonable person would have known” – also known as qualified immunity.

While qualified immunity started as a way of giving reasonable deference to the decisions of officers in the field, it has become a bar to recovery in some cases of clear official misconduct. For instance, qualified immunity has been found to prevent recovery in cases involving –

1. An officer’s decision to release a police dog to attack a surrendering suspect sitting with his arms raised;

¹ This is the local government limit for personal injury and death. The state government limit is \$2,307,500.

2. An officer shooting a child while intending to shoot a non-threatening dog; and
3. A corrections officer's decision to pepper spray an inmate, which he admitted was "for no reason."

In light of the problems with cases involving qualified immunity in the federal courts, and our inability to change federal law, I was asked to provide possible solutions in our state courts.

Possible Solutions. Oregon could circumvent qualified immunity by either addressing cases involving police misconduct through modifying the existing Oregon tort claims law or by creating a statute similar to 42 USC 1983 in state law, albeit without allowing a defense of qualified immunity. Modifying the existing tort claims process provides certain benefits, including allowing recovery for non-intentional conduct and working through an existing well-defined process. Creating a separate cause of action has the advantage of minimizing unintentional changes to other torts and building connections with other laws to allow for more 'upstream' prevention work.

Possible Special Session Legislation. Should the Joint Committee decide to pursue legislation in the short session, I recommend modifying Oregon's existing tort claims process. To achieve the goals specified, the changes should include two major points. First, it should include a statement that qualified immunity shall not apply in cases involving peace or corrections officers. This would effectively prevent the importation of the federal law into state cases, which might otherwise frustrate the intent of the legislation. Second, legislation should make recoveries in these cases fairer, by –

- a. lifting the cap on this narrow set of torts, either entirely or to match the local government limit to the state limit;
- b. providing for vicarious liability for officers who witness the misconduct and failed to take action (effectively multiplying the cap); and/or
- c. providing for reasonable attorney fees.

Lifting the cap provides the most direct intervention. While such changes have traditionally been negotiated to apply to the full range of potential torts, there is no legal reason why cases involving peace or correctional officer misconduct could not be separated out to reduce the potential cost to employers. One variation on this approach that would likely not have a fiscal impact on the state budget would be to lift the local government caps to mirror the state government cap. The cap is particularly unjust as it caps both economic *and* non-economic damages.

As we recently imposed a duty for peace officers to report misconduct by other officers, another approach would be to extend this duty to creating liability in civil court as well. This has the effect of multiplying the potential recovery when misconduct is witnessed, but not reported, by another officer. While indirect, this approach has the advantage of building on our previous

work.

Finally, providing for mandatory costs and attorney fees for a prevailing plaintiff would provide for a fuller recovery of the actual amount of the injury. Court costs, expert witnesses, and attorney fees often exceed 40% of the judgment in personal injury cases.

Longer Term Issues for Consideration. Should the Joint Committee wish to explore more comprehensive legislation in addition to or in lieu of the above, the following issues have surfaced as concerns.

First, improving discovery of other complaints of excessive force and similar conduct (substantiated or not) against the officer/s involved would provide litigants and juries a fuller picture of the officer's history. To give an example of relevant data, consider that the officer's history of arresting minorities at a higher (or lower) rate than their representation in a community may indicate bias for or against a specific group. Similarly, prior reports may provide details about an officer's habits in using force or declining to do so that may aid in reaching a fair settlement or in assisting a jury in deciding a case.

Second, we should address the problem of 'out of scope' behavior by clarifying that, for the purposes of these cases, an officer in uniform or otherwise representing himself as an officer through appearance or conduct shall be considered as in the scope. While an employer is not generally liable for off-duty or out of scope behavior by a police officer, an employer should be responsible for behavior by an employee purporting to be in the performance of duties, whether or not the employee was actually 'on the clock'.

Third, court adjudications should represent a conclusive finding of fact on the disciplinary process, as they represent the ultimate expression of full due process. Legislation "closing the loop" on misconduct cases could -

- a. Require reporting of judgments back to DPSST, similar to the National Practitioner Databank for malpractice claims; and/or
- b. Reconsider the structure of the insurance function for these cases to provide for more 'back pressure' from claims through a public insurer or other structure.

Fourth, you may wish to consider (limited) personal liability or another tool as a way of ensuring that officers are personally invested in avoiding excessive force. As a preliminary matter, even where personal liability is established in federal court, 99% of the value of payouts in police misconduct cases comes from insurers, not individuals. The purpose is less to actually get recoveries from officers personally and more to invest them in avoiding the moral hazard that occurs when a person is never held liable for their conduct. This may be accomplished through either a 'deductible' system or one where settlements for misconduct are reported back to DPSST for consideration of discipline.

You may consider addressing the role of Independent Police Review/Civilian Review (IPR) in excessive force/deprivation of civil rights cases. Questions that merit consideration include –

- a. Should IPR be required in all sworn police forces?
- b. Should IPR be required in sworn police forces that are not accountable to an elected public body (including university police)?
- c. Should the findings of IPR be binding on the employer for the purposes of claims?
- d. Should the findings of fact be binding on the Police Chief in the disciplinary process?
- e. Should the IPR process provide an avenue to override the disciplinary recommendations of the Chief? Currently, IPR is most often advisory regarding determinations of both the facts and the level of discipline involved.²

IPR can play an essential role in keeping the local police culture in better step with the values of the community they serve.

Finally, please consider closing the ‘local discipline’ loophole in our legislation from the first special session to require reporting of all local suspensions as well as those undertaken at DPSST. Most misconduct does not result in a report to DPSST for licensure action.

In conclusion, I encourage you to take prompt action in the second special session to address the problems with qualified immunity by clarifying that it does not apply in state court and providing for more equitable judgments for those injured through police misconduct. Over the long term, I hope you will take additional steps to better integrate the court and disciplinary processes and move upstream in the causation chain to prevent future cases of excessive force and misconduct. Thank you for the opportunity to testify.

A handwritten signature in black ink that reads "Marshall Z. Wilde". The signature is written in a cursive, flowing style.

Marty Wilde, State Representative, District 11

² Candace Avalos recently discussed this in an article in the Oregonian.
<https://www.oregonlive.com/opinion/2020/07/opinion-its-time-to-give-police-oversight-boards-some-teeth.html>