

HOUSE BILL REPORT

HB 1202

As Reported by House Committee On:

Civil Rights & Judiciary
Appropriations

Title: An act relating to addressing meaningful civil remedies for persons injured as a result of police misconduct, including by allowing for an award of attorney fees in addition to damages and injunctive and declaratory relief.

Brief Description: Addressing meaningful civil remedies for persons injured as a result of police misconduct, including by allowing for an award of attorney fees in addition to damages and injunctive and declaratory relief.

Sponsors: Representatives Thai, Davis, Bateman, Ramos, Kloba, Callan, Simmons, Berry, Santos, Ryu, Ramel, Sells, Ortiz-Self, Gregerson, Wicks, Berg, Bergquist, Dolan, Macri, Fey, Pollet, Harris-Talley and Frame.

Brief History:

Committee Activity:

Civil Rights & Judiciary: 1/26/21, 2/5/21 [DPS];

Appropriations: 2/17/21, 2/18/21 [DP2S(w/o sub CRJ)].

Brief Summary of Second Substitute Bill

- Provides a cause of action for a person injured in person or property by a peace officer acting under color of authority if the officer engaged in specifically listed conduct, and requires an award of actual damages and costs and attorneys' fees to a prevailing plaintiff.
- Authorizes the Attorney General to investigate employers and peace officers engaging in a pattern or practice of conduct in violation of the act and to bring a civil action against a peace officer or employer to restrain and prevent the peace officer or employer from engaging in the pattern or practice of conduct.

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.

HOUSE COMMITTEE ON CIVIL RIGHTS & JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Hansen, Chair; Simmons, Vice Chair; Davis, Entenman, Goodman, Kirby, Orwall, Peterson, Thai, Valdez and Walen.

Minority Report: Do not pass. Signed by 6 members: Representatives Walsh, Ranking Minority Member; Gilday, Assistant Ranking Minority Member; Graham, Assistant Ranking Minority Member; Abbarno, Klippert and Ybarra.

Staff: Edie Adams (786-7180).

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 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.

House Bill No. 1310.

House Bill No. 1310 (HB 1310), introduced in the 2021 Legislative Session, establishes a standard for the use of physical force by peace officers. Under this legislation, a peace officer may use physical force against another person when necessary to effect an arrest, prevent an escape, or otherwise protect against an imminent threat of bodily injury to the peace officer or another person. A peace officer may use deadly force against another person only as a last resort when necessary to protect against an imminent threat of serious physical injury or death to the officer or another person.

In addition, HB 1310 requires an officer to use reasonable care when determining whether to use physical force, and when using physical force against another, including requiring an officer to:

- reasonably avoid conduct that would create situations requiring physical force;

- exhaust available and appropriate de-escalation tactics prior to using physical force;
- use the minimal degree of physical force necessary under the circumstances;
- terminate use of physical force as soon as the necessity for the force ends; and
- use available and appropriate less-lethal alternatives before using deadly force, and make less-lethal alternatives issued to the officer reasonably available for their use.

Law Enforcement Limitations Regarding Immigration Enforcement.

Legislation enacted in 2019 placed restrictions on law enforcement with respect to immigration enforcement matters, including that law enforcement may not:

- disclose nonpublic personal information about an individual to immigration authorities or give immigration authorities access to interview individuals about a noncriminal matter while the person is in custody;
- inquire into or collect information about an individual's immigration or citizenship status or place of birth, unless there is a connection between the information and a criminal investigation;
- provide information pursuant to notification requests from federal immigration authorities for the purpose of civil immigration enforcement, except as required by law; or
- detain, or take into or hold in custody, any person solely for the purpose of determining immigration status.

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.

Summary of Substitute Bill:

A person injured in person or property by a peace officer acting under color of authority has a cause of action against the peace officer if the officer:

- engaged in conduct that under the common law constitutes assault, battery, intentional infliction of emotional distress, false arrest, false imprisonment, malicious prosecution, intentional trespass, or conversion;
- executed a detention, traffic stop, search, seizure, or entry into a home that is unlawful under the Washington Constitution;
- engaged in conduct that violated the duty of reasonable care under chapter . . ., Laws of 2021 (House Bill No. 1310); or
- violated a provision of RCW 10.93.160, which relates to law enforcement limitations with respect to federal immigration enforcement.

The injured person also has an action against any other peace officer who had the power

through reasonable diligence to prevent or aid in preventing the injury from occurring but failed to do so.

Employer Liability.

The plaintiff may name the peace officer's employer as a defendant in the action. The employer is vicariously liable for the harm if the peace officer was acting within the scope of employment.

The employer is independently liable if the injury is proximately caused by: a regulation, practice, procedure, policy, or training approved or condoned by the employer; or the employer's failure to use reasonable care in hiring, training, retaining, supervising, or disciplining the peace officer.

Defenses and Immunities.

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

It is not an immunity or defense to an action 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; or
- at such time, that 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.

The court must award a prevailing plaintiff actual damages, and at least nominal damages, as well as costs and reasonable attorneys' fees. The court may grant declaratory and injunctive relief as it deems appropriate.

Attorney General Enforcement.

The Attorney General is given authority to investigate employers and peace officers engaging in a pattern or practice of conduct in violation of the act and to bring a civil action against a peace officer or employer to restrain and prevent the peace officer or employer from engaging in the pattern or practice of conduct. The prevailing party may, at the discretion of the court, recover the costs of the action including reasonable attorneys' fees.

Other Provisions.

A cause of action against a peace officer or employer by an injured person must be commenced within three years after the cause of action accrues.

Nothing in the act limits the right of a peace officer to have a legal defense provided at the expense of his or her employer or to having a judgment satisfied by the employer.

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

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

Substitute Bill Compared to Original Bill:

The substitute bill makes the following changes:

- replaces the unidentified House bill number with a reference to HB 1310, so that a cause of action may be brought against a peace officer who engages in conduct that violates the duty of reasonable care under HB 1310, which requires an officer to use reasonable care when determining whether to use physical force, and when using physical force against another;
- adds that an officer has a defense if the officer substantially complied with training established by the employer or approved or condoned by superior officers;
- removes a provision that stating that the cause of action is not subject to chapter laws governs contributory negligence, comparative fault, and joint and several liability in actions based on fault; and
- modifies terminology, including by referring to "intentional infliction of emotional distress" instead of "outrage" and "intentional trespass" instead of "trespass."

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) There is so much loss and pain due to injustices happening in our back yard and across the nation. Law enforcement officers have sworn a duty to protect the people and they need to be held to this standard. The bill is about building trust with the community and bringing accountability to the police. It will provide impacted families a way to go to court to seek justice.

Without this bill, families will continue to be frustrated because there are many barriers to justice in the current system. Families that do not have the financial resources to access the courts are denied justice. Justice is important for all communities. Society expects law enforcement to follow the law and uphold the Constitution. When an officer causes harm and there are no consequences, there is no motivation for change and no responsibility. This bill will bring peace of mind to families who have been frustrated in their journey to justice.

Section 1983 was enacted because the states would not provide a meaningful remedy for violation of constitutional rights. Now things are reversed. The labyrinth and procedural barriers of section 1983 actions have undermined faith in the system's ability to provide a remedy. It is wrong to deny relief based on qualified immunity just because no prior court decision says the particular action is unlawful. Qualified immunity is not needed to protect officers from personal liability because they virtually never pay in these cases. Research shows that the threat of civil liability is not a major factor in an officer's decisionmaking.

Almost all law protecting individual rights from police overreach comes not from federal law but from the state Constitution, but there is no legal remedy for violation of state constitutional rights. The bill provides a state cause of action that does not include qualified immunity. This bill focuses on Washington law and provides better remedies with no change in the substantive law, including the requirement for indemnification of officers. Washington courts can provide a fair forum and can penalize people for bringing frivolous suits. Courts in other states that have established a cause of action for violation of state constitutional rights have not had an issue with courts being overwhelmed with cases.

Incidents of police misconduct are almost always due to inadequate policies and training. The bill is more balanced in that it holds the employer accountable when the officer is just following the rules. Policies and training will improve policing and reduce these cases. Law enforcement officers can be and are being trained in methods and tactics that result in lawful policing. If employers engage in proper training and we use tools to ensure accountability, we can avoid costly lawsuits.

(Opposed) The bill will have a negative impact on public safety. The bill limits the ability of officers to respond in a manner that holds people accountable for criminal acts. If officers have to face untold lawsuits, decertification, and criminal actions without careful consideration of officer's duties, this will change officer behavior and impact public safety.

The bill allows personal lawsuits against officers. An officer could be bankrupted from legal defense costs since the bill does not require indemnification. There are thousands of motions that challenge the constitutionality of a stop or seizure and these will be turned into lawsuits under the bill. Officers go into the most dangerous and rapidly evolving situations and they should not face liability when they could not have known the conduct was unlawful. An officer should not be liable if the officer is following employer policies and training.

This bill unfairly tilts liability to law enforcement. It undermines the public policy of having good policies in place and instead refocuses the priority into pure risk management. It is unconscionable to preclude a defense that the conduct was not unlawful at the time, or that the officer could not have known the conduct was unlawful. The bill precludes contributory fault which is extremely unfair because the entire burden will fall on law enforcement agencies.

The bill will increase costs to taxpayers. There will be more suits and most will be settled because it is too expensive to pursue the case. Cities are already facing difficulties with the insurance market. There are things that we cannot control but that we will be liable for under the bill. The focus should be on meaningful reform, not increasing liability. Consent decrees and court orders are not the best way to provide equitable policies across the state.

This is a solution in search of a problem. Federal law provides a robust cause of action that includes attorneys' fees, and state law provides tort actions for police misconduct. Cities cannot find reasonable insurance for this because the remedies that are out there are already being used successfully. The bill does not create any new path for relief. The only new thing is the fee-shifting provision that will simply encourage specious litigation. Lawyers will be the only ones to see benefit from this bill.

(Other) The bill has some good provisions, including the defense based on complying with laws or rules condoned by the agency, and holding an agency liable if hiring or disciplinary practices caused the injury. There are concerns with a lack of clarity regarding who determines what constitutes a constitutional violation or reasonable care, and what actions of an officer are allowed. The provision allowing enforcement by the Attorney General should be removed given the many other police reform bills. Retailers are concerned that the definition of employer includes private entities. Many retail stores employ off-duty officers to deter retail theft and other crimes. Retailers contract with law enforcement agencies, but do not train or supervise officers nor discipline them, and retailers should not be held liable for their conduct.

Persons Testifying: (In support) Representative Thai, prime sponsor; Lauren Bonds, National Police Accountability Project; Joanna Schwartz, University of California Los Angeles School of Law; Liz Vogeli; Mary Kay Becker; Frank Shoichet; Elizabeth Porter, University of Washington Law School; Nickeia Hunter, Trishandra Pickup, and Noel Parrish, Washington Coalition for Police Accountability; Samuel Martin, Washington for Black Lives; and Breean Beggs.

(Opposed) Mike Hoover, Washington State Association of Counties; Ted Buck, Frey Buck, P.S.; James McMahan, Washington Association of Sheriffs and Police Chiefs; Ryan Lufkin, and Jeff DeVere, Washington Council of Police and Sheriffs; Spike Unruh, Washington State Patrol Troopers Association; Candice Bock, Association of Washington Cities; and Megan Coluccio, Washington Defense Trial Lawyers.

(Other) Marco Montebalco, Washington State Fraternal Order of Police; and Mark Johnson, Washington Retail Association.

Persons Signed In To Testify But Not Testifying: Maya Manus, Urban League of Metropolitan Seattle; Kurtis Robinson; Enoka Herat, American Civil Liberties Union of Washington; and Susan Griggs.

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Civil Rights & Judiciary. Signed by 19 members: Representatives Ormsby, Chair; Bergquist, Vice Chair; Gregerson, Vice Chair; Macri, Vice Chair; Chopp, Cody, Dolan, Fitzgibbon, Frame, Hansen, Johnson, J., Lekanoff, Pollet, Ryu, Senn, Springer, Stonier, Sullivan and Tharinger.

Minority Report: Do not pass. Signed by 14 members: Representatives Stokesbary, Ranking Minority Member; Chambers, Assistant Ranking Minority Member; Corry, Assistant Ranking Minority Member; MacEwen, Assistant Ranking Minority Member; Boehnke, Caldier, Chandler, Dye, Harris, Hoff, Jacobsen, Rude, Schmick and Steele.

Staff: Jessica Van Horne (786-7288).

Summary of Recommendation of Committee On Appropriations Compared to Recommendation of Committee On Civil Rights & Judiciary:

A null and void clause is added, making the bill null and void unless funded in the operating budget.

Appropriation: None.

Fiscal Note: Preliminary fiscal note available.

Effective Date of Second Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed. However, the bill is null and void unless funded in the budget.

Staff Summary of Public Testimony:

(In support) Police violence shatters the lives of victims and their families. The current system does not provide meaningful consequences when law enforcement breaks the law or violates constitutional rights. Individuals should be able to take law enforcement to court. This bill will hold police accountable and deter misconduct by providing access to justice. We must do right by the community and prevent harm. This bill reinforces several constitutional and common law rights, including the state's responsibility to protect and maintain individual rights, and the opportunity to have one's day in court. There must be accountability when these rights are infringed. Immunity from suit is the exception, not the rule. Qualified immunity causes greater harm to victims of police misconduct. Providing a meaningful remedy is necessary to build trust between law enforcement and the community.

The language allowing an officer's defense against a cause of action if the officer substantially complied employer-approved procedures or training strikes an appropriate

balance between officers and employers. One suggested change would be to provide that prevailing respondents, not just plaintiffs, may receive attorney's fees. There are also concerns with the section that provides the Attorney General's Office (AGO) with the power to investigate law enforcement agencies. As the main attorney for state-level law enforcement agencies, the AGO may have a conflict of interest when carrying out these enforcement actions. Providing an independent entity with enforcement powers, or removing the enforcement provision altogether, is preferred.

(Opposed) This bill will increase costs for local governments by increasing the amount of litigation and the number of cases that local governments settle. Causes of action brought under the bill will not result in judgments leading to reforms. Rather, local governments will choose to settle because the cost of fully litigating cases will be too much, even if local liability is unproven. There are already ways to hold law enforcement accountable.

There is a risk that increasing the number of lawsuits brought against local governments will harden the insurance market. Counties are often self-insured or part of a risk pool, which are backed by secondary insurance. This bill increases the risk that counties will be priced out of the secondary insurance market. The fiscal impacts of the bill for local governments are indeterminate, and insurers do not like uncertainty. Because the state is a self-insurer, it is less restricted in how it can pay for liabilities. Local governments do not have the same flexibility as the state. Under the bill, plaintiffs would be able to recover attorney's fees and other costs, but not respondents. This will only increase costs for the state and local governments.

Law enforcement agencies and officers have concerns that this will increase claims considerably. An increase in claims against state agencies will have significant fiscal impacts for the state. Officers navigate dangerous situations and must make split-second decisions on the appropriate use of force. The current system allows for citizens to bring a cause of action, but also provides for a process to prove a level of validity to the claim. The bill would create liability for individual officers even if they could not have known their actions were unlawful at the time. If a cause is brought against an officer, the law enforcement agency must remove that officer from street duty, leading to financial costs and public safety impacts. Law enforcement officers would like greater clarity in the bill language that individual officers would not be held liable.

Persons Testifying: (In support) Leslie Cushman, Washington Coalition for Police Accountability; Mary Kay Becker; and Michael Transue, Washington Fraternal Order of Police.

(Opposed) Candice Bock, Association of Washington Cities; Mike Hoover, Washington State Association of Counties; Sanjay Walvekar, Washington Association of Sheriffs and Police Chiefs; Davor Gjurasic, Washington State Patrol Troopers Association; and Jeff DeVere, Washington Council of Police and Sheriffs.

Persons Signed In To Testify But Not Testifying: None.