

SENATE BILL REPORT

E2SHB 1310

As of March 16, 2021

Title: An act relating to permissible uses of force by law enforcement and correctional officers.

Brief Description: Concerning permissible uses of force by law enforcement and correctional officers.

Sponsors: House Committee on Appropriations (originally sponsored by Representatives Johnson, J., Lovick, Ryu, Simmons, Berry, Fitzgibbon, Hackney, Wylie, Sells, Wicks, Cody, Callan, Gregerson, Santos, Senn, Ortiz-Self, Chopp, Davis, Valdez, Dolan, Bateman, Ormsby, Bergquist, Morgan, Ramel, Ramos, Lekanoff, Frame, Harris-Talley, Pollet, Macri and Peterson).

Brief History: Passed House: 3/6/21, 55-42.

Committee Activity: Law & Justice: 3/16/21.

Brief Summary of Bill

- Establishes a civil standard for peace officer use of force.
- Requires the attorney general to develop model policies on law enforcement's use of force and de-escalation tactics and individual law enforcement agencies to adopt policies consistent with the attorney general's model policies.

SENATE COMMITTEE ON LAW & JUSTICE

Staff: Shani Bauer (786-7468)

Background: Federal Civil Actions—Deprivation of Constitutional Rights. Federal law, under 42 U.S.C. §1983, provides a civil cause of action to redress violations of federal constitutional rights caused by persons acting under color of state law. This cause of action is often referred to as a section 1983 action. The legal standard for determining whether

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

actions violate constitutional rights depends on the particular constitutional right at issue. Section 1983 actions against law enforcement officers often involve claims of excessive use of force, unlawful search or seizure, or false arrest in violation of Fourth Amendment rights.

The general standard for evaluating Fourth Amendment claims is whether or not the officer's actions were objectively reasonable. In making this determination, the court must balance the nature and quality of the intrusion on the individual's rights against the state's interests in the case. Court decisions indicate that reasonableness is highly dependent on the particular facts and circumstances of each case including: the severity of the crime at issue; whether the suspect poses an immediate threat to the safety of the officers or others; and whether the suspect is actively resisting arrest or attempting to evade arrest by flight. The reasonableness of a particular use of force is examined from the perspective of a reasonable officer on the scene, and not with the benefit of hindsight.

Qualified immunity in the context of section 1983 actions is a doctrine that originated in federal case law. It provides government officials performing discretionary functions immunity from civil suits unless the plaintiff shows that the officer violated clearly established rights. When determining whether or not a right was clearly established, courts consider whether the constitutional right alleged to have been violated was sufficiently clear so that a reasonable officer would have known that his or her conduct violated the rights. This is an objective standard, meaning that the standard does not depend on the officer's subjective state of mind.

Section 1983 actions are suits generally brought against the individual officer who committed the alleged violation since the doctrine of vicarious liability of employers does not apply in section 1983 actions. An officer's employing agency may only be held liable in a section 1983 action when the injury is the result of the execution of a policy or custom adopted by the agency.

Washington Civil Actions. The Washington Constitution contains provisions that protect individual rights of state residents, including Article 1, section 7, which provides that "[n]o person may be disturbed in his private affairs, or his home invaded, without authority of law." Washington does not have a statute that specifically creates a cause of action for violation of state constitutional rights, and Washington courts have consistently refused to recognize a private cause of action for damages for state constitutional violations absent legislative guidance.

However, a civil suit in Washington based on excessive use of force or other police misconduct could be brought under state common law tort actions. These include actions for intentional torts, such as assault, battery, false arrest, false imprisonment, or trespass, or a negligence cause of action. In a 2019 case, the Washington Supreme Court held that the fact that an officer's conduct constitutes an intentional tort does not preclude a negligence claim based on an officer's failure to use ordinary care to avoid unreasonably escalating an

encounter to the use of deadly force.

Washington courts recognize a common law qualified immunity for government officers exercising discretionary functions. A police officer is entitled to immunity from civil liability where the officer carries out a statutory duty according to procedures dictated to the officer by statute and superiors and where the officer acts reasonably.

An employer may be held vicariously liable for an employee's tortious act if the employee was acting within the scope of employment when the act was committed. An employer may also be liable for the conduct of an employee based on negligent hiring, training, or supervising of the employee. However, a claim based on negligent hiring, training, or supervising applies only where the officer acts outside of the scope of employment.

Defense and Indemnification of Public Employees. When a civil action is brought against a state or local government officer or employee, the state or a local government must defend the officer or employee in the proceeding if his or her actions were within the scope of his or her duties. Monetary damages awarded against the officer or employee must be paid by the state or local governmental entity if the court finds that the officer or employee was acting within the scope of his or her duties, and the judgement may not become a lien upon any property of the officer or employee.

Criminal Liability of Peace Officers. Whether a peace officer is criminally liable for using force depends on the specific crime alleged and any applicable defense. A peace officer has the same right of self-defense as others. Deadly force is justifiable when used by a peace officer in certain circumstances so long as they are operating in good faith. Good faith is an objective standard which must consider all the facts, circumstances, and information known to the peace officer at the time to determine whether a similarly situated reasonable peace officer would have believed the use of deadly force was necessary to prevent death or serious physical harm to the officer or another individual. The circumstances where deadly force is justifiable include, for example, when necessarily used to: arrest a suspect who the peace officer reasonably believes has committed a felony; prevent escape or recapture an escapee from prison or jail; or suppress a riot involving a deadly weapon.

Training. All peace officers are required to complete basic training through the Criminal Justice Training Commission (CJTC). Basic training consists of a 720-hour program covering a wide variety of subjects including: criminal law and procedures; traffic enforcement; cultural awareness; communication and writing skills; emergency vehicle operations; firearms; crisis intervention; patrol procedures; criminal investigation; and defensive tactics. All peace officers are required to complete violence de-escalation training through the CJTC within the first 15 months of employment, and then must complete updated violence de-escalation training periodically thereafter.

Summary of Bill: Use of Force by Peace Officers. A civil standard for use of force by peace officers is established. A peace officer may use physical force against another person

when necessary to protect against criminal conduct where there is probable cause to make an arrest; effect an arrest; prevent an escape as defined under chapter 9A.76 RCW; or protect against an imminent threat of bodily injury to the peace officer or another person. A peace officer may use deadly force only when necessary to protect against an imminent threat of serious physical injury or death to the officer or another person.

The provisions are created in a new chapter in Title 10 of the RCW and are applicable to any general authority, limited authority, or specially commissioned Washington law enforcement officer and any community corrections officer.

A peace officer must use reasonable care in determining when and whether to use physical force and to that end, must:

- when possible, exhaust available and appropriate de-escalation tactics prior to using any physical force;
- use only the minimal degree of physical force necessary to overcome resistance under the circumstances;
- terminate the use of physical force as soon as the necessity for such force ends;
- when possible, use available and appropriate less lethal alternatives before using deadly force; and
- make less lethal alternatives issued to the officer reasonably available for his or her use.

A peace officer may not use any force tactics prohibited by applicable departmental policy, this chapter, or otherwise provided by law, except to protect his or her life or the life of another person. Nothing in this section prevents a law enforcement agency from adopting policies or standards with additional requirements for de-escalation and greater restrictions on the use of physical and deadly force than provided in this section.

Applicable Definitions. "Imminent threat" means, based on the totality of the circumstances, it is objectively reasonable to believe a person has the present and apparent ability, opportunity, and intent to immediately cause death or serious bodily injury to the peace officer or another person. "Necessary" means, under the totality of the circumstances, a reasonably effective alternative to the use of deadly force does not exist, and the amount of force used was a reasonable and proportional response to the threat posed to the officer and others. "Totality of the circumstances" means all facts known to the peace officer leading up to and at the time of the use of force, and includes the actions of the person against whom the peace officer uses such force, and the actions of the peace officer.

Model Policy. By July 2, 2022, the attorney general must develop and publish model policies on law enforcement's use of force and de-escalation tactics. By December 1, 2022, all law enforcement agencies must adopt policies consistent with the model policies and submit copies of the applicable policies to the attorney general. If the agency departs from the model policy, the agency must provide notice and reasons for the departure. Within 60 days of any future modification of its policy, the agency must provide notice to the attorney

general. The attorney general must make copies of the agency policies available on its website and on December 31st of each year, publish a report on the status of individual agencies and compliance with this section.

Training. Basic law enforcement academy training and violence de-escalation training provided by the CJTC must be consistent with this act and the model policies established by the attorney general. The CJTC must submit a report to the legislature and the Governor by January 1st and July 1st of each year on the implementation of and compliance with the training requirements. The report must include data on compliance by agencies and officers and recommendations for any changes to laws and policies necessary to improve compliance.

Appropriation: The bill contains a null and void clause requiring specific funding be provided in an omnibus appropriation act.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.