

Manager/Supervisor Risk Management

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A twice weekly e-mail training for YCPARMIA members

TOPIC: SECTION 1988 ATTORNEY FEES

“The tail wagging the dog” is how one local federal judge allegedly described attorney fees in law enforcement cases. As previously discussed, 42 U.S.C. Section 1983, rather than creating a right, provides a means of recovery. In seeking that recovery, 42 U.S.C. Section 1988 provides that a trial “court, in its discretion, may allow the prevailing party...a reasonable attorney fees...” Anything beyond a “nominal” damage award supports an award of attorney fees. This is unusual; in a normal civil case attorney fees are not part of the settlement or judgment (attorney fees can also be awarded in employment liability suits).

The important term is “prevailing party.” The “party” is obviously the side that obtains a court judgment. The problem comes with “prevailing.” When a plaintiff is awarded only nominal damages, have they prevailed, and if so, what would a reasonable fee be? And, what is “nominal?” Is nominal something that is measured against the plaintiff’s demand? Maybe the best way to answer these questions is with an example. I have a vague memory of a Sacramento federal jury giving a damage award to an admitted criminal that was limited to the amount of his medical bills, about \$2K; the judge then awarded \$125K in attorney fees to the plaintiff’s counsel. The fee award was calculated by multiplying the hours worked by the attorney’s rate. The award was not modified by the degree of success that he obtained.

This is where the “tail wagging the dog” comes in. A 1983 case with questionable merit and virtually no damage potential must be evaluated based on its possibility of exposing the entity to adverse attorney fees. Balancing principle and economic reality is a never ending process in civil rights claims. If the defense is not strong enough to get a complete defense verdict, the entity is looking at paying its own legal costs, the damage award, and the plaintiff’s fees and costs. It is not uncommon for the attorney fees to greatly exceed the damage award. It is this unique exposure that drives settlements in questionable liability situations, and makes section 1983 law enforcement liability the significant cost driver for public risk.

Note, the attorney fee award falls under the judge’s discretion; it is not part of the damages determined by the jury. A pro se litigant (representing themselves) is not entitled to attorney fees. Similarly the defendant entity, while they can be the prevailing party, normally does not get their attorney fees unless they can prove that the plaintiff’s case was frivolous, groundless, or vexatious – so virtually never.

Let me make a final point; not all liability claims against law enforcement trigger a 1983 exposure with its companion 1988 attorney fee awards. Auto accidents, premises liability, and simple accidents that do not violate a federal right or law are treated like any other government tort claim. The claimant must file a claim, and are responsible for paying their own attorney fees.

Next topic: Liability Coverage