

## MEMORANDUM

TO: Client

FROM: Lawfinders, Associates, Inc.

RE: *Smith v. Officer Jones*

DATE: January 1, 1999

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### INTRODUCTION

Pursuant to your instructions, we have prepared this evaluation of Plaintiffs' 1985(3) and 1986 Civil Rights claims, the only claims remaining in the above-referenced matter following the Court's Order granting partial dismissal. Our research indicates that several arguments may be developed in favor of a motion to dismiss or motion for summary judgment. First, Plaintiffs may be held to have failed to meet the "conspiracy" element of a § 1985(3) claim. There is some authority for the proposition that the police officers, as employees of the same government agency, can not "conspire with themselves" sufficient to state a claim under 42 U.S.C. § 1985(3) and 1986. However, California federal courts as well as federal courts throughout the circuits, are in disagreement on this theory. The application of the "intra-corporate conspiracy" doctrine is an open question in California, and presents an issue of first impression in the Ninth Circuit. Additionally, because courts have viewed equal protection cases where a police officer is accused of failing to act with a skeptical eye, development of the evidence on the intent of the police officers to deprive a

citizen of his or her equal protection under the law may provide a solid foundation for a motion for summary judgment.

### **DISCUSSION**

On December 17, 1997, the Court in the above referenced matter dismissed the civil rights claims presented in Plaintiffs' First Amended Complaint under 42 U.S.C. § 1983 and California pendent state law. The Court stated, however, that the Complaint was sufficient to state a cause of action under 42 U.S.C. § 1985(3) and 1986. Section 1985(3) of the Civil Rights Act prohibits conspiracy under color of state law to deprive an individual of his or her civil rights. 42 U.S.C. § 1985(3). To state a claim for relief under 42 U.S.C. § 1985(3), a plaintiff must allege four elements: "(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States." (*United Brotherhood of Carpenters & Joiners v. Scott* (1983) 463 U.S. 825, 828-29 [77 L. Ed. 2d 1049, 103 S. Ct. 3352], reh'g denied 464 U.S. 875 [78 L. Ed. 2d 186, 104 S. Ct. 211].) Section 1986 liability is predicated on §1985 liability, therefore, no claim for relief can be stated under § 1986 unless a valid claim under § 1985 is established. (*Dacey v. Dorsey* (2d Cir. 1978) 568 F.2d 275; cert

denied, 436 U.S. 906 [56 L.Ed. 2d 405, 98 S. Ct. 2238].) Thus, the remaining claims in this action will rise or fall based on the Court's determination of liability under §1985(3).

A plaintiff in an equal protection case must comply with stringent standards of pleading: "It is a truism that under current Equal Protection Clause jurisprudence, a showing of disproportionate impact alone is not enough to establish a constitutional violation." (*Washington v. Davis* (1976) 426 U.S. 229, 242 [48 L.Ed.2d 597, 96 S. Ct. 2040].) "Facially neutral" policies are difficult to challenge on constitutional grounds. (*Soto v. Flores* (1st Cir. 1997) 103 F.3d 1056, 1067; cert. denied 1997 U.S. LEXIS 4739 [139 L. Ed. 2d 32].) Even cases that "paint an unwholesome picture" must comply with the "strict standards imposed by the Supreme Court for showing discriminatory intent in equal protection claims." (*Soto, supra*, 103 F.3d at p. 1071.) The Supreme Court in *DeShaney* held that "a State's failure to protect an individual against private violence does not constitute a violation of the Due Process Clause." (*DeShaney v. Winnebago County* (1989) 489 U.S. 198, 195 [103 L.Ed.2d 249, 109 S.Ct. 998].) This holding has been extended to prevent "plaintiffs to circumvent the rule of *DeShaney* by converting every due process claim into an Equal Protection claim." (*McKee v. City of Rockwall* (1989) 877 F.2d 409, 413; cert. denied 493 U.S. 1023 [107 L. Ed. 2d, 746 110 S. Ct. 727].) Upon failure to make a sufficient showing on a central element

of a plaintiff's civil rights case, summary judgment may be granted in favor of a defendant. (*Celotex Corp. v. Catrett* (1986) 477 U.S. 317 [91 L.Ed. 2d 265, 106 S. Ct. 2548].)

**A. Plaintiffs Must Establish The Conspiracy Element of a 1985(3) Claim.**

Conspiracy is a required element in a section 1985(3) claim. (*United Brotherhood of Carpenters & Joiners v. Scott* (1983) 463 U.S. 825, 828-29 [77 L. Ed. 2d 1049, 103 S. Ct. 3352] reh'g denied 464 U.S. 875 [78 L. Ed. 2d 186, 104 S. Ct. 211].) In a civil rights case, a plaintiff must make more than conclusory allegations of conspiracy. (*Paredes v. Richmond* (N.D. Cal. 1993) U.S. Dist. LEXIS 9599 at p. \*2; *Jones v. Carlson* (N.D. Cal. 1991) U.S. Dist. LEXIS 16223 at p. \*4.) "While it is not necessary that each participant in a conspiracy knew the exact parameters of the plan, it must at least be shown that each conspirator shared the general conspiratorial objective." (*Paredes, supra*, 1993 U.S. Dist. LEXIS at p. \* 3 (citations omitted).) An agreement or a "meeting of the minds" is critical to the element of conspiracy. (*Id.* at p. \*2.)

In this case, the scope of the conspiracy alleged is somewhat unclear: although the Plaintiffs have sued only the individual police officers, the Petition alleges that it is a policy of the police department to selectively enforce assault laws based on gender. In a similar case, involving allegations that police conspired to apply domestic protection laws to a lesser extent against women, the court found conspiracy was sufficiently alleged when the defendant alleged "a custom, policy and practice of treating complains from, or on behalf of,

women threatened with violence in domestic disputes differently from other complaints of violence.” (*Soto v. Flores* (1st Cir. 1997) 103 F.3d 1056, 1066.) In *Soto*, however, the plaintiff alleged discriminatory statements on the part of both the police officers sued, while in this case, only one officer is alleged to have stated that the policy of the police department is to let women fighting work themselves out without intervention. Plaintiff’s allegations may be vulnerable to a challenge that there was no “meeting of the minds” sufficient to meet the conspiracy element of a §1985(3) claim.

Additionally, “it is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy.” (*Washington v. Duty Free Shoppers* (N.D. Cal. 1988) 696 F. Supp. 1323 (rejecting application in civil rights context).) Developed in the realm of anti-trust law, the intra-corporate conspiracy doctrine stands for the proposition that an entity (such as a corporation or a governmental agency) cannot conspire with “itself.” (*Rabkin v. Dean* (N.D. Cal. 1994) 856 F. Supp. 543, 551.) The *Rabkin* court stated that “individual members of a governmental body cannot conspire when they act in their official capacity to take official acts on behalf of the governing body.” (*Id.*) The court explained:

The intra-corporate conspiracy doctrine was first developed to preclude a corporation from being charged with conspiracy to violate the anti-trust laws, when it exercises its rights through its officers and agents, which is the only medium through which it can possibly act. Similarly, it defies common sense to render the same conduct for which a government entity is held liable . . . as separate acts accomplished by separate conspiratorial actors other than the government entity.

(*Id.* at p. 552 (internal citations omitted).) In the *Rankin* case, the court concluded that the city counsel, in denying the salary increase of a city employee, cannot be held to have conspired with itself in order to state a claim under § 1985(3).

There is considerable controversy over the application of the corporate entity doctrine in civil rights cases throughout the federal circuits. The Ninth Circuit has expressly declined to resolve this issue. (See *Portman v. County of Santa Clara* (9th Cir. 1993) 995 F.2d 898, 910; *Padway v. Palches* (9th Cir. 1982) 665 F.2d 965, 969 (superseded by statute on other grounds).) Of the four reported California courts to consider the issue, three have held (with considerable discussion) that the corporate entity doctrine does not apply to bar a § 1985(3) claim involving a governmental entity. (See, e.g., *Diem v. City and County of San Francisco* (N.D. Cal. 1988) 686 F. Supp. 806; *Washington v. Duty Free Shoppers* (N.D. Cal. 1988) 696 F. Supp. 1323; *Rebel Van Lines v. City of Compton* (C.D. Cal. 1987) 663 F. Supp. 786.)<sup>1</sup>

Generally speaking, the rationale behind rejection of the doctrine is consistent:

The intra-enterprise conspiracy exception in antitrust law is necessary to prevent antitrust plaintiffs from being able to get around the more stringent requirements of a monopolization action and hold a single corporate defendant liable on the less stringent conspiracy to restrain trade theory . . . no similar concerns justify insulating the actions of a single company in the context of civil rights.

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<sup>1</sup>Interestingly, although the *Rabkin* case cited numerous opinions disagreeing with its application of the corporate entity doctrine in other jurisdictions, it did not mention the two previous Northern District opinions that disavowed the doctrine in the civil rights context.

(*Rebel Van Lines, supra*, 663 F. Supp. at p. 791.) The *Diem* court concluded: “[The] intra-corporate conspiracy exception should not apply to conspiracies within a single governmental entity. To do so would immunize official policies of discrimination and contravene the law as it now exists.” (*Diem, supra*, 686 F. Supp. at p. 810.)

Other circuits are split on the issue. Some courts have held that the "intra-corporate conspiracy" doctrine applies in section 1985 cases, holding that a governmental body cannot conspire with itself, and that individual members of a governmental body cannot conspire when they act in their official capacity to take official acts on behalf of the governing body. (See *Runs After v. United States* (8th Cir. 1985) 766 F.2d 347, 354; *Gladden v. Barry* (D.D.C. 1983) 558 F. Supp. 676, 679; *Edmonds v. Dillin* (N.D. Ohio 1980) 485 F. Supp. 722, 729.) Other courts have rejected application of the intra-corporate conspiracy doctrine to Section 1985 actions, analyzing the issue consistent with the *Diem* and *Rebel Van Lines* opinions. (See *Stathos v. Bowden* (1st Cir. 1984) 728 F.2d 15, 20-21 (governmental body); *Novotny v. Great American Fed. Savings & Loan Ass'n.* (3d Cir. 1978) 584 F.2d 1235, 1256-59 (en banc), rev'd on other grounds, (1979) 442 U.S. 366 [60 L. Ed. 2d 957, 99 S. Ct. 2345] (corporation).)

The *Rebel Van Lines* court opines that the Supreme Court has implicitly ruled on the issue, noting that the Supreme Court could have twice disposed of a case on the basis of the intra-corporate immunity doctrine, “but choose not to do so.” (*Rebel Van Lines, supra*, 663

F. Supp. at p. 791, citing *Novotny v. Great American Fed. Savings & Loan Assn.* (3d. Cir. 1976) 584 F.2d 1235, *rev'd on other grounds* 442 U.S. 366 [60 L.Ed. 2d 957, 99 S. Ct. 2345]; *United Brotherhood of Carpenters and Joiners of America v. Scott* (1983) 463 U.S. 825 [49 L. Ed. 2d 1049, 103 S. Ct. 3352] (discussing class based animus requirement of § 1985(3).) The Ninth Circuit opinion in *Portman*, while expressly refusing to rule on the issue, contained a lengthy discussion of the issue, citing specifically to the “emphatic” rejection of the doctrine by the *Rebel Van Lines* court. (*Portman, supra*, 995 F. 2d at p. 9 10.) Thus, although the application of the intra-corporate conspiracy doctrine to § 1985(3) claims is clearly an open question, and would as a matter of law dispose of Plaintiff’s remaining claims, the weight of authority in California rejects the doctrine. If the lower court refused to dismiss the Complaint on this basis, an issue of first impression would be presented to the Ninth Circuit.

**B. Denial of Equal Protection of the Laws Based on a Discriminatory Intent Is a Required Element of a 1985(3) Claim.**

It is well established that the police cannot “selectively deny protective services to certain disfavored minorities without violating the Equal Protection Clause.” (*DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 198, 195 (1989) [103 L.Ed. 2d 249, 109 S.Ct. 998].) In order to survive a claim for summary judgment, however, “a plaintiff must proffer sufficient evidence that would allow a reasonable jury to infer that it is the custom of the police to provide less protection to [victims] . . . and that discrimination against

women was a motivating factor.” (*Hynson v. City of Chester* (3rd. Cir. 1988) 864 F.2d 1026, 1031, cert. denied 484 U.S. 1007 [98 L. Ed. 2d 653, 108 S. Ct. 702].) A plaintiff must show that the defendant “selected a course of action at least in part because of, not merely in spite of its adverse effects on an identifiable group” (*Soto, supra*, 103 F.3d at p. 1072; see also *Andrews v. Fowler* (1996) 98 F.3d 1069, 1079.)

Acknowledging the difficulties inherent in demonstrating a discriminatory intent, the court in *Armster v. City of Riverside* (C.D. Cal. 1985) 611 F. Supp. 103, 106, concluded that “Nevertheless, just because racial animus is important, that does not suspend the application of Rule 56.” (internal ellipses omitted). In the *Armster* case, two police officers were sued under § 1985(3) by a janitor who was held for questioning for suspicious conduct and eventually released. In holding that the plaintiff did not establish deprivation of equal protection based on discriminatory motive, the Court noted that the plaintiff’s conclusory allegations of discriminatory intent were insufficient to withstand a motion for summary judgment. *Id.* at p. 106. The court noted that the defendant police officers had submitted declarations that their actions were not “engaged in with evil motive or intent or with a negative racial motive or intent.” (*Id.*) Similarly, a civil rights action against a prison guard was dismissed on summary judgment because the affidavit of the Plaintiff in response to the motion “simply repeats what is set forth in his complaint, with the addition of a statement to the effect that ‘this conspiracy is based partly on racial animus’ with no factual elaboration

whatsoever.” (*Carter v. Cuyler* (E.D. Pa. 1976) 415 F. Supp. 852, 855.) Evidence should be adduced from the police officers accused in this case of non-discriminatory reasons for their decision to not physically intervene in the fight at issue.

Assuming the police officers in this case submit declarations to support the claim that their conduct was not based on gender or other discriminatory animus, the Plaintiffs will be required to come forward with evidence to contradict the testimony of the police. “As [defendant] has filed a properly supported motion for summary judgment and plaintiff has failed to come forward with sufficient evidence to demonstrate the existence of a genuine issue of material fact” the defendant’s motion for summary judgment was granted. (*Paredes v. City of Richmond* (N.D. Cal. 1993) U.S. Dist. LEXIS 9599 at p. \* 4 (1985 claim rejected); see also *Jones v. Carlson* (N.D. Cal. 1991) U.S. Dist. LEXIS 16223 at p. \*3 (non-movant must present affirmative evidence to defeat properly supported motion for summary judgment).)

The Ninth Circuit has refused to dismiss a civil rights claim made by a woman against police officers for failing to treat a domestic abuse case as seriously as other assaults. (*Balistreri v. Pacifica Police Dept.* (9th Cir. 1988) 901 F.2d 696, 701.<sup>2</sup>) The *Balistreri* court noted that it could “easily” conceive of facts that “would constitute an equal protection cause

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<sup>2</sup>This case was cited by the Court in the Order refusing to dismiss the 1985 and 1986 claims as the binding precedent in this matter. It should be noted that while the case characterizes the claim as an “equal protection” claim, it is not explicitly described in the opinion as a 1985 or 1986 claim.

of action.” (*Id.*) This case can be taken as authority for the proposition that cases “clearly establish” that police officers cannot elect to treat assaults against women differently than assaults against men. In the *Balistreri* case, the plaintiff did not allege any affirmative discriminatory statements made by the police, but instead alleged a course of conduct (related to her repeated requests for protection from her abusive husband). (*Id.*) These allegations were held to be sufficient to withstand a motion to dismiss. (*Id.*)

Similarly, the court in *Gates v. Superior Court of Los Angeles County* (1995) 32 Cal.App.4th 481, 495-96 [38 Cal.Rptr.2d 489], held that “to deliberately reduce the number of police officers in a minority community, because of the residents’ race, is an undemocratic act of indescribable inhumanity . . . this case may not be read that equitable relief is unavailable when police supervisors discriminate in the deployment of protective resources for racial reasons.” In *Gates*, the city and various police officers were sued for removing police protection from areas with large minority populations. (*Id.*) The state claims were dismissed pursuant to a finding that California statute precluded recovery of money damages for injury during riots, however, federal claims (including a 1985(3)) claim were not challenged and were expressly permitted to stand. The *Gates* court strongly implied that allegations of statements by police officers such as “some people were going to go without police assistance” are sufficient to support a claim for denial of equal protection. *Id.* at p. 490, 495-96.

Courts in other jurisdictions have evaluated police misconduct cases under a more stringent standard than the above cases would seem to indicate. Courts have held that statements indicating police “disagreement” with a public policy do not evidence denial of equal protection. In *Rockwall*, 877 F.2d at p. 413; statements that the police “do not like to make arrests in domestic violence cases” was held to be insufficient to support an equal protection claim:

Officers do many things – indeed, they may be required by policy to do many things – that they do not like to do. Nor, for that matter, is one officer’s dislike binding upon another. It is possible that most, or even nearly all, of the [police officers in the department] disliked making arrests in domestic violence cases, but that [defendant officers] did not share in this dislike. In this respect, too, a dislike is different from a policy, which is binding on all officers regardless of their sentiments.

(*McKee, supra*, 877 F.2d at p. 415.) Similarly, a statement made by a police supervisor (who was not a defendant in the case) that he did not agree with domestic violence laws was held to be insufficient evidence of gender based denial of equal protection. (*Soto v. Flores* (1st Cir. 1997) 103 F.3d 1056, 1070.) The *Soto* case may be distinguished, however, because the officer involved was not the police representative alleged to have made a statement indicative of intent to unequally apply the laws. Facts should be developed in this case regarding whether both police officers expressed disagreement with assault laws against women, and whether the statements could be characterized as general disagreement with the laws rather than a policy of selective enforcement.

Finally, one isolated incident of failure to act, “when unaccompanied by supporting history, will frequently be an inadequate basis for inferring a policy.” (*McKee*, 877 F.2d at p. 415-16.) As the court explained: “To permit such an argument in this case [claim based on one alleged statement] would eviscerate the discretion reserved to police officers by *DeShaney*.” (*Id.*) In *McKee*, the court refused to “generalize a single incident – the police department’s inaction in her own case – into a general policy or practice.” (*Id.* at p. 415.) Facts should be developed in discovery regarding statistics that could refute Plaintiffs’ claim, or other evidence to characterize the instant case as an isolated incident unrelated to discriminatory policy.

**C. Plaintiffs Must Establish the “Act in Furtherance of a Conspiracy” Element of a Civil Rights Claim.**

In order to proceed on a § 1985(3) claim, a plaintiff must plead an “act in furtherance of a conspiracy.” (*United Brotherhood of Carpenters, supra*, 463 U.S. at p. 828-29.) The court in *Stevens v. Rifkin*, (N.D. Cal. 1984) 608 F. Supp. 710, directly addressed the type of allegations necessary to meet this element of a civil rights claim. In that case, police officers were sued under federal and state equal protection laws for denying police protection to the “White Panthers,” a political group. (*Id.* at pp. 714-715.) The court held that “under the extreme [sic] liberal standard” of pleading, “mere allegations” that the acts occurred was sufficient. (*Id.* at pp. 736-37.) The court noted that in that case, the plaintiffs allegations of “an unofficial custom and policy of the City and County of San Francisco to mistreat

members of the White Panther Party” were held to be a specific basis for meeting the pleading requirements of an equal protection claim. (*Id.*) This element is not typically discussed in equal protection cases in a great amount of detail, as the inquiry is somewhat redundant of the evidence typically set forth in support of the discriminatory intent element to deprive a person of equal protection element of the analysis.

**D. Plaintiff Must Establish Facts Sufficient to Establish a Causal Connection Between the Alleged Misconduct and the Injury.**

A plaintiff in a 1985(3) claim must plead facts sufficient to establish “a causal relationship between the discriminatory policy and the injury to the plaintiff.” (*Mody v. City of Hoboken* (3rd Cir. 1992) 959 F.2d 461, 466; *Soto, supra*, 103 F.3d at p. 1061.) In *Mody*, there was no evidence that the failure of the police to arrest an individual for alleged assault (against a third party) who later assaulted the plaintiff was casually connected to plaintiffs’ injury. (*Id.* at p. 466-67.) Here, Plaintiffs must establish a causal connection between the alleged wrongdoing, failure to intervene, and their injuries. Plaintiffs in this case could not definitively estimate the length of the police presence at the fight during their depositions. It may be fruitful to develop evidence from the police officers that the injuries sustained by the plaintiffs, particularly given the possibly short duration of the event, would have occurred even if the police had intervened.

If Plaintiffs can establish the causation aspect of the injury alleged, money damages are recoverable for injuries sustained by a plaintiff under 1985(3). (*Haddle v. Garrison*, 1998 U.S. LEXIS 8081.) The court in *Hutchinson v. Grant* (9th Cir.1986) 796 F.2d 288, 289, held that a question of fact existed when the plaintiff made specific allegations of the injuries claimed to have resulted from the police officer's violation of equal protection laws. Similarly, in *Gates*, federal claims for money damages pursuant to police failure to protect minority communities were permitted to proceed, despite the fact that plaintiffs could not recover money damages pursuant to California statute. (*Gates, supra*, 32 Cal.App.4th at p. 495-96.) Although this issue is not directly addressed in the *Balistreri* case, implicit in the decision is the finding that plaintiffs' allegations that she was injured due to the failure of the police to intervene in a domestic dispute were sufficient to withstand dismissal. (*Balistreri v. Pacifica Police Dept.* (9th Cir. 1988) 901 F.2d 696, 701.)

**E. A Qualified Immunity Defense May be More Difficult to Establish as a Matter of Law than a Defense of Each Element of a § 1985(3) Claim.**

As a general principle of tort law, "government officials performing discretionary functions generally are shielded from liability for civil damages." (*Harlow v. Fitzgerald* (1982) 457 U.S. 800, 818 [73 L.Ed.2d 396, 102 S.Ct. 2727]; *Tribble v. Gardner* (9th Cir. 1988) 860 F.2d 321, 324, cert. denied 490 U.S. 1075 [104 L.Ed.2d 650, 109 S.Ct. 2087].) This immunity is only applied where the conduct of the official "does not violate clearly

established statutory or constitutional rights of which a reasonable person would have known.” (*Tribble, supra*, 860 F.2d at p. 324.)

The type of conduct involved in this case has not been addressed in the context of a qualified immunity defense. The Supreme Court has held that it is well established that the police cannot selectively deny services to minorities without violating the Equal Protection Clause. (*DeShaney, supra*, 489 U.S. at p. 195.) Although not directly addressing the issue of immunity, the Ninth Circuit refused to dismiss a civil rights claim made by a woman against police officers for failing to treat a domestic abuse case as seriously as other assaults. (*Balistreri v. Pacifica Police Dept.* (9th Cir. 1988) 901 F.2d 696, 701.) The *Balistreri* court noted that it could “easily” conceive of facts that “would constitute an equal protection cause of action. (*Id.*) Similarly, dicta in *Gates* case strongly indicates that selective protection of minority classes is prohibited under equal protection rights. (*Gates, supra*, 32 Cal.App.4th at p. 495-96.) These cases can be taken as authority for the proposition that cases “clearly establish” that police officers cannot elect to treat assaults against women differently than assaults against men.

### **CONCLUSION**

As the foregoing analysis indicates, several theories for summary judgment on the § 1983(5) and 1986 claims may be advantageous to develop. The intra-corporate entity doctrine may apply to bar the cause of action in its entirety, since members of the same city

department may be held incapable of conspiring with themselves. Additionally, facts indicating a gender-neutral reason for the actions of the police officers in this case would support an argument that the “intent to deny equal protection” element of a civil rights claim cannot be supported. Further discovery should include development of this theory.