



LEGAL DEFENSE TRUST TRAINING BULLETIN

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ORANGE COUNTY DEPUTY SETTLES CIVIL RIGHTS SUIT WITH COUNTY OVER 1994 DISCHARGE

*United States District Court Rules Defendants Violated Deputy Wehrli's Civil Rights,
Discrimination Statutes and the Bill of Rights Act*

With trial scheduled for July 2003, the County of Orange decided to buy its peace with Deputy Mark Wehrli, and will pay \$537,500.00 to settle Wehrli's federal civil rights lawsuit which was filed in January 1995. Recently, the trial judge, United States District Judge Gary L. Taylor, ruled that Sheriff (formerly Orange County Marshal) Mike Carona and Marshal's Captain Don Spears, together with the County itself, violated Wehrli's civil rights to due process under the 5th and 14th Amendments, violated California Fair Employment and Housing Act employment discrimination laws (FEHA), and violated the California Public Safety Officers Procedural Bill of Rights Act (POBRA). The Court found Carona fired Wehrli in 1994 in retaliation for Wehrli's refusal to waive his due process and appeal rights in connection with his medical disqualification from peace officer status on account of a handicap, in this case, epilepsy.

In 1993, Mark Wehrli was a veteran Deputy Marshal in Orange County in good standing. He experienced an off-duty seizure and momentary loss of consciousness, but since the episode was unwitnessed and Mark had no previous history of seizures or "blackouts", he did not seek medical attention. A few months later, he experienced another seizure, however this time he sought medical care. Mark was diagnosed with epilepsy, and started on Dilantin therapy to control the seizures.

Mark dutifully reported the second incident to his employer. Mark was referred to the Orange County

Occupational Health Physician, Dr. Loretta Lee. She immediately restricted Mark to "light duty" and consulted the California POST Medical screening standards. According to her interpretation of the data, she reported to the Marshal that Mark's situation presented an intolerable risk of recurrence, and that while with each year Mark remained seizure-free there is a corresponding reduction in the risk of another seizure, the overall picture indicated that Mark should not perform any "peace officer duties" for *five years*. If Mark remained seizure-free for five years, he could be reevaluated then.

Based on this, Carona and Spears notified Mark that the Department had "no permanent light duty positions available", and that if Mark could not locate other suitable County employment by the end of 1994, he would be discharged.

Late in the year, Carona and Spears notified Wehrli that an alternate, non-sworn position had been located for him in the Department, "as an accommodation" of his disability. The position of "Office Assistant" which was offered to Mark paid about one-half of his Deputy salary, with fewer benefits, no safety retirement, and no career advancement.

Mark and his counsel, Michael P. Stone, disagreed with Dr. Lee's evaluation, because it was apparent that she failed to adjust the prediction of recurrence for patients who, like Mark, were on seizure

control medication. In other words, Dr. Lee consulted the wrong table, which predicted the risk of recurrence for patients who were not on a control medication regimen.

When the proper table was consulted, that for patients who are medication compliant, the statistics revealed that the risk of recurrence was low, declining each seizure-free year to a "normal" risk in the general population after the fifth year.

With this evidence, as well as a "job analysis" study performed by Wehrli, Stone and Tim Coughlin, Mark's ADMOC (Association of Deputy Marshals of Orange County) representative, which proved that there were full-time positions ("jailer") throughout the branch courthouses' lock-ups which Mark could safely hold within his medical restrictions, Mark and his counsel endeavored to present the arguments at an appeal hearing, available under the Marshal's personnel rules. Meanwhile, Mark intended to work in the clerical post identified for him by Carona and Spears.

But then, Carona and Spears presented Mark with the Hobson's choice which led to the constitutional violations. When Mark attempted to accept the Office Assistant job to avoid being unemployed, Carona and Spears told him he **could have the job only if he waived his right to appeal the separation from the Deputy position, and irrevocably relinquish any right to reinstatement as a Deputy Marshal.**

Mark's counsel, incredulous that Carona and Spears could really believe they could lawfully condition continued County employment on a coerced waiver of constitutional rights, attempted in several letters to persuade them that attaching *any* conditions to the "accommodation", *especially an unconstitutional one*, was plainly wrong. Undeterred, Carona discharged Wehrli based on his alleged "refusal" to accept the Office Assistant job, effective Christmas Eve, 1994.

Wehrli's counsel filed a lawsuit in U.S. District Court on January 5, 1995, under 42 U.S.C. §1983 (the federal Civil Rights Acts) together with the FEHA and POBRA claims. Shortly thereafter, Orange County stayed the lawsuit by filing for Bankruptcy Act protection.

Meanwhile, Mark's counsel appealed through the internal procedures, and a hearing proceeded before Judge Glen A. Mahler, sitting as a hearing officer. Mahler found that Dr. Lee had indeed misinterpreted the medical tables and that Mark could safely perform the position of sworn jailer. Mark was reinstated after a year of unemployment to his sworn position, however without backpay, because the Judge determined Carona acted properly based upon the information Dr. Lee provided. The Judge found that Mark's termination did not violate due process, or any other laws.

The County then asserted in the federal lawsuit, once the stay was lifted, that Judge Mahler's decision acted to block Mark's federal and State claims on a theory of collateral estoppel. The District Court initially agreed with the County and granted its motion for summary judgment against Mark, and dismissed his case.

Mark's lawyers appealed, arguing that because the Marshal's Rules provided that the hearing judge's decision was final and unreviewable in Superior Court, the decision was not entitled to collateral estoppel effect. The United States Court of Appeals for the Ninth Circuit agreed, and reversed the District Court in a published decision, *Wehrli v. County of Orange*, 175 F.3d 692(1999 9th Cir.). The United States Supreme Court denied the County's petition for a writ of certiorari. 528 U.S.1004 (1999).

Back in the District Court, Judge Gary Taylor recently considered cross-motions of the parties for summary adjudication. Mark's counsel moved for findings of liability as a matter of law on Mark's three claims in the complaint: (1) violation of federal due process; (2) employment discrimination (handicap); and (3) retaliation for assertion of rights granted under POBRA (the right to "appeal" a discharge under §3304

[b]). Judge Taylor denied the County's motion, and granted Mark's motion to establish liability based on all three claims. That decision was later modified to declare that Carona and Spears were entitled to qualified immunity on the civil rights claim in their individual capacity because the rights they violated were "not clearly established" in 1994, such that a "reasonable official" would not necessarily realize that his acts were unconstitutional. But since Carona acted as a policymaker for the County, the County is liable for his unconstitutional acts in discharging Wehrli, the Court also ruled.

Ultimately, the County decided that it would be more cost-effective to settle, rather than go to trial with liability already found, leaving only the issue of damages for the jury.

Mark continues to serve as an Orange County Deputy Sheriff, following the merger of the Marshal's and Sheriff's Departments, and the election of Carona as Sheriff. Mark remains seizure-free after nine years. Had not Mark Wehrli and his counsel refused to accept Carona's decision, and later even the initial District Court decision, Mark's nine-year legal struggle would have ended in defeat and career destruction in 1994. Mark has been represented since 1994 by Michael P. Stone and Muna Busailah of Michael P. Stone, P.C., Lawyers, of Pasadena, California, 626-683-5600.

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