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Will Fajitagate case set 9th Circuit precedent?

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The 2002 street fight involving three off-duty San Francisco cops, two civilians and some steak fajitas could set a new 9th Circuit precedent on the ability to collect from a local government for the off-duty actions of its police.

Precedent has generally favored local governments. But in oral arguments held Wednesday at Boalt Hall School of Law, lawyers for the two civilians involved in the infamous Fajitagate scandal argued the court should make an exception when there is such a pattern of behavior by an officer that off-duty misconduct is foreseeable.

The argument appeared to sway two of the three judges, especially John Noonan Jr., who likened the San Francisco police department to a pet owner who ignores a pattern of violence and puts the people in his community at risk of getting bitten.

"I don't want to offensively compare the officers to bulldogs, but you could make that analogy," Noonan said.

During arguments, Judge Jay Bybee appeared to lean at times toward the plaintiffs. One of the plaintiffs attorneys, Dennis Cunningham, filed a motion last week to recuse Bybee from the panel, citing his involvement with the Bush administration "torture memo." Once denied, Cunningham filed an "emergency motion" under 9th U.S. Circuit Court of Appeals rule 27-3 for independent consideration by the court, which apparently was rejected.

In a civil suit in San Francisco Superior Court, a jury awarded the plaintiffs \$41,500 in compensatory damages and \$4,500 in punitive damages against two of the officers, Alex Fagan Jr. and Matthew Tonsing. The jury awarded no damages against the third officer, David Lee. All three officers were acquitted of criminal charges stemming from the incident.

armed robbery. Two years later, in *Huffman v. Los Angeles*, 147 F.3d, 1054, another 9th Circuit panel sided with Los Angeles County in a suit that came after a drunk deputy sheriff shot and killed someone during a barroom brawl.

Though Judge Sidney Thomas eventually seemed aligned with Noonan, early in Wednesday's argument Thomas tested the position of plaintiff

He argued Wednesday that, as a 14th Amendment case, the plaintiffs' argument falls short for two reasons -- there was no state action involved, and there was no link between the fight and any custom, policy or practice of the police department.

"It was three private individuals," Newdorf said, adding that none of them identified themselves as a cop. "If a badge had been displayed, there's your

By that same logic, Deputy City Attorney David Newdorf argued, "If I go out tonight and give some bad advice, the city is not liable for legal malpractice."

Wednesday's appeal derives from a separate federal suit against San Francisco and former assistant police chief Alex Fagan Sr. -- Fagan Jr.'s father. U.S. District Judge Jeffrey White threw out the plaintiffs' suit on summary judgment.

Cunningham, the appellate attorney for plaintiff Jade Santoro, said that the court's ruling should require a "minimum amount of congruence" between the off-duty and on-duty conduct, enough to warrant scrutiny from police brass.

In 1996's *Van Ort v. Stanewich*, 92 F.3d, 831, a 9th Circuit panel found that an off-duty policeman in San Diego County acted as a private citizen, not a state actor, during the commission of an

Adam Snyder's attorney, John Houston Scott, questioning whether he would make local governments liable for every incident involving an off-duty police officer.

Scott said no, but he distinguished Wednesday's case from the two earlier 9th Circuit cases. Fagan Jr.'s off-duty conduct in the 2002 fight was "virtually identical" to the way he acted when he was on the clock, Scott said. "This was his *modus operandi*."

David Newdorf, a San Francisco deputy city attorney, countered that argument at one point, saying, "The use of force in carrying out police work ... is categorically different than off-duty conduct."

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By that same logic, he added, "If I go out tonight and give some bad advice, the city is not liable for legal malpractice."

Thomas also took the defense to task, wondering whether, if a police department retains the power to discipline officers for off-duty conduct, it would also bear some responsibility for actions off the clock.

Thomas asked Newdorf whether he could envision any circumstance where a municipality would be liable for off-duty conduct.

Newdorf said he could, if there was an "affirmative, official policy that said after your shift is over, you have to go out in the street and beat somebody up."