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Feeling Violated

Laurel Ripple claims she was brutalized and stripped by male officers during anti-free trade protests in Miami. She and others are eyeing lawsuits, but the legal hurdles are formidable.

By: Steve Ellman

On the afternoon of Nov. 21, South Miami native Laurel Ripple participated in what by all accounts was a peaceful vigil by 300 people outside the Miami-Dade pretrial detention center on Northwest 13th Street.

The vigil was in support of more than 100 people arrested the previous day while protesting against the Free Trade Area of the Americas conference. After about three hours, the police ordered the crowd to disperse.

"We were walking away, not disrupting traffic, when a string of riot cops stepped out with a bullhorn and told us we had three minutes to disperse," said Ripple, 21, a Hampshire College student in Massachusetts doing volunteer work with the Sierra Club. Then police surrounded her and about 60 other people, and ordered them to the ground.

Ripple, a veteran of other anti-globalization demonstrations, said she sat down and covered her face with her arms. But, she said, an officer pulled her arms away and pepper-sprayed her in the eyes, picked her up, slammed her back down, dragged her, pulled her by the hair and placed her under arrest. She screamed in pain. During the incident, her previously sprained ankle was reinjured.

"He told me I was resisting arrest because I couldn't walk," she said. An officer twisted her hand above her head before cuffing the slightly built, 125-pound woman with her hands behind her back.

Ripple suffered a panic attack. When it passed, she said, she found herself being half-carried and half-dragged, fully dressed, into a makeshift shower for "decontamination." After the shower, she was surrounded by four male officers in full-body hazardous material suits and gas masks. In a daze, she realized they were cutting off her clothes with scissors. She was left naked. Her clothes and possessions were thrown into the garbage.

"I screamed and asked for a female officer but they ignored me," she said. She was handed a paper hospital gown, and later given prison garb to wear. She made bail at 3 the next morning. "I was completely shocked," Ripple said. "I felt violated."

She was charged with unlawful assembly, a criminal misdemeanor. She said she knows of two other female protesters who had similar arrest experiences. Her case is pending.

A spokesman for the Miami-Dade Fire Department, whose paramedics cut off Ripple's clothes, defended the male officers' actions. The spokesman said it's standard procedure to use the emergency personnel who are immediately available, regardless of gender, because "life and safety and recontamination are our first priority."

Ripple is one of dozens, and perhaps hundreds, of people who have complained about their treatment by police during the FTAA protests and are considering filing lawsuits; a few are seeking criminal charges against officers.

Many of those who participated in or were in the vicinity of anti-FTAA events say officers unjustly arrested them, used excessive force - including clubbing them and shooting them with rubber bullets and pellets - unlawfully prevented them from participating in licensed protest events, illegally searched and seized their possessions, or otherwise violated their rights.

Those with complaints include hundreds of retirees and labor union members who say they were blocked by police from attending licensed events. Civil liberties attorneys say the police massively violated protesters' rights of free speech and assembly. A total of 231 people were arrested during the week of FTAA events.

But legal experts say the would-be plaintiffs will face formidable challenges, such as the necessity of proving that police actions went beyond their duty to maintain order. At least one prominent South Florida plaintiff attorney says he's thinking hard about whether to accept any cases because of the difficulty of winning.

Miami Police Chief John Timoney, who led the FTAA force of 2,500 officers from 40 different police agencies, has insisted that his officers only acted in response to protester violence and has denied all allegations of excessive force. Miami Mayor Manny Diaz and Gov. Jeb Bush applauded Timoney's performance and that of his officers.

But protester accounts of police misconduct have received some corroboration from independent observers. Last month, Miami-Dade Circuit Judge Richard Margolius said in open court that he saw "no less than 20 felonies committed by police officers," the Miami Herald reported. "Pretty disgraceful, what I saw with my own eyes," he said. "I probably would have been arrested myself if it had not been for a police officer who recognized me."

The American Civil Liberties Union and the National Lawyers Guild have taken the lead in preparing lawsuits, interviewing potential plaintiffs and gathering evidence. The two groups say key legal decisions have not yet been made, including deciding which plaintiffs have the strongest cases, whom to sue, whether to file in federal or state court, and what legal theories to use. Still, the attorneys involved say they expect to file their first claims in a matter of weeks.

Police misconduct suits have become the routine aftermath of U.S. political protests since a federal class action lawsuit alleging civil rights violations was filed in October 2000 by people who demonstrated against the World Trade Organization meeting in Seattle in 1999. The case is pending. Similar claims were filed by demonstrators against the city of Philadelphia for alleged

violations by police under Timoney's command during the 2000 Republican National Convention. Some of those suits resulted in confidential settlements in 2002.

The expected FTAA suits arising from the Miami demonstrations will again put the spotlight on the behavior of Miami-area police. For years, both the Miami and Miami-Dade police have been accused of wrongful and racially discriminatory shootings of civilians. In April, a federal jury convicted four Miami police officers of conspiring to plant guns on police shooting victims and lying to cover it up. A month earlier, the Justice Department found that the Miami Police Department lacked clear guidelines on use of force and stop and search procedures. That federal investigation is ongoing.

In an interview, Miami City Attorney Alejandro Vilarello said he's "confident that the general allegations in the media of police misconduct will be successfully defended." But, he said, it would be "premature" for his office to take any action until the Miami Police Department completes its promised internal review. Miami-Dade County First Assistant Attorney Murray Greenberg said his office would "defend suits as appropriate." Neither Vilarello nor Greenberg would discuss possible defense strategies.

Also on trial in any civil suits by FTAA demonstrators will be what Mayor Diaz and other officials have proudly dubbed the "Miami model" of overwhelming police response to political protest. Critics liken the model to U.S. military tactics in Iraq.

"The Miami model is an orchestrated adoption of military tactics domestically," said Marc Steier, a New York City lawyer who represents the National Lawyers Guild in Miami. "They've turned those weapons on civil rights and liberties."

Miami ACLU chapter president Lida Rodriguez-Taseff agreed. "The war on terror is being unleashed at home," she said.

'Not professional protesters'

Rodriguez-Taseff said her group has at least a dozen potential FTAA plaintiffs. One is disabled military veteran Bryan Brown, who claims he was only a bystander yet was arrested and had his bicycle seized and never returned; Brown was charged with failure to obey a police order. Another ACLU client, documentary filmmaker Carl Kesser, was filming police handling of protesters on Nov. 20 when he was shot in the head with a beanbag allegedly fired by police. He underwent surgery and said he suffered nerve damage around his right eye.

Private attorneys also are involved. Last month, the Florida Alliance for Retired Americans retained Coral Gables lawyer Michael Feiler to represent the group and several individual members. The retirees claim that on Nov. 20, Miami police officials breached an agreement to allow 25 busloads of its mostly elderly members, who came from around the state, to attend FTAA protest events.

The retirees' group says some of its members were denied access by police, while others - some of whom use canes and walkers - had to disembark from their buses and walk as far as a mile.

One member, Bentley Killmon, 71, was arrested after allegedly being pushed to the ground by police. He says he was held in detention for nearly 12 hours with his hands painfully handcuffed behind his back.

"These were not professional protesters," Feiler said. "Yet these folks got hit with rubber bullets and tear gas as police tried to disperse them when they approached the agreed-on protest area." Feiler said police treatment of his clients clearly was part of a pattern and practice established by Chief Timoney.

National Lawyers Guild executive director Heidi Boghosian in New York said her group expects to file the first of its lawsuits in a few weeks. "We're looking at police brutality issues, First and Fifth Amendment violations, Sixth Amendment due process as well as Eighth Amendment excessive bail," she said.

Other groups whose members claim their rights were violated are the Washington, D.C.-based advocacy group Public Citizen and the AFL-CIO. Federation staff attorney Kathy Krieger in Washington, D.C., said police "truncated" the labor unions' permitted events. "We're looking at a broad spectrum of claims, including false arrest and excessive force," she said. Both Public Citizen and the labor federation are working with the ACLU on potential cases.

Tough to pierce immunity

But lawyers for the ACLU and National Lawyers Guild, as well as other legal experts, say the plaintiffs face tough challenges. For one thing, plaintiffs who sue government bodies on the basis of federal civil rights law, the most common foundation for police misconduct claims, must show that the police officers' acts were part of a pattern and practice of their police agency. That involves showing that the officers' acts resulted from the direction of policy-makers.

Another problem is that federal claims brought against individual police officers must penetrate the officers' qualified immunity, never an easy feat. Plaintiffs must establish that offending officers acted despite fair warning that their acts infringed on constitutional rights.

Because many of the officers deployed in Miami during the FTAA conference did not wear identifying badges with their names or even information about what police force they belonged to, plaintiffs alleging excessive force will have difficulty naming their alleged assailants.

Finally, the plaintiffs could face a problem overcoming juror antipathy, given what some consider the demonization of protesters by public officials and the media prior to and during the FTAA conference.

Fort Lauderdale solo attorney Hugh Koerner, who has extensive experience in representing plaintiffs in police misconduct cases, said FTAA plaintiffs may have to overcome particular juror skepticism about excessive force claims. "Police officers acting lawfully can use whatever force is necessary to overcome resistance," he said. "Some jurors may think, 'They asked for it.' "

A more immediate problem is that the Miami-Dade state attorney's office is attempting to deny

representation by public defenders to FTAA protesters facing criminal misdemeanor charges, such as failure to obey a police order. The office says they aren't entitled to such representation if they aren't at risk of jail sentences.

Without free representation, many arrested protesters could be forced to accept plea deals. A plea of guilty or no contest would essentially kill their chances of filing civil lawsuits, said Marc Steier, the New York lawyer for the National Lawyers Guild.

Another potential snag is that ideological differences have emerged between the ACLU and the leftist National Lawyers Guild. While the groups say they are collaborating to some extent in developing civil suits, they already have had some public rifts.

"[The lawyers guild] has a different philosophy on the suits," said the ACLU's Rodriguez-Taseff. "They want to use them to advance their position on trade and other issues. Our focus is purely constitutional."

Looking at federal claims

There are a number of possible legal avenues for those who sue the city and the police over the handling of the FTAA protests.

The most venerable approach is bringing suit under 42 USC Section 1983, originally known as the Civil Rights Act of 1871. It provides that anyone who, under cover of state or local law, causes a person to be deprived of rights guaranteed by the U.S. Constitution or federal law is liable to that person. It confers no rights in itself, but rather creates a means to enforce those rights guaranteed by federal law.

Since the 1960s, Section 1983 has served as the basis for claims brought by civil rights workers and political protesters. To encourage such claims, the law was amended in 1976 to provide for successful plaintiffs to recover attorney fees from defendants. A number of successful lawsuits have been brought against the Miami Police Department under Section 1983 for wrongful shootings.

Claims under Section 1983 can be filed in either federal or state court, and have the advantage of sidestepping state sovereign immunity damage caps that apply in lawsuits against government bodies in Florida. Section 1983 allows for damages and declaratory relief against municipalities and local governments and against individual employees of all levels of government.

But in state claims against either individual officers or government entities, the law makes no provision for recovery of attorney fees from losing defendants. Because of the sovereign immunity and attorney fee issues, plaintiff attorneys lean toward filing federal claims.

The difficulty of filing 1983 suits against government entities, however, is that plaintiffs must show an unconstitutional custom, policy or practice. In contrast, under other theories, a plaintiff may only have to show a single offense. "None of these complaints is worth anything [under

Section 1983] unless you've established a pattern," Rodriguez-Taseff said.

"That standard is very high," said Summer Barranco, an associate at Purdy Jolly & Giuffreda in Fort Lauderdale, who has extensive experience in defending police against misconduct claims. "One must show deliberate indifference by the government."

Rodriguez-Taseff said the ACLU is studying the 134 complaints it has received for evidence of police patterns and practices. Her group has filed a public records request seeking Chief Timoney's training and procedural guidelines for the FTAA police force, as well as documents that outline the command structure of the coalition he led.

Several plaintiff attorneys interviewed for this article argue that the simple fact that police engaged in mass arrests and use of force in response to alleged violence by very few demonstrators by itself shows an illegal pattern and practice. According to the Miami-Dade public defender's office, out of 231 total arrests, there were only 25 felony charges, and all but five were dropped or reduced to misdemeanors. The balance of the arrests were for alleged offenses such as unlawful assembly and failure to disperse.

But Barranco said that the low percentage of felony charges compared with total arrests does not necessarily show an unconstitutional pattern and practice in the context of street demonstrations. "The police could argue they had probable cause to believe violence was impending," she said. "The burden is on the plaintiff to show otherwise."

Ben Waxman, a Miami lawyer who is one of the ACLU volunteers preparing cases, argues that suits based on the Fourth Amendment, alleging illegal search and seizure of property by police, have a strong chance of success.

In 1998, Waxman was part of a team that won a landmark settlement with the city of Miami in a class action challenging the city's policies toward homeless people. Under the so-called Pottinger settlement, the city agreed to end homeless sweeps, in which police cleared the streets of vagrants and seized and burned their possessions.

Waxman contends that the strong limitations accepted by the city on search and seizure involving the homeless will prove highly relevant to the cases of a number of FTAA arrestees, such as Miami New Times reporter Celeste Fraser Delgado, who allege that police seized and dumped their possessions including wallets, purses and identification. Waxman said he has spoken to as many as a dozen people with such claims. Delgado is among those considering lawsuits.

"The Pottinger settlement put Miami police on notice of their obligation to inventory, preserve, and protect seized property, even in the course of a valid arrest," Waxman said. Possible relief for such plaintiffs includes compensatory damages and injunctive relief if the destruction is shown to be part of a pattern and practice.

Video could be key

Michael Feiler, who is representing the Florida Alliance for Retired Americans, says he will file suits on behalf of his clients in federal court under Section 1983. He says he initially will claim excessive force and due process violations under the Fourth and Fifth Amendments. He will name the city of Miami as defendant, adding other defendants and other counts as discovery proceeds, and seek damages for his clients' pain and suffering.

Feiler's strategy suggests the likely importance in the FTAA litigation of the massive quantities of video and photographs shot during the protests. Such evidence brings with it plenty of issues.

The Coral Gables lawyer plans to introduce as evidence videotape footage shot by news crews and protesters. He said such evidence is admissible as long as it is "authenticated" - meaning that the plaintiff demonstrates to the court's satisfaction that the footage was shot at the time and place of the alleged offense.

But Barranco said video footage will be persuasive only if it shows unprovoked police action, since federal claims of false arrest can be defended on the grounds of "arguable probable cause," which the plaintiffs must disprove. She and other experts say defense attorneys will argue that video evidence is flawed because demonstrators were engaging in illegal conduct just off camera, prompting the police to act as they did.

Feiler acknowledged that the value of any particular piece of video will depend on how much context it provides of the police and protestor exchanges. "The cops will be free to explain [the video] away however they want," he said. "The jury will decide who to believe."

As Feiler acknowledges, another big issue for plaintiffs is how to identify the alleged wrongdoers and who to sue. Numerous eyewitnesses say police at the FTAA demonstrations did not wear any identifying badges or information; their faces typically were covered by riot helmets and masks. In an interview, former Miami Police Chief Kenneth Harms criticized that omission, saying every officer should have visible identification to ensure accountability.

Feiler said that the identity of individual officers would have to be disclosed on arrest sheets or could be learned through discovery of police logs. But Waxman says it won't be that easy to identify all the culprits. People who were blocked from participating in FTAA protest events or who were shot with tear gas, pellets or beanbags - without being arrested - may have a hard time identifying the offenders.

Miami police spokesman Lt. Bill Schwartz said people who have complaints about police conduct should provide the department with the precise time and location of the incidents. Then, he said, police officials can determine at least what agency was involved, although identifying individual officers could be more difficult or impossible.

Another big question is which government entities can be held liable. That, Koerner says, could depend on the language of formal agreements between Miami and the different police agencies involved, which FTAA plaintiffs will have to obtain.

Koerner says it's possible that under the agreements, each police agency was liable only for the

conduct of its own officers - rather than all police agencies bearing collective responsibility for all officers. If that's the case, he says, that's bad news for plaintiffs who are not able to identify the police agency, individual officer or officers involved in their case.

Under state law, police misconduct claims may be brought against individual officers or government entities for any injury for which a private individual could be sued, such as false imprisonment or battery. But to prevail against individual officers, they must be shown to have acted in bad faith or with malicious intent. No bad faith need be shown to prevail against government entities.

Koerner says it may be possible to hold Chief Timoney or other police officials individually liable, on the theory that they failed to properly supervise their subordinates. But, he notes, political demonstrations are "such a combustible mixture that the defense can make a case that the chief's actions were not the proximate cause of individual rights violations."

Skeptical of panels

In addition to the likely lawsuits, police behavior during the week of FTAA events will be examined by citizen review boards and by the police departments themselves.

Lt. Schwartz, whose department contributed a significant number of officers for the FTAA force, said his department's internal review is in progress and is due sometime in January. He said investigators were collecting after-action reports by police lieutenants, dispatch tapes of police radio calls, and police video.

"If anyone makes a complaint, we'll look into it," Schwartz said. "If any video shows misconduct, we'll look into it." But he added that many of those who filed complaints came to Miami from other parts of the country and that the department has "no way to follow up."

Miami-Dade County police spokesman Sgt. Pete Andreu, whose department also contributed a significant number of officers to the FTAA force, said his department also has begun an internal review.

Independent citizen review panels at both the city and county levels are expected to investigate complaints they have received about police misconduct during the FTAA protests. As of last Monday, the two panels had received a combined total of 23 complaints. They will hold a joint public hearing to examine the complaints on Jan. 15.

Both the ACLU and the National Lawyers Guild have advised people with complaints not to pursue them with the citizen review panels. They have expressed skepticism about the willingness of the panels to take aggressive action. That skepticism was heightened last month when Miami Civilian Investigative Panel member Peter Roulhac praised Chief Timoney at a Greater Miami Chamber of Commerce luncheon for his "amazingly professional work."

The legal groups also fear that the review panel probes will prejudice their clients' civil suits.

Since her arrest, Laurel Ripple has worked as a volunteer at Miami Activist Defense, a support group for FTAA arrestees. She plans to return to college in the fall.

Meanwhile, Ripple has her own criminal case to worry about. Last week, she was arraigned on a misdemeanor count of unlawful assembly and pleaded not guilty. Once her misdemeanor case is resolved, Ripple plans to file a civil suit against the city of Miami and Chief Timoney, alleging excessive force and wrongful arrest.

"You go to these events expecting a certain level of police hostility," she said. "But this was extreme and totally unprovoked."

Daily Business Review law editor Harris Meyer provided additional reporting for this article.