

Oleoresin Capsicum (OC spray) Case Law Update

By Gordy Van

Police have a variety of tools at their disposal to effectuate taking a suspect into custody for an arrest. These tools include physical hands-on tactics including joint locks and strikes, batons, oleoresin capsicum (aka OC spray or pepper spray), Tasers and firearms. Case law dictates when the use of some of these tools may be deemed excessive.

One of our member's police officers encountered a suspect who was intoxicated and belligerent. He was yelling at other passersby and almost stumbled into the roadway. Upon contact the suspect refused officer commands and the officer's attempts to de-escalate the situation were not successful. A decision was made to take physical control of the suspect who was taken to the patrol car, handcuffed and searched. When officers attempted to place him in the patrol car, he resisted and a short burst of OC spray was applied having the intended result of immediate compliance. The arrest was captured on dash cam video, although no audio was captured. A claim was filed, alleging excessive use of force. We believed the force used was reasonable and the claim was denied.

The suspect filed a lawsuit, alleging his civil rights were violated as a result of the officers' unreasonable use of force. The plaintiff obtained the city's use of force policies through discovery. The city had a use of force continuum, which classified OC spray as a level one use of force. Ninth Circuit case law has determined that OC spray is an intermediate use of force. The city's use of force continuum was not directly comparable to the Ninth Circuit's description of an intermediate use of force, but the Judge in our case indicated that he found that the city's policy did not properly classify OC spray and that the policy led to the deprivation of plaintiff's civil rights. This indicated to us that not only was the Judge going to find a civil rights violation against the city which would include awarding damages and plaintiff's attorney fees, but he also asked questions that led us to believe he was considering awarding injunctive relief that would include setting police use of force policy for our member city. We believe our members and their police leadership are the appropriate parties to set policy for their departments, not the judiciary. To avoid an unfavorable result against the city, we settled the case mid-trial. The city has subsequently amended their use of force policy.

Policies, including use of force policies, should be regularly reviewed and be updated to ensure they are consistent with current case law.