MEYER & O'CONNOR, LLC

Fall, 2020: Update[1]

Significant Appellate Decisions
Issued During Covid-19 Lockdown

Attorney Advertising Material

Civil Rights

***Monell* "Single Incident" Liability Significantly Expanded:** *J.K.J. v. Polk Cty.*, 960 F.3d 367 (7th Cir. 2020) (Scudder, J.) (*en banc*).

Brief Summary: Plaintiffs – two female inmates of the Polk County, Wisconsin jail who had been raped repeatedly by a male guard – obtained a jury verdict of $2 million each in compensatory damages against both the guard and the County for violations of their Eighth and Fourteenth Amendment rights and an award of $3.75 million each in punitive damages against the guard. A Seventh Circuit panel ruled 2-1 that the County could not be held liable under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978) and its progeny. *J.K.J. v. Polk Cty.*, 928 F.3d 576, 587-99 (7th Cir. 2019). Despite no prior pattern of similar incidents or indeed any prior rape, an overall "good" institutional "record" with respect to sexual misconduct toward inmates, multiple clear and well understood policy and criminal law prohibitions of the guard's knowing and intentional criminal conduct and the guard's concealment thereof, the full Seventh Circuit in a 7-4 *en banc* decision reversed the panel and upheld the jury verdict against the County. *J.K.J. v. Polk Cty.*, 960 F.3d 367, 377-86 (7th Cir. 2020).

The majority upheld the jury's verdict under the "single incident" theory articulated in *City of Canton v. Harris*, 489 U.S. 378, 390 n. 10 (1989), holding that plaintiffs had adduced sufficient evidence to establish liability under the "… path to *Monell* liability" based on a single incident described in *City of Canton,* under which liability can attach where the "'risk of constitutional violations … [is] … so high and the need for training so obvious that the … [municipality entity's] … failure to act can reflect deliberate indifference and allow an inference of institutional culpability, even in the absence of a similar prior constitutional violation.'" *Id* at 380 (*quoting City of Canton*, 489 U.S. at 390). Under such circumstances, "'the failure to provide proper training may fairly be said to represent a policy for which the … [municipal entity] … is responsible, and for which the … [municipal entity]… may be held liable if it actually causes injury.'" *Id*. (*quoting City of Canton,* 489 U.S. at 390; bracketed language inserted). Here, the majority held that there was sufficient evidence for a reasonable jury to find "conscious, deliberate municipal inaction" on the part of the County "in the face of an obvious *and* known risk that its male guards would

[1] Meyer & O'Connor, LLC, a trial and appellate firm focusing on complex commercial litigation, civil rights and employment litigation, tort and criminal defense, periodically publishes an *Update* addressing significant legal developments as an informational service for clients, friends and acquaintances and as attorney advertising. This *Update* does not constitute legal advice or create an attorney-client relationship with Meyer & O'Connor, LLC. Please direct questions or comments regarding this *Update* to Timothy P. O'Connor, Meyer & O'Connor, LLC, Suite 304, 19 S. LaSalle St., Chicago IL. 60603; (e) toconnor@meyeroconnor.com; (p) 312-346-9000

sexually assault female inmates" and that such inaction was the "moving force" behind plaintiffs' injuries. *Id* at 379, 381, 384 (emphasis in original).

Why *Polk Cty.* Matters: As the dissenting opinions in *Polk Cty.* argue with great force, [2] the majority's decision amounts to *respondeat superior* liability thinly disguised as *City of Canton* "single incident" liability or at least very nearly amounts to this. As such, *Polk Cty.* is a significant precedent. At a minimum, even if not quite imposing *respondeat superior* liability, *Polk Cty.* sets forth an expansive interpretation of "single incident" liability, beyond any prior decision of the Supreme Court or the Seventh Circuit, and thus has far-reaching implications – unless confined by subsequent decisions to the context of sexual assault in a correctional facility.[3]

Polk Cty. imposes *Monell* liability despite i) multiple clear, easily understood, easily applied policies (and criminal law provisions) of which all employees were aware that prohibited any sexual contact with, and/or harassment of, inmates and required guards to, and directed inmates to, report any such misconduct; ii) the guard's knowledge that he was violating policy and committing crimes and concealment of his acts; iii) the fact that the prohibitions on sexual contact with, and/or harassment of, inmates were enforced by the jail – once the guard's crimes were uncovered he was fired and prosecuted and a different guard who previously engaged in less serious misconduct was investigated and reprimanded and later resigned; and iv) plaintiff's own expert conceded that the jail had a "good" institutional "record" overall with respect to sexual misconduct toward inmates, even taking into account the aforementioned less serious prior misconduct by a guard who did not commit the rapes. *Polk Cty.*, 960 F.3d at 373-74, 377-86, 388, 390-91, 394.

Further, and perhaps even more significantly, while the majority acknowledged that the evidence did not show a prior "pattern of similar violations" to provide notice to the County of a "known" or "obvious" risk that a male guard would sexually assault a female inmate – a finding of the district court that plaintiffs did not challenge on appeal – the majority nevertheless held that a reasonable jury could find, on this same evidence, notice of "a known *and* obvious" risk of rape for purposes of *City of Canton* "single incident" liability. *Id* at 380-81 (emphasis in original). As Judge Brennan wrote in dissent: "The majority opinion turns the single incident theory on its head, using the same facts to produce the opposite conclusion. On this same record the need for more training and better policies is simultaneously 'not at all obvious' and 'so obvious'…. Pattern and single incident theories of liability differ in their requirements, but they share the identical objective of notice.

---

[2] See *id* at 389 (Easterbrook, J., dissenting) ("If *Monell* is to be overruled, and vicarious liability established, that should be done forthrightly (and by the Supreme Court) rather than via the roundabout route the majority has devised.") and *id* at 401 (Brennan, J., dissenting) ("… the majority opinion departs from the Supreme Court's requirements in [*City of*] *Canton*, [*Bd. Of Cmm'rs of*] *Bryan County* [*v. Brown*, 520 U.S. 397 (1997)] and *Connick* [*v. Thompson*, 563 U.S. 51 (2011)] and oversteps the culpability and causation rules governing § 1983 claims, resulting in *respondeat superior* liability, an outcome forbidden since *Monell*.").

[3] It does not appear that the County filed a petition for a writ of *certiorari*. If this is in fact the case, *Polk Cty.* of course will not be reversed by the Supreme Court. Additionally, the appeal by the guard who committed the rapes is not noteworthy. The majority and dissenting opinions agreed that his appeal was without merit. *Id* at 376-77, 386, 420. The significant question before the Seventh Circuit was whether the County should be liable under *Monell* for the guard's crimes.

Under either theory, a municipality must have notice of omissions before being deemed deliberately indifferent…. Evidence that falls short under one theory falls short under the other as well." *Id* at 405–406.

Absent a prior "pattern of similar violations," the majority stretched to find notice under *City of Canton* from the County's general obligation under *DeShaney*[4] to protect inmates, the prior misconduct by a different guard (Allen Jorgenson[5]) that "fell short of rape" (and which was investigated and for which Jorgenson was reprimanded), an inherently imbalanced "power dynamic" between male guards and female inmates and a "broken culture" that "denigrat[ed]" women (i.e., inappropriate comments by guards, including by an official in charge of the jail, a "dismissive" attitude toward the federal Prison Rape Elimination Act ("PREA"), "barely existent" sexual abuse training and a failure to sufficiently punish Jorgenson). *Id* at 381-84.

The majority stated that "[w]e recognize that policies can always be more robust, and training can always be more thorough," that "PREA is not a constitutional standard, and jails are not required to adopt it" and that "[o]ur federal structure leaves the choices to state and local authorities." *Id* at 384. But these words ring hollow and are hard to credit in light of the majority's decision and reasoning.

Thus, while it was undisputed that the jail's policies (and Wisconsin law) clearly prohibited sexual contact with inmates and were easily understood, easily applied and known by all employees, that jail policy required guards to report actual or reasonably suspected sexual misconduct and directed inmates to do so, that there had been no prior "pattern of similar … violations" (or indeed any prior rape at all) and that the jail had a "good" institutional "record" overall with respect to sexual misconduct toward inmates (even taking Jorgenson's lesser misconduct into account), the majority nonetheless faulted the County for inadequate sexual abuse training and a policy that "fell short on prevention and detection" of sexual abuse. *Id* at 373-74, 379, 390-91, 393. Similarly, while the majority acknowledged that "PREA is not a constitutional standard, and jails are not required to adopt it," the majority repeatedly invoked the County's "dismissive" attitude toward PREA and the testimony of plaintiff's expert, which was "grounded … on PREA's recommendations…," as evidence supporting the verdict. *Id* at 373-74, 379, 381-84,390-91, 394. And although the majority stated that "[o]ur federal structure leaves the choices to state and local authorities," the majority held that the decision of officials to reprimand, rather than more severely punish, Jorgenson for his alleged less serious misconduct and to tell Jorgenson that the reprimand was not "a 'major deal' and he could move on from it," supported the jury's verdict. *Id* at 372, 383. The officials to whom "our federal structure" left the "choice" of how to address Jorgenson's misconduct thought Jorgenson "was a good employee … a go-to employee … [whom they] … wanted to salvage" and therefore "felt that it was important … [to] … recognize and support … [Jorgenson's] … prior work history." *Id.* at 372. But according to the *Polk Cty.* majority: "The jury could have viewed this slap on the wrist as confirming the jail's broken culture …" *Id.* at 383.

---

[4] *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

[5] Plaintiffs were raped by guard Darryl Christensen. The prior alleged misconduct with a different female inmate that "fell short of rape" involved guard Allen Jorgenson. *Id* at 370, 372-73.

It is very difficult, if not impossible, to reconcile *Polk Cty.* with the Supreme Court's decision in *Connick*, the most recent Supreme Court case addressing "single incident" liability as "hypothesized" in *City of Canton*. In *Connick*, plaintiff had spent years on death row due to a *Brady* violation and "alleged that [the *Brady*] violation was caused by the district attorney's deliberate indifference to an obvious need to train prosecutors to avoid violations of *Brady*," pointing to "at least four prior *Brady* violations in the district attorney's office." *Id* at 399. On these facts, the Supreme Court held that "single incident" liability did not apply. *Connick*, 563 U.S. at 63-71. As Judge Easterbrook wrote in dissent in *Polk Cty*.: "Consider *Connick* …: The Justices recognized that the prosecutor's office … had violated the *Brady* doctrine repeatedly but held that this did not show a toleration of wrongdoing. If that was not enough in *Connick*, the Jail's failure to control lewd talk or do more in response to one guard's sexual harassment is categorically insufficient to make the County liable for a different guard's rapes." *Polk Cty.*, 960 F.3d at 389. Equally, if the recurrent question whether evidence implicates *Brady*, which at times can present a difficult decision even for an attorney, does not present an obvious need for training, it is difficult to see how a simple, flat prohibition on jail guards having sexual contact with inmates – and a corresponding requirement that guards report such crimes – does present an obvious need training.

The *Polk Cty.* majority made no attempt to reconcile its decision with *Connick*, mentioning *Connick* only a few times in passing. *Id* at 370-86. But the majority did contend that precedent supported its decision, citing, *inter alia*, the Seventh Circuit's prior decisions in *Woodward v. Corr. Med. Servs. of Ill., Inc.*, 368 F.3d 917 (7th Cir. 2004) and *Glisson v. Indiana Dep't of Corr.*, 849 F.3d 372 (7th Cir. 2017) (*en banc*), each of which "present[ed] a viable *Monell* claim based on a municipality's failure to act in the absence of a [prior] pattern." *Polk Cty.*, 960 F.3d at 380-81. But both *Woodward* and *Glisson* are distinguishable. In *Woodward*, a health care provider to a jail repeatedly, systemically and with the knowledge and acquiescence of its management violated and/or ignored its own suicide prevention protocols despite the fact that jail inmates present a highly elevated risk of suicide. *Woodward*, 368 F.3d at 920-26. This in turn led directly to a failure to take suicide prevention steps with respect to the decedent in *Woodward*, who clearly was at great risk of committing suicide and managed to do so because suicide prevention steps were not taken. *Id* at 925-26, 929. By contrast, there was no failure (systemic or otherwise) to follow policy in *Polk Cty.* – except on the part of the guard who committed the rapes. *Polk Cty.*, 960 F.3d at 370-86. *Glisson* is more similar to *Polk Cty.* in that it is a 6-4 *en banc* decision in which the court held that a policy "gap" – the failure of a healthcare provider to a prison system "to enact centralized treatment protocols for chronically ill inmates" where the need for such coordinated care was obvious – gave rise to a triable *Monell* claim. *Glisson*, 849 F.3d at 382, 387. But *Glisson* too is distinguishable because it involved a claim that defendant had "a deliberate policy *not* to require any kind of formal coordination of medical care," *id* at 379 (emphasis added), in contrast to *Polk Cty.*, where "the jail had express zero-tolerance sexual assault policies and trained its guards about those policies." *Polk Cty.*, 960 F.3d at 420. Moreover, neither *Woodward* nor *Glisson* involved a "failure to train" claim. *Id* at 419-420.

It is not difficult to imagine scenarios outside the sexual abuse/corrections context to which *Polk Cty.* might be applied. *Polk Cty*. conceivably could be applied in any number of contexts – including use of force,[6] the execution of search warrants, equal protection, etc. – where a

[6] Indeed, the backdrop against which *City of Canton* "hypothesized" single incident liability was a failure to train officers regarding constitutional limitations on the use of deadly force. *Connick*, 563 U.S. at 63.

municipal entity has a clear, easily understood policy but the argument can be made (as it always at least in a facile sense can be made) that the municipal entity failed to train on the policy with sufficient rigor and/or failed to institute and/or train on needed supplemental procedures to prevent and detect violations of the policy. A future such claim based on *Polk Cty*. would be even stronger if there is an ostensibly "optional" federal or professional standard that the municipal entity chose not to follow, at least in its entirety, like PREA in *Polk Cty* or the Indiana Department of Corrections healthcare directive at issue in *Glisson*, 849 F.3d at 380, and an institutional culture that can be characterized as "dismissive" toward the concerns underlying the standard declined by the municipal entity. *Polk Cty*.. 960 F3d at 367. Under such circumstances, the failure to adopt the standard and/or reform the institutional culture can serve as a fulcrum for a claim that the municipal entity acted with deliberate indifference to a known and obvious risk of the harm that the standard was meant to prevent. *Polk Cty.*, 960 F.3d at 378-79, 381-82; *Glisson*, 849 F.3d at 379-82. And, as in *Polk Cty*., notice of an obvious risk can at least in part be found based on such "generalized risks" as a "broken culture" or an "imbalanced" "power dynamic." *Polk Cty*., 960 F.3d at 382, 407.

Whether *Polk Cty*. portends that expanded, nearly *respondeat superior* liability in "single-incident" cases will become a "new normal" under *Monell*, at least within the Seventh Circuit, or whether *Polk Cty*. will be limited to its facts and singular context – i.e. sexual assault in a correctional facility – remains, of course, to be seen. But what can be said now is that *Polk Cty*. employed a significantly expanded version of *City of Canton* "single incident" liability, beyond what either the Supreme Court or the Seventh Circuit previously have allowed.

Set forth below as key points are some of the ways in which *Polk Cty*. expands "single incident" liability.

Key Points:

1. <u>Failure To Conduct "Robust" Training On An Already Clear, Well Understood Policy Can Support "Single Incident" Liability</u>: The hypothetical "single incident" scenario described in *City of Canton* involved a failure to train officers – who have been equipped with firearms and who "'policymakers know to a moral certainty … will be required to arrest fleeing felons'" – regarding the circumstances under which they could employ deadly force. *Id* at 380 (quoting *City of Canton*, 489 U. S. at 390 n. 10). *Connick* deemed *City of Canton*'s single incident hypothetical a "narrow range" of potential liability arising from "an obvious need for some form of training" because "[t]here is no reason to assume that police academy applicants are familiar with the constitutional constraints on the use of deadly force" and "in the absence of training, there is no way for novice officers to obtain the legal knowledge they require." *Connick*, 563 U.S. at 64. *Connick* distinguished *City of Canton's* "narrow" hypothetical based on police officers and the use of deadly force from the case at bar arising from prosecutors' *Brady* decisions: "[t]he *Canton* hypothetical assumes that the armed police officers have *no knowledge at all* of the constitutional limits on the use of deadly force" whereas the plaintiff in *Connick* "cannot rely on the *utter lack of an ability cope with constitutional situations* that underlies the *Canton* hypothetical, but rather must assert that prosecutors were not trained about *particular Brady* evidence or the *specific scenario related to the violation in this case*." *Id* at 67 (emphasis added). This critical distinction rendered *City of Canton* inapplicable: "That sort of nuance simply cannot support an inference of

deliberate indifference here. As the Court said in *Canton*, '[i]n virtually every instance where a person has had his rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city 'could have done to prevent the unfortunate incident.'" *Id* (citing *City of Canton*, 489 U.S. at 392).

Taken together, *City of Canton* and *Connick* make clear that a single incident, failure to train claim requires both "an obvious need for some form of training" arising from a complicated or difficult task or situation that the employees of a municipal entity will face – such as the "split-second decisions with life-or-death consequences" that "[a]rmed police must sometimes make," *Connick*, 563 U.S. at 64 – and reason to believe that such employees are not equipped with the knowledge necessary to address such task or situation and have no way to acquire such knowledge absent training.

Polk Cty. clearly does not fall within this "narrow range." As the *Polk Cty*. majority admitted, the County made all personnel aware that sexual contact with inmates violated policy and was a crime and there was no evidence that any employee failed to understand this simple, clear prohibition. *See*, *e.g.*, *id* at 373-75 and *passim*. And both the majority and Judge Brennan's dissent agree that jail policy required guards to report even suspected sexual misconduct and also directed inmates to report such misconduct. *Id* at 373-74, 390-91.[7] Nowhere in *Polk Cty*. is there any suggestion that anyone, guard or inmate, failed to understand the obligation to report sexual misconduct, with the only possible exception being the majority's observation that it is possible some inmates might not realize that conduct is improper because of the difficult circumstances from which they came, which concern was at least partially addressed by the inmate handbook, which stated that "[e]very inmate has the right to be safe from sexual abuse and harassment," that "[n]o one has the right to pressure you to engage in sexual acts" and that "[i]f you are being pressured[,] threatened, or extorted for sex, you should report this to staff immediately…" *Id* at 373-75 and *passim*.

In light of this, it is clear that the *Polk Cty*. majority did not really fault the County for failing to provide essential training, instilling knowledge that employees need to handle difficult tasks or situations and would not otherwise obtain. Instead, in reality, the majority faulted the County for failing to conduct sufficiently robust training with respect to clear policies that already were well understood:

> …. Training is important because it can educate and sensitize guards as well as shape and reinforce institutional values, bringing to life words that otherwise exist only on paper. The trial evidence showed that the County's training on preventing

[7] The language in jail policy that "instructed that any staff member or inmate 'who knows or reasonably suspects' sexual misconduct was to inform the 'Jail Administrator' or, if the complainant was an inmate, … could inform a staff member" was taken from PREA and added in July, 2012, *id* at 373-74, toward the beginning of the time period during which Christensen committed his crimes. *Id* at 371. Neither the majority nor the dissents attach any significance to the fact that this language was added in July, 2012, *id*, *passim*, and this *Update* therefore does not either. Moreover, since sexual contact between a guard and an inmate is a crime under Wisconsin law, it is difficult to believe that guards were not in any event always obligated by Wisconsin law generally to report any such misconduct. As a practical matter, then, throughout the time period at issue, jail policy required the reporting of even suspected sexual misconduct.

> and detecting the sexual harassment and abuse of inmates was all but nonexistent. The training consisted almost exclusively of informing guards of the easy and evident—that the jail's policies prohibited sexual contact with inmates. The only training even addressing the sexual assault of inmates by guards came in a single session on the Prison Rape Elimination Act in 2014, well after much of Darryl Christensen's abuse of J.K.J. and M.J.J. had occurred, and which he did not even attend. And even then the jury — ever mindful of Captain Nargis's dismissive 'tizzy email' [stating that personnel were 'in a tizzy to train their staff on PREA'] — could have found that the County itself hardly took the PREA training seriously. What was missing stands out. The jury heard no evidence of the County informing guards of the inherent vulnerability the confinement setting presents to female inmates, educating jailers on the symptoms of an inmate suffering from the trauma of abuse, requiring officers to report each other's misconduct, or taking any time to otherwise instruct guards on matters of prevention and detection, whatever form that might have taken.

Id at 379*; see also id* at 374 ("Aside from … written policies, Polk County Jail staff received no training (in any sense of the word) focused on the sexual harassment or assault of female inmates."). Other than, perhaps, education concerning "the symptoms of an inmate suffering from the trauma of abuse," there is nothing in the foregoing passage that was not already addressed by jail policy, as described by the majority itself, or that any guard or inmate would not have known already simply from common sense.[8] And as the majority itself admits, guards were trained on jail policy, even if relatively briefly, including a requirement that guards read one policy each day, and inmates were provided with, and told to read, the inmate handbook. *Id* at 373-75. [9]

Thus, in stark contrast to *City of Canton* and *Connick*, *Polk Cty*. expands the breadth of single incident liability by allowing liability for failure train with sufficient rigor on clear, already well understood policy. As Judge Easterbrook wrote in dissent,[10] "the [Supreme] Court sees *knowledge* as the proper goal of training." *Id* at 387 (Easterbrook, J., dissenting) (emphasis added). The point of *City of Canton*'s hypothetical was that "a policy such as 'comply with the Fourth Amendment'

---

[8] As the majority itself states elsewhere in its opinion: "It is difficult to conceive of any setting where the power dynamic could be more imbalanced than that between a male guard and a female inmate. *The jury knew that from common sense — the reality was as obvious as obvious could be*…" *Id* at 382 (emphasis added).

[9] It is worth noting that, among the jail's written policies were prohibitions of "verbal, physical, emotional, psychological, or sexual harassment" of inmates and "intimate social or physical relationship[s] with" inmates, a statement that "sexual contact with any inmate is a criminal offense under Wisconsin law and any officer that suspects such conduct has a duty to report it" and the following statement in a handbook provided to inmates "upon arrival at the jail": "Every inmate has the right to be safe from sexual abuse and harassment. No one has the right to pressure you to engage in sexual acts. If you are being pressured threatened, or extorted for sex, you should report this to staff immediately." *Id* at 390 (Brennan, J. dissenting).

[10] This *Update* does not necessarily "side" with the dissenting opinions but rather quotes such opinions frequently because they assist greatly in understanding the actual import of the majority opinion.

is useless to non-lawyers without information about what compliance entails. Is it lawful to shoot a fleeing felon? If the answer depends on ongoing danger, how much danger justifies deadly force? A city that stops with 'obey the Constitution' lacks a genuine policy." *Id*. "Contrast that," Judge Easterbrook wrote, "with Polk County …. Anyone can understand the rule against intimate physical relations between guards and inmates. The Jail made sure that every guard knew about this rule. What training is required to get guards to grasp it? The problem is not a want of *comprehension* (as in *Canton*'s hypothetical) but a want of *compliance*. Yet subordinate employees' failure to comply with a valid policy is not a ground of liability against a municipality." *Id.*[11]

2. **A Failure To Adopt "Best Practices" In Place Of An Existing Policy May Be Deemed A "Policy Gap" Supporting "Single Incident" Liability**: The majority also concluded that the County was liable because there were "gaps" in the County's policy with respect to the prevention and detection of sexual abuse. As Judge Hamilton explained in a concurring opinion: "… [I]t is worth emphasizing that the *Monell* claims against the county are based on much more than whether guards knew right from wrong or knew that it was a crime to have sex with inmates. The *Monell* claims are also based on the county's failure to monitor its guards and its failure to provide effective channels for complaints so as to discourage abuse." *Id* at 386. Judge Hamilton cited as an analogy the need to audit bank tellers: "The risk of embezzlement, even by tellers who know the law and the rules, is obvious. So is the need for audits. The risk and need are so obvious that the bank's stockholders could easily find that its managers (i.e., its policymakers) were not merely negligent but deliberately indifferent (i.e., reckless) toward this obvious and known risk, even if only one teller gave in to the temptation." *Id*. The majority referred to this alleged "failure to monitor … guards and … provide effective channels for complaints" as policy "gaps" regarding prevention and detection of sexual assault and held that such "gaps" supported the jury's verdict. *Id* at 378-79.

But the County clearly had a policy regarding prevention and detection: guards and inmates were informed of the prohibition on sexual contact or harrassment; guards were informed that violations would be punished (as Christensen and Jorgenson both were); and guards were required, and inmates directed, to report such misconduct. *Id* at 371-74, 390-91.[12] *Polk Cty*. thus presents a

---

[11] Judge Easterbrook's more fundamental contention was that "[t]he Constitution does not require training"; instead, "[t]he duty is to avoid unconstitutional policies." *Id* at 386-87. In Judge Easterbrook's view, liability would attach in *City of Canton's* hypothetical because a municipal entity that does not inform officers in some detail when deadly force can be used violates the Constitution by in effect having no policy at all. *Id* at 387 ("A city that stops with 'obey the Constitution' lacks a genuine policy."). That is, there are some circumstances where a municipal entity effectively has no policy unless it provides training because the subject matter cannot be comprehended without training. In Judge Easterbrook's view, *City of Canton*'s hypothetical is such a situation and this – and not any constitutional requirement that municipal entities must always offer training – is why the Court in *City of Canton* spoke of an obvious need for training and *Monell* liability absent such training. As set forth above, under Judge Easterbrook's analysis, *Polk Cty.* emphatically did not present a situation in which training was necessary in order to have a policy: "Anyone can understand the rule against intimate physical relations between guards and inmates. The Jail made sure that every guard knew about this rule. What training is required to get guards to grasp it?" *Id* at 387.

[12] As Judge Easterbrook noted in dissent, "the [C]ounty … elect[ed] deterrence and incapacitation as the means of enforcing its policies": "Threats of criminal prosecution or losing one's livelihood offer better

different sort of "gap" in policy, if gap it really was, than was present in *Glisson*, which involved an alleged "deliberate policy *not* to require any kind of formal coordination of medical care." *Glisson*, 849 F.3d at 379, 382, 387 (emphasis added). The majority came closest to describing a policy gap when it held that a jury "could have found that" the County's policy with respect to inmates reporting sexual abuse -- under which "an inmate seeking to report abuse is left to inform one of 27 employees in a small jail that she suffered a sexual assault at the hands of his coworker" -- "was not a viable reporting option and indeed reflected a meaningful policy gap." *Id* at 379. In other words, under the majority's reasoning, the County's policy did not provide a "safe and confidential" way to report abuse and therefore the County in effect offered inmates no channel to report abuse whatsoever, which constitutes a policy gap. *Id*. But this seems more accurately described as a disagreement over best practices rather than a wholesale gap because it is difficult to see how any jail reporting system (particularly in a small institution) ever can entirely eliminate the need for a victim at some point to inform a co-worker of the abuser of the abuse that she or he has suffered, plaintiff's expert admitted, as discussed *infra*, that there is no "empirical data" that adopting PREA (which was passed in 2003) produces better results, there is no requirement to adopt PREA and the jail was in compliance with governing Wisconsin law[13].

Thus, there was no "gap" in jail policy in the sense that the policy simply failed to address prevention and detection of sexual misconduct; instead, the gap was, in reality, that jail policy did not reflect "best practices" with respect to prevention and detection of sexual misconduct – at least as such "best practices" are specified by PREA.

Although a review of Seventh Circuit cases regarding "policy gaps" is beyond the scope of this *Update* and no authority categorically forbids basing liability on a failure to adopt "best practices" in place of an existing policy, the alleged "policy gaps" in *Polk Cty*. are an incremental expansion, at least, of single incident liability. This is especially so because there was no prior incident of rape or indeed any misconduct with an inmate except for Jorgenson's alleged lesser misconduct,[14] plaintiff's expert admitted "that there is no empirical data that compliance with PREA yields better results" and there is no legal obligation to adopt PREA. *Id* at 384, 388, 394. In substance, the majority deemed "the County['s] … elect[ion] [of] deterrence and incapacitation as the means of enforcing its policies" over PREA's "best practices" a policy "gap" supporting liability even

---

prospects of deterring malicious conduct [than training]. Polk County threatened guards with both kinds of punishment, and it carried through against Christensen. Those steps show vividly that the Jail does not tolerate sexual abuse of prisoners—that the policy is not just a cynical attempt to deflect liability." *Id* at 388. "[N]othing in the Constitution … prevents a [C]ounty from electing deterrence and incapacitation as the means of enforcing its policies." *Id*.

[13] This is not to say that the channel for reporting advocated by plaintiff's expert (*id* at 378-79) would not be better. It is rather to say that the difference between the County's policy and the policies described by plaintiff's expert is best understood as a difference over best practices that the *Polk Cty*. majority, in turn, deemed a policy gap.

[14] "It … [was] … undisputed that in the nine years preceding trial, 14,100 inmates came though the jail, and the Jorgenson circumstance was the only known allegation of an improper relationship between a guard and an inmate." *Id* at 393. And as plaintiff's expert conceded, even taking Jorgenson's alleged misconduct into account, the jail had a "good" overall record regarding sexual misconduct. *See supra*.

though there is substantial support (cited by Judge Easterbrook) for the view that deterrence and incapacitation are more effective than training and no "empirical data" (as admitted by plaintiff's expert) that PREA's "best practices" yield better results. *Id* at 388, 394. Indeed, the majority's policy "gap" arguably is exactly the sort of "micromanage[nt] of local government…" that *Connick* forbids. *Connick*, 563 U.S. at 68. Moreover, as Judge Brennan pointed out, the Supreme Court, in contrast to the Seventh Circuit in *Polk Cty*. and *Glisson*, "has never extended single-incident liability outside failure to train …" *Polk Cty.*, 960 F.3d at 407.

All this said, however, the take-away from *Polk Cty*. in this regard is that a failure to adopt "best practices" in place of an existing policy can be construed as a "policy gap" that in turn supports single incident liability – at least if such "best practices" are delineated by a federal statute,

3. **"Optional" Federal Standards May Practically Be Mandatory; Compliance With Governing State Law May Not Forestall Liabaility**. While acknowledging that "PREA is not a constitutional standard, and jails are not required to adopt it," the majority nonetheless expressly relied on the County's allegedly "dismissive" attitude toward PREA and, more significantly, the testimony of plaintiff's expert – who, as Judge Brennan pointed out, "grounded his testimony on PREA's recommendations" – in affirming the verdict against the County. *Id* at 376, 379, 384, 394.[15] It is thus difficult to credit the majority's statement that "PREA is not a constitutional standard, and jails are not required to adopt it" given that a failure to do so in *Polk Cty.* was, as a practical matter, deemed significant evidence in support of the jury's verdict. As Judge Brennan wrote: "Strikingly an opinion witness who advanced a standard [PREA] the majority opinion says is not required sets the fault standard in this circuit, even though that witness agreed the County had a good record on sexual assaults." *Id* at 412.

Conversely, and equally significant, compliance with governing state law was not sufficient in *Polk Cty*. to forestall liability under *Monell*: "Plaintiffs agreed that state law, not PREA, governs county jails in Wisconsin, but they offered no evidence that the jail's sexual assault policies or training fell below state legal or administrative standards. As for compliance with state law, the County presented evidence that the Wisconsin Department of Corrections annually reviews the jail's policies, including its policy prohibiting fraternization with inmates. In each year of plaintiffs' incarcerations, that Department found the jail to be in full compliance with all applicable Wisconsin statutes and regulations." *Id* at 394.

4. **Judicial Scrutiny May Extend Deep Into The Particulars Of Training**. *Polk Cty.* is authority for the proposition that courts may scrutinize not only the substance of training provided by a municipal entity but also may second guess the particulars of how such training was provided. As Judge Brennan observed, training guards on the clear, simple prohibition of sexual contact with inmates does not present any pedagogical difficulty:"[t]he County's policies and training—that guards are not to sexually assault inmates—admits of no nuance, separating it from the deadly force training of *Canton* and the *Brady* prosecutorial obligations of *Connick*. The training here is imperative and declarative: a jailer may not have sexual contact with an inmate, and if the jailer does, the jailer will be fired and prosecuted for a felony under Wisconsin law. That is not a gray area, confounding correctional officials …." *Id* at 418-19 (Brennan, J., dissenting). But notwithstanding the straightforward nature of the policy, "the majority opinion is replete with

[15] "PREA played a large role in plaintiffs' case." *Id* at 394 (Brennan, J., dissenting)

conclusions on the nature, quantity, and timing of the training: what language was and was not included in Polk County's written policies; what topics were and were not discussed in training sessions; when the training did and did not occur; and how the training should have been done, in contrast to how it was done." *Id* at 418 (Brennan, J., dissenting); *see also id* at 378-79 (description of jail policies and training in majority opinion).

Thus, notwithstanding that "… failure-to-train liability is concerned with the substance of training, not the particular instructional format" and that § 1983 "does not provide plaintiffs or courts *carte blanche* to micromanage local government…," *Connick*, 563 U.S. at 431, the "particular instructional format" of training – and not just the "substance" of training – is now, in the wake of *Polk Cty*., fair game for plaintiffs and courts, no matter how straightforward the policy or subject matter at issue.

5. **The Constitution May Not Really "Leave … Choices Up To" Local Officials**. As noted above, local officials may not really have as much discretion in making "choices" as the majority opinion proclaims. *Id* at 384. Here, it was undisputed that the County investigated each time allegations by an inmate against guard Allen Jorgenson came to light and that Jorgenson was reprimanded for his misconduct and later resigned after female co-workers complained about him. *Id* at 372-73. Officials explained the reprimand and their statement to Jorgenson that the reprimand "was not a 'major deal' and he could move from it" as their effort to "salvage" Jorgenson because he had been a "good," "go-to" employee. *Id* at 372. The majority deemed this exercise of discretion a "slap on the wrist" that constituted evidence supporting the jury's verdict. *Id* at 383. Thus, the County was as a practical matter penalized for the "choice" officials made to try to "salvage" Jorgenson in light of his overall work history.

6. **Causation May Be Found Even Where An Employee Willfully Does Precisely What Clear Policy Forbade – At Least If There Also Was A Failure Found In Prevention And Detection Procedures And/Or Training**. The majority found the County's lapses caused plaintiff's injuries within the meaning of *Monell* even though it was guard Darryl Christensen who raped plaintiffs and concealed the rapes and Christensen "admitted … [that] … he knew he was putting the plaintiffs at risk" and "that his conduct not only violated prison policy but was criminal" and that he did not need more training to know this. *Id* at 371, 376, 391 "Having established that the jury could conclude that the risk of constitutional injury – here, the sexual assaults – was obvious, it took but a small inferential step for the jury to find causation." *Id* at 384. The contention that Christensen, not the County, was the "moving force" behind plaintiff's injuries failed because "the evidence allowed the jury to conclude that the County's acting to institute more robust policies – foremost addressing prevention and detection – and then training on those policies would have resulted in another correctional officer, an inmate, or even … [plaintiffs] … taking some step to stop … [the guard's] … sexual assaults." *Id* at 385. Also, the jury was not "compelled to conclude that the sexual abuse suffered by … [plaintiffs] … had one and only one cause." *Id* at 385-86.

Polk Cty. thus stands for the proposition that, at least if there was a failure with respect to prevention and detection procedures and/or training, a municipal entity can be held in a "single incident" *Monell* case to have been a "moving force" behind injuries caused by an employee's willful, criminal conduct in violation of policy, law and his or her training. Under such circumstances, the conclusion always can be reached, as it was in *Polk Cty*., that with better

prevention and detection procedures and/or training, someone would have reported or stopped the offending employee and thus the municipal entity's failings were a "moving force" behind the injuries too.

7. **A Less Serious, Dissimilar Prior Incident Can Constitute Evidence Of A "Known" Or "Obvious" Risk Of A Much More Serious Incident Of The Same General Type.** There was no rape (much less multiple rapes) of an inmate by a guard at the jail prior to Christensen's rapes of plaintiffs – hence plaintiffs' reliance on, and the majority's affirmance under, the "single incident" theory set forth in *City of Canton*. That said, the majority treated Jorgensen's less serious prior misconduct as tantamount to a prior incident of rape for purposes of finding that the County had notice of an obvious risk that a guard would rape an inmate. While "the accusations of Jorgenson's reprehensible conduct fell short of rape," the majority stated, "it would be naive in the extreme to dismiss the misconduct as no more than boorish behavior or, more to it, providing no incremental notice of an obvious risk." *Id* at 382. "That Jorgenson's grooming of N.S. did not end with rape is no liability shield; it was good fortune." *Id* at 383. Thus, the majority held, although Jorgenson's misconduct "fell short of rape," it nonetheless was "a plain example of predatory sexual behavior staring [the County] in the face" and a "flashing" red light…" *Id* at 383. "Jorgenson's misconduct reinforced for Polk County that the risks were real and acute in the jail" and "[f]aced with that notice, the County had a legal obligation to act—to take reasonable steps to reduce the obvious and known risks of assaults on inmates." *Id* at 384.

At root, the majority deemed sexual harassment (Jorgenson) as equivalent to rape (Christensen) for purposes of finding notice of a "known and obvious risk" of rape under *City of Canton*'s "single incident" hypothetical.[16] The majority equated Jorgenson's lesser misconduct with Christensen's rapes – thereby greatly increasing the ostensible notice to the County – in part by describing what Jorgensen did as "predatory sexual behavior," a term broad enough to cover both Jorgenson's and Christensen's conduct despite significant differences between what each guard did. *See* n. 26, *supra*. This is at least arguably at odds with *Connick*, where the Supreme Court held that four prior *Brady* violations by the defendant district attorney's office "could not have put [the District Attorney] on notice that the office's *Brady* training was inadequate with respect to the sort of *Brady* violation at issue here" because "those [prior] incidents are not similar to the violation at issue here." *Connick*, 563 at U.S. at 428. In *Connick*, in other words, even though the four prior incidents of failing to turn over favorable information and the failure to turn over favorable information at issue were all similar in the sense that all were *Brady* violations, such general similarity was insufficient to provide notice; greater similarity was required – and lacking. By contrast, the *Polk Cty*. majority appears to have held, or at least arguably has held, that a general

[16] This is not to disagree with the majority's assessment that what Jorgenson did and/or allegedly did (*see id* at 372-73) was reprehensible. It is rather to say that Judge Easterbrook is correct when he described Jorgenson's alleged conduct – which led ultimately to his resignation but for which it is clear he was not prosecuted and the County was not held civilly liable (*id*., *passim*) – as "sexual harassment." *Id* at 389. Christensen's rapes, by contrast, were a far more serious matter, leading to his incarceration for thirty years and the County's being held civilly liable for $4 million in damages.

similarity is enough for a less serious, dissimilar prior incident to provide notice of a known and obvious risk of a much more serious incident.

At bottom, then, under *Polk Cty*. an incident that is less serious and dissimilar – but of the same general type or category as potentially much more serious conduct – can be deemed sufficient to give notice of a known and obvious risk of such more serious conduct.