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## Civil Rights & Judiciary Committee

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### HB 1025

**Brief Description:** Creating a private right of action for harm from violations of the state Constitution or state law by peace officers.

**Sponsors:** Representatives Thai, Reed, Berry, Ryu, Simmons, Bateman, Fitzgibbon, Farivar, Peterson, Alvarado, Pollet, Street, Cortes, Doglio, Macri, Gregerson, Stonier, Kloba and Santos.

#### Brief Summary of Bill

- Provides that anyone injured by a peace officer who acted under color of authority and engaged in conduct that is unlawful under the state Constitution or state law, has a cause of action against the peace officer.
- Provides an additional cause of action against any other peace officers who could have prevented the injury or aided in preventing the injury but failed to do so.
- Establishes standards for vicarious and independent liability for peace officer employers.
- Establishes defenses for peace officers and their employers.

**Hearing Date:** 1/25/23

**Staff:** John Burzynski (786-7133).

#### Background:

Federal Civil Actions—Deprivation of Constitutional Rights.

Federal law codified at 42 U.S.C. §1983 provides a civil cause of action to redress violations of federal constitutional and statutory rights caused by persons acting under color of state law. This

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cause of action is often referred to as a section 1983 action. The legal standard depends on the legal right at issue.

The doctrine of qualified immunity provides government officials performing discretionary functions with immunity from section 1983 actions unless the plaintiff shows that the officer violated "clearly established" rights. When determining whether a right was clearly established, courts consider whether the right at issue was sufficiently clear such that every reasonable official would have known that his or her conduct violated the right.

Section 1983 actions are generally brought against the individual officer who committed the alleged violation. The doctrine of vicarious liability of employers does not apply in section 1983 actions. However, an officer's employing agency may 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.

Washington has not enacted a statute authorizing a general cause of action against government officials for conduct that is unlawful under the state Constitution or state law. Washington courts have refused to recognize a private cause of action for damages for state constitutional violations absent legislative guidance. However, a civil suit against state agents and employees can be brought under state common law for tort actions. These include actions for intentional torts, such as assault, battery, false arrest, false imprisonment, or trespass; and for unintentional torts, such as a negligence claim based on an officer's failure to use reasonable care.

Washington courts recognize a distinct state variant of qualified immunity in some instances. A police officer is generally entitled to state qualified 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. However, this immunity does not apply to claims of assault and battery arising out of the use of excessive force to effectuate an arrest.

Generally, 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.

#### Requirement to Use Reasonable Care.

Peace officers must use reasonable care when determining whether to use physical or deadly force and when using physical or deadly force against another. Peace officers must:

- when possible, use all de-escalation tactics that are available and appropriate under the circumstances before using physical force;
- when using physical force, use the least amount 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 less lethal alternatives that are available and appropriate under the

- circumstances before using deadly force; and
- make less lethal alternatives issued to the officer reasonably available for his or her use.

#### Requirement to Intervene and Report.

Identifiable on-duty peace officers who witness another peace officer engaging or attempting to engage in the use of excessive force against another person are required to intervene, when in a position to do so, to end the use of excessive force or attempted use of excessive force, or to prevent the further use of excessive force, and render aid at the earliest safe opportunity. Additionally, identifiable on-duty peace officers who witness another peace officer engaged in conduct that is unlawful or contrary to agency policy are required to report the conduct to their supervisor.

#### Defense of Public Employees.

When a civil action is brought against a state or local government officer or employee, the state or 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 judgment may not become a lien upon any property of the officer or employee.

#### **Summary of Bill:**

##### Peace Office Liability.

This act establishes a cause of action against: (1) a peace officer acting under color of authority for conduct that violates the state Constitution or state law and injures persons or property; and (2) any other peace officer who, through reasonable diligence, had the power to prevent or aid in preventing the injury and failed to do so.

A peace officer has a defense if, when the injury occurred, the officer substantially complied with a regulation, practice, procedure, policy, or training that was established by the peace officer's employer or approved or condoned by superior officers.

##### Employer Liability.

A plaintiff may also name a peace officer's employer as a defendant. The employer is vicariously liable for a peace officer's unlawful conduct causing injury if that conduct was within the scope of the peace officer's employment.

If a peace officer proves a defense of substantial compliance with a regulation, practice, procedure, policy, or training that was established by the peace officer's employer or approved or condoned by superior officers, then the employer is independently liable for the injury proximately caused by the regulation, practice, procedure, policy, or training at issue, unless the training was provided by the Criminal Justice Training Center or the policy was model guidance drafted by the Attorney General's Office.

Peace officer employers are also independently liable for injuries proximately caused by the employer's failure to use reasonable care in hiring, training, retaining, supervising, or disciplining a peace officer, unless the employer can establish it was not able to use reasonable care in retaining or disciplining the officer as a result of binding arbitration.

#### Prohibited Defenses.

It is not an immunity or defense that the rights, privileges, or immunities sued upon were not clearly established at the time of the act, omission, or decision by the peace officer or employer.

It is not an immunity or defense that at such time, the state of the law was such that the peace officer or employer could not reasonably have been expected to know whether such act, omission, or decision was lawful.

#### Remedies.

A prevailing plaintiff has a right to recover actual damages as determined by the trier of fact and nominal damages. A court may award a prevailing plaintiff costs and reasonable attorney's fees, and may grant declaratory and injunctive relief.

#### Peace Officer's Rights.

Nothing in this act limits the right of a peace officer to have a legal defense provided at the expense of their employer or to have a judgment for a violation of this act satisfied by their employer.

#### Other Provisions.

The act must be liberally construed. Nothing in the act affects any other common law or statutory right of action available to the plaintiff.

A cause of action under this act must commence within three years of the action accruing.

The act applies to causes of action arising on or after the effective date of the act.

**Appropriation:** None.

**Fiscal Note:** Preliminary fiscal note available.

**Effective Date:** The bill takes effect on January 1, 2025.