HOLDING CELLS

If a city decides to maintain a holding cell prior to transport by the jailer, it must follow certain federal and state laws surrounding the operation of the cell. Additionally, cities avail themselves to potential liability on §1983 claims relating to detention of individuals which may be unfamiliar to city police officers.

In 2015, the U.S. Supreme Court held in *Kingsley v. Hendrickson* that 42 U.S.C. § 1983 excessive force claims brought by pretrial detainees are measured by an objective reasonableness standard rather than a subjective standard previously required (known as deliberate indifference). While Kingsley resolved the circuit split as to the standard required for pretrial detainees' excessive force claims, it did not decide whether pretrial detainee claims of inadequate medical care, conditions of confinement, or failure to protect are also measured under the objective standard.

The 6th Circuit in *Brawner v. Scott County*, 14 F.4th 585 (6th Cir. 2021) extends that objective reasonableness standard to other kinds of pretrial detainee claims. The objective standard requires that an official should have known of a risk to the pretrial detainee and did nothing to abate the risk. Other circuits, however, apply a subjective standard, also known as deliberate indifference. The subjective standard requires that the official actually knew of the risk to the pretrial detainee and did nothing to mitigate the risk.

Practically, this shift from subjective to objective standard could result in more frequent potential liability for municipal defendants when sued under§ 1983.

A. Summary of case law leading up to Kingsley

For purposes of claims under § 1983, three constitutional provisions protect a right to be free from excessive force: the Fourth, Eighth, and Fourteenth Amendments. *Crocker v. Beatty*, 995 F.3d 1232, 1246 (11th Cir. 2021) citing *Piazza v. Jefferson Cnty.*, 923 F.3d 947, 952 (11th Cir. 2019).

The *Piazza* court gives a good summary of the applicable amendments:

"First things first. What constitutional provision governs the use of force in this case, and what doctrinal standard guides our analysis? While the Fourth Amendment prevents the use of excessive force during arrests, see *Graham v. Connor*, 490 U.S. 386, (1989), and the Eighth Amendment serves as the primary source of protection against excessive force after conviction, see *Whitley v. Albers*, 475 U.S. 312 (1986), it is the Fourteenth Amendment that protects those who exist in the in-between—pretrial detainees. *Garrett v. Athens–Clarke County,* 378 F.3d 1274, 1279 n.11 (11th Cir. 2004)." *Piazza v. Jefferson Cnty., Alabama*, 923 F.3d 947, 952 (11th Cir. 2019)

That pretrial detainees fall within the Fourteenth Amendment's ambit dates to the Supreme Court's decision in *Bell v. Wolfish*, 441 U.S. 520 (1979). The court explained there that the "proper inquiry" when "evaluating the constitutionality of conditions or restrictions of pretrial detention" is "whether those conditions amount to punishment of the detainee." Id. at 535 "For under the Due Process Clause," the court continued, "a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." Id.

The 6th Circuit has historically analyzed Fourteenth Amendment pretrial detainee claims and Eighth Amendment prisoner claims "under the same rubric." *Richmond v. Huq*, 885 F.3d 928, 937 (6th Cir. 2018) (quoting *Villegas v. Metro. Gov't of Nashville*, 709 F.3d 563, 568 (6th Cir. 2013)).

However, the Supreme Court's decision in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015) eliminates the subjective element of a pretrial detainee's deliberate-indifference claim.

In *Brawner v. Scott County*, Tennessee 14 F.4th 585 (6th Cir. 2021) the 6th court addresses the issue. The court cites Kingsley:

> Several considerations have led us to conclude that the appropriate standard for a pretrial detainee's excessive force claim is solely an objective one. For one thing, it is consistent with our precedent. We have said that "the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." *Graham [v. Connor*, 490 U.S. 386,] 395, n. 10 [109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)]. And in *Bell [v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979)], we explained that such "punishment" can consist of actions taken with an "expressed intent to punish." [Id.] at 538, 99 S.Ct. 1861. But the Bell court went on to explain that, in the absence of an expressed intent to punish, a pretrial detainee can nevertheless prevail by showing that the actions are not "rationally related to a legitimate nonpunitive governmental purpose" or that the actions "appear excessive in relation to that purpose." Id., at 561, 99 S.Ct. 1861. The Bell court applied this latter objective standard to evaluate a variety of prison conditions, including a prison's practice of double-bunking. In doing so, it did not consider the prison officials' subjective beliefs about the policy. Id., at 541–543, 99 S.Ct. 1861. Rather, the court examined objective evidence, such as the size of the rooms and available amenities, before concluding that the conditions were reasonably related to the legitimate purpose of holding detainees for trial and did not appear excessive in relation to that purpose. Ibid.

In *Brawner*, the 6th Circuit goes on to say:

"Given *Kingsley's* clear delineation between claims brought by convicted prisoners under the Eighth Amendment and claims brought by pretrial detainees under the Fourteenth Amendment, applying the same analysis to these constitutionally distinct groups is no longer tenable. See, e.g., Miranda, 900 F.3d at 350 ("Pretrial detainees stand in a different position: they have not been convicted of anything, and they are still entitled to the constitutional presumption of innocence. Thus, the punishment model is inappropriate for them." (citing Kingsley, 576 U.S. at 400-01, 135 S.Ct. 2466)); Darnell, 849 F.3d at 35... "Accordingly, we agree with the Second, Seventh, and Ninth Circuits that Kingsley requires modification of the subjective prong of the deliberate-indifference test for pretrial detainees."

B. Sovereign Immunity

It is also important to note that counties enjoy the protections of sovereign immunity (which acts as a complete shield from liability) while cities do not. The doctrine of sovereign immunity generally protects and exempts state and local government, agencies, and occasionally their agents, from liability in civil litigation alleging tortious conduct or breach of contract. When immunity protection is available, the governmental entity or agent is usually entitled to a complete dismissal of the litigation at the earliest stages of the proceedings. "As background, the Supreme Court reiterated that the state and counties enjoy sovereign immunity but cities, as municipal corporations, enjoy no immunity for negligent acts committed outside the legislative and judicial realms." *Louisville Arena Auth., Inc. v. RAM Eng'g & Const. Inc,* 415 S.W.3d 671 (Ky. Ct. App. 2013)

Unlike the county, the city does not get to enjoy the cloak of protection that sovereign immunity offers. Therefore, undertaking detention of individuals in holding cells prior to transport could open the city up to significant liability or significant litigation expense defending the actions of the city police officers' interaction with pre-trial detainees.

1. Holding Cells are subject to PREA regulations

Prison Rape Elimination Act of 2003 is a federal law (28 C.F.R. pt. 115) established to address the elimination and prevention of sexual assault and rape in correctional systems. PREA applies to all local confinement facilities,

including temporary holding cells.

Section 115.5 General Definitions:

"Lockup" means a facility that contains **holding cells**, cell blocks, or other secure enclosures that are: (1) Under the control of a law enforcement, court, or custodial officer; and (2) Primarily used for the temporary confinement of individuals who have recently been arrested, detained, or are being transferred to or from a court, jail, prison, or other agency.

What is required: (This highlights and is not an exhaustive list of all PREA requirements.)

1) A written policy mandating zero tolerance towards all forms of sexual abuse and sexual harassment and outlining the agency's approach to preventing, detecting, and responding to such conduct. (§115.111)

2) An agency shall employ or designate an upper-level, agency-wide PREA coordinator with sufficient time and authority to develop, implement, and oversee agency efforts to comply with the PREA standards in all its lockups. (§ 115.111)

3) For each lockup, the agency shall develop and document a staffing plan that provides for adequate levels of staffing, and, where applicable, video monitoring, to protect detainees against sexual abuse. In calculating adequate staffing levels and determining the need for video monitoring, agencies shall take into consideration .... (a) The physical layout of each lockup; (b) the composition of the detainee population; (c) The prevalence of substantiated and unsubstantiated incidents of sexual abuse; and (d) any other relevant factors. (§115.113)

4) Juveniles and youthful detainees shall be held separately from adult detainees. (§115.114)

5) Limits to cross-gender viewing and searches. (§115.115)

6) Detainees with disabilities and detainees who are limited English proficient. (§ 115.116)

7) §115.116(e) The agency shall either conduct criminal background records checks at least every five years of current employees and contractors who may have contact with detainees or have in place a system for otherwise capturing such information for current employees.

8) Employee and volunteer training requirements. (§ 115.131)

9) During the intake process, employees shall notify all detainees of the agency's zero-tolerance policy regarding sexual abuse and sexual harassment. (§115.132(a))

10) In lockups that are not utilized to house detainees overnight, before placing any detainees together in a holding cell, staff shall consider whether, based on the information before them, a detainee may be at a high risk of being sexually abused and, when appropriate, shall take necessary steps to mitigate any such danger to the detainee. (§115.141(a))

11) The agency shall also inform detainees of at least one way to report abuse or harassment to a public or private entity or office that is not part of the agency, and that is able to receive and immediately forward detainee reports of sexual abuse and sexual harassment to agency officials, allowing the detainee to remain anonymous upon request. (§115.151(b))

12) The agency shall establish a policy to protect all detainees and staff who report sexual abuse or sexual harassment or cooperate with sexual abuse or sexual harassment investigations from retaliation by other detainees or staff, and shall designate which staff members or departments are charged with monitoring retaliation. (§115.167(a))

13) Data collection. (a) The agency shall collect accurate, uniform data for every allegation of sexual abuse at lockups under its direct control using a standardized instrument and set of definitions. (b) The agency shall aggregate the incident-based sexual abuse data at least annually. (§115.187)

2. Local holding cells subject to state regulations:

KRS 441.055 requires the Department of Corrections to promulgate administrative regulations establishing minimum standards for jails that house state prisoners.

441.415 (1)(a) "Local correctional facility" means a jail as defined in KRS 441.005, and any other facility by whatever name known that is operated by a unit of local government, combination of units of local governments, or regional jail authority for the involuntary confinement of persons arrested for or charged with the commission of a crime and persons convicted of a crime.

501 KAR 3:050

The purpose of holding areas shall be for temporary detention not to exceed thirty (30) hours in secure holding or thirty (30) hours in diversion holding.

(a) Design features for secure holding shall include:

1. Twenty-five (25) square feet per rated capacity with a minimum size of no less than fifty (50) square feet;
2. Eight (8) feet deck height;
3. One (1) commode and lavatory for a rated capacity of ten (10) or less, two (2) commodes and lavatories for a rated capacity of eleven (11) to twenty (20), or three (3) commodes and lavatories for a rated capacity of twenty-one (21) or more;
4. Penal-type equipment;
5. One (1) penal-type lavatory and commode;
6. One (1) penal-type light fixture capable of providing sufficient light for the tasks being performed; and
7. Decks, walls, surfaces of wall bases and floors that are constructed of approved masonry, concrete, or steel construction.

(b) If a diversion holding area is provided, features and requirements shall include:

1. Twenty-five (25) square feet per rated capacity with a minimum size of fifty (50) square feet;
2. Total rated capacity not to exceed twenty-four (24) persons;
3. One (1) bathroom for a rated capacity of ten (10) or less; two (2) bathrooms for a rated capacity of eleven (11) to twenty (20); and three (3) bathrooms for a rated capacity of twenty-one (21) or more;
4. At least one (1) water fountain that is located in the area;
5. A phone system that is available for use by prisoners;
6. Fire-rated construction with penal hardware, windows, and door;
7. Fire-rated chairs and tables per rated capacity but no beds;
8. An unobstructed view into the area; and
9. Areas that allow constant in-person surveillance.

(c) Policy and procedure shall set forth criteria for placement of prisoners in the diversion holding area.

3. Other Civil Liability

Individuals detained and awaiting transportation to a county jail are among those who are often housed in local police holding facilities. In many cases, very little is known about these individuals upon their arrival at the holding facility, including their risk of escape, mental and physical problems, criminal histories, and potential for violence or suicide, among other important matters. Due to these potential unknowns, a police holding facility must function as a quasi-detention center, under the same security and detainee well-being protocols and standards as a detention center or correctional facility.

The International Association of Chiefs of Police created a model policy on holding facilities for this reason. The highlights of the policy address:

1. Fire: smoke detection devices and fire suppression services
2. Evacuation Plan
3. Detainee Death (suicide prevention protocol)
4. Illness, Injury, or Disability
5. Sanitation

6. Security and Control
7. Feeding

(This is a non-exhaustive list of all aspects of the model policy)

All of these categories pose various levels of civil liability associated with the temporary holding of an arrestee prior to transport to the jail.

4. Caselaw

"When the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." See *DeShaney v. Winnebago Cnty. Dep't of Soc. Serv.*, 489 U.S. 189 (1989).

Claims brought by arrestees and pre-trail detainees are often barred by the qualified immunity defense. However, there is potential liability on the city when detaining people prior to transport by the jailer.

Examples of liability can be seen in:

- *Carter v. City of Detroit*, 408 F.3d. 305 (6th Cir. 2005): A police officer allegedly failed to order the arrestee be taken to the hospital when she was exhibiting symptoms of a heart attack. He was not entitled to qualified official immunity in her estate's wrongful death lawsuit.
- *Oritz v. City of Chicago*, 656 F.3d 523 (7th Cir. 2011): The family of a female arrestee who died while held in a cell in a police station was awarded $1 million in damages by a jury. The jury found that a police practice of holding detainees in cells in police stations without medical attention for up to two days was unconstitutional.
- *Swans v. City of Lansing*, 65 F. Supp.2d 625 (W.D. Mich. 1998): The jury found in favor of the estate of a detainee who died in a holding cell. While being booked into the detention center, Swans became violent, kicked a booking sergeant, and responding officers used force to control him and attempted to place him in a restraint chair but were unsuccessful. The officers carried him to a holding cell, restrained him in the prone position with his hands restrained in handcuffs behind his back, his legs restrained with a restraint strap, and the officers left the cell. The officers monitored him by closed-circuit television, returned to the cell within 10 minutes, and discovered that he was unresponsive. The officers removed the restraints, called for emergency medical services, initiated CPR, and he was transported to the hospital, where he died. The autopsy revealed that Swans died from cardiac dysrhythmia caused by positional asphyxia during custodial restraint. At trial the jury determined that the officers used excessive force, misused the restraints, and that administrators failed to train, supervise, and direct their officers in how to properly respond to and restrain mentally impaired detainees. The jury awarded $10 million to Swans' estate.
- *Hopper v. Plummer et al.*, 887 F.3d. 744 (6th Cir. 2018). The Sixth Circuit denied qualified immunity to detention officers who used the prone restraint position, which resulted in the death of the detainee, which was caused by cardiac arrhythmia and compressional asphyxia. Experiencing a seizure, the detainee collapsed in his cell. Responding officers decided to pull him out of the small cell and placed him on his stomach. Jail medical personnel also responded, and the detainee tried to stand up. The officers placed him on his stomach and handcuffed him with his hands behind his back. One officer placed his knee on the lower leg of the detainee and another officer placed his knee on the shoulder blade of the detainee to control his thrashing movements. The detainee became unresponsive. The nurse attempted to provide medical treatment but could not while the detainee was prone. The detainee stopped breathing and died. The coroner determined the cause of death was cardiac arrhythmia. The plaintiff's medical expert, however, determined that the detainee died of asphyxia due to the detainee's torso being compressed while he was prone and handcuffed. A §1983 action was filed claiming the officers used excessive force and acted with deliberate indifference to the detainee's medical needs. Claims were filed against the

HOLDING CELLS

sheriff for failing to train and supervise the officers and for unconstitutional policies. The Sixth Circuit affirmed the lower courts' denial of summary judgment and agreed that the officers applied excessive and compressive force upon a restrained detainee's back, shoulders, and legs over the course of 22 minutes who was neither actively resisting nor posed a threat to the officers. Also, the court concluded that the officers delayed in providing medical care to the detainee in violation of the Eighth Amendment.

This is not an exhaustive list of legal implications and risk management concerns related to operating a holding cell at a local police department but portrays the amount of care which must come with such policy decision.

Kentucky League of Cities

Questions? KLC is here to help!
Please contact John Clark (jclark@klc.org) or Brian Nunn (bnunn@klc.org) with KLC Loss Control Law Enforcement at 800.876.4552 or visit klc.org for more information.


John Clark


Brian Nunn