NO. CIV-16-184-HE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

TABATHA BARNES, *et al*.,

Plaintiff,
v.

THE CITY OF OKLAHOMA CITY, a municipal corporation, *et al.*,

Defendants.

DEFENDANT THE CITY OF OKLAHOMA CITY'S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

Respectfully Submitted,

Kenneth Jordan
MUNICIPAL COUNSELOR

By: Sherri R. Katz, OBA # 14551
Richard N. Mann, OBA #11040
Thomas Lee Tucker, OBA # 20874
Assistant Municipal Counselors
200 N. Walker Ave., 4th Floor
Oklahoma City, OK 73102
(405) 297-2451
sherri.katz@okc.gov
richard.mann@okc.gov
thomasltucker@okc.gov
Attorneys for Defendant City

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v.	)	Case No. CIV-16-184-HE
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DEFENDANT THE CITY OF OKLAHOMA CITY'S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

COMES NOW a Defendant, The City of Oklahoma City, and pursuant to Rule 56 of the Federal Rules of Civil Procedure (FRCP) respectfully requests that this Court grant it Judgment herein as there is no issue of material fact, and it is entitled to Judgment as is more fully set out in its Brief in Support submitted herewith.

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

1. In January 2011, the OCPD was advised that a foster child of OCPD Officer Maurice Martinez claimed that Martinez had sexually abused him. Det. Rocky Gregory[1] investigated those claims, and presented charges to the District Attorney's Office, who filed 37 charges against Martinez. (Affidavit of Gregory attached to the Information filed on April 22, 2011 in *State v. Maurice Martinez,* Oklahoma County District Court Case CF-2011-2327, Exhibit 2.) The Information was amended on August 31, 2011. (Amended

[1] The same detective who is alleged in this case to have ignored the claims of Plaintiff Morris.

Information in *State v.* Martinez, CF-2011-2327, Exhibit 3.) On August 21, 2012, Martinez pleaded guilty to 13 charges and was sentenced to 25 years (suspended by the Court). (Judgment and Sentence, *State v. Martinez,* CF-2011-2327*,* Exhibit 4.) On July 13, 2011, he resigned as a police officer with the City after being served with a predetermination notice. (06/24/11 Memo to Martinez, Exhibit 5; 07/25/11 Resignation Letter, Exhibit 6; Affidavit of Chief Citty, Exhibit 1.)

2. On January 26, 2014, OCPD Officer Matt Downing made a traffic stop and was outside the vehicle talking to the driver. Robert Biegler drove by and yelled "road rage sucks." Downing got in his police car, chased Mr. Biegler to a convenience store, tackled him, and arrested him. A citizen called 911, and a supervisor was sent to the scene who investigated the incident and released Mr. Biegler. Further investigation by the OCPD resulted in Officer Downing being charged with Assault and Battery. On February 26, 2015, he pled guilty to that charge and others and resigned from OCPD. (Information in *State v. Downing,* CM-14-0615, Exhibit 7; Judgment and Sentence in *State v. Downing,* CM-14-615 and CM-15-736 and Resignation, Exhibit 8; Exhibit 1.)

3. In the three years preceding Holtzclaw's sexual assault of S. Hill, twelve arrestees and other citizens (including the *Martinez* case above) have complained that officers sexually assaulted them. All such complaints were investigated by the officers' supervisor (3), Office of Professional Standards "IA" (2), or the Sexual Assaults Unit of the OCPD (5), and one by the Crimes Against Children Unit; one case occurred in another jurisdiction, and its police department investigated the alleged crime since it occurred in its jurisdiction. Ten of the complaints were determined to be unfounded because the

complainants refused to cooperate with the investigators or changed their stories; or eyewitnesses refuted the claims. Two of the complained-on officers were filed on by the prosecuting authorities. Both resigned from the OCPD before any administrative proceedings could begin. In eight cases, the allegations were presented to the prosecutor, who declined to file charges. One officer resigned after the District Attorney declined to file charges, but before the OCPD could begin administrative proceedings. (Exhibit 1.)

4. Plaintiffs' allegations that the OCPD did not present the claim of Demetria Campbell to the District Attorney ¶ 43 of the First Amended Complaint [Doc. 8] is a "red herring." First, there is no requirement that an officer's use of force be presented to the District Attorney under state law or federal law (even if excessive – *see* 22 O.S. §§ 34.1 *et seq.)*; second, an officer can use some force to detain a person. 21 O.S. §§ 643(1) and (2). More importantly, the OCPD presented the facts of the Armstrong incident to the District Attorney's Office, which did not file charges (08/02/13 Letter of District Attorney Prater, Exhibit 9); yet these Plaintiffs ignore that finding and allege the filing of a civil lawsuit over that incident should have put the City on "notice" of something regarding Holtzclaw. [¶ 21(a) of the First Amended Complaint, Doc. No. 8].

5. In his two years and two months on the "streets" with the OCPD, Holtzclaw was involved in twenty-one Uses of Force, including Armstrong.[2] All but Armstrong

[2] Davis testified his uses of force were irrelevant – if there were any sexual acts complained of, the Sexual Assaults Unit would have investigated it. Davis Deposition, pp. 240-248. See also Davis Deposition, pp. 223-224. She did not need to look at Holtzclaw's personnel file or IA file because if he had been accused of sexual misconduct, the Sex Crimes Unit would have investigated it.

(which was investigated pursuant to OCPD Procedure 150.18) were investigated and reviewed pursuant to OCPD Procedure 150.00 – 150.18 and 160.40, Exhibits 10 and 11. All his uses of force were found appropriate and justified (only two, including Ms. Campbell, involved black females: OCPD Case No. 12-38964, date of incident May 12, 2012, Exhibit 12; Exhibit 1). There are no allegations of sexual misconduct in the report either. (Exhibit 1.) A Citizen's Complaint filed by a black male was also received about Holtzclaw, but it was for false arrest, harassment, physical abuse, and mental distress. It was not for sexual assault. The complaint was investigated by his lieutenant and determined to be unfounded. (Administrative Investigative Report of Lt. Arthur Gregory, OCPD Report No. 14-21185, IA-14-24, Exhibit 13; Exhibit 1.)[3]

6. Because of the Use of Forces, Holtzclaw was placed on the OCPD's Early Intervention Program. (OCPD Procedure 148, Exhibit 14) for the second and third quarters of 2013, the annual one for 2013, and the first quarter of 2014 because his uses of force exceeded the number specified during that quarter or a year. This is done for four or more uses of force in a quarter and ten annually. (Exhibits 15-18; Exhibit 1.) His uses of force were re-reviewed, and he was interviewed, however he was not interviewed in 2014 as he

[3] In *Schneider v. City of Grand Junction Police Dept.*, 717 F.3d 760, 776-777 (10th Cir. 2013), the Court cited to other Circuits' cases on a failure to discipline cause of action. Those cases establish that if the prior investigations do not reveal any sustained misconduct (or, if misconduct is found and the government disciplined the employee appropriately), there can be no "deliberate indifference." *Id.* All Holtzclaw's uses of force were investigated and no misconduct (except the failure to report the Campbell use of force for which he was counseled) was found. Some of these uses of force were re-reviewed as a part of the OCPD's Early Intervention Program.

was placed on administrative leave. His Bureau Commander recommended no intervention was necessary. (Exhibit 15 at OKC011600; Exhibit 16 at OKC011616; Exhibit 17 at OKC11587; Exhibit 18 at OKC11624; Exhibit 1.)

7. Plaintiff Shardayreon Hill came forward on September 19, 2014, after Holtzclaw had been charged and arrested for other sexual assaults. (Gregory Trial Testimony, p. 1577-1578.) She claimed that on December 20, 2013, while at Integris hospital and hooked up to various monitors, Holtzclaw touched her breasts and forced her to commit oral sodomy. (She had been arrested by Holtzclaw because she had been smoking PCP and spilled some on herself. She was taken to the hospital to be detoxified.) (Hill Trial Testimony, pp. 1230-1233, 1266, 1268-1270, 1272-1273, 1284-1294.) She stated she felt that she had to go along with him because he told her he could get her out of other charges. *Id.* After this incident, she and Holtzclaw exchanged messages via Facebook. *Id.* (S. Hill Facebook Posts, Exhibit 19.) She also claimed that on January 9, 2014, Holtzclaw, while off duty and not in uniform, exposed himself to her. *Id.* (Counts 21-26 pp. 5-6 and Probable Cause "PC" Affidavit of Gregory, Exhibit 20.)

8. On August 14, 2014, Det. Gregory contacted Plaintiff Tabatha Barnes because her name was on the list of black females that Holtzclaw had asked OCPD's Crime Information Unit "CIU" to run for warrants from January 1, 2014, until June 18, 2014. On February 27, 2014, and March 25, 2014, he had "run" her name. (Gregory Trial Testimony, pp. 1973-1975.) (08/24/14 Gregory Report, OCPD Case No. 14-068166 (002), Exhibit 21); Exhibit 1.) She advised Gregory that on February 27, 2014, an officer saw her and others sitting in a vehicle that was running, but not moving because it was warming up to go to

the store after midnight when money would be deposited into her "SNAP" account. She had no driver's license but could not recall if she was in the driver's seat. She got into the officer's car when he ran her name. (Counts 1, 3-6 on pp. 1-2 and PC Affidavit of Davis, p. 10, Exhibit 22[4]; Testimony of Barnes, pp. 1768-70, 1787-90, 1897, 1902, 1904, 1910, 1969-1970.) It appears she had ingested PCP on the day of her testimony. On February 27, 2014, she had warrants outstanding for her arrest. She testified that the officer made her lift her shirt and bra up exposing her breasts "to check to make sure she was not hiding drugs," and he touched her breasts. She also testified that on March 25, 2014, he entered her house without her permission and made her lift her shirt and bra exposing her breasts and take down her pants exposing her vagina as she did not have any underwear on. (*Id.*)

9. On August 15, 2014, Carla Raines was contacted by Det. Gregory because her name was on the list. (08/15/14 Gregory Report, OCPD Case No. 14-068786 (000), Exhibit 23; Exhibit 1) She stated that on some date (later determined to be March 14, 2014), an officer stopped her while she was walking at night at 16th Street and Fonshill because he was "checking the welfare of people." Eventually, because of this officer's questioning, she lifted her shirt and bra "to make [him] sure she did not have anything on her." (Count 2 on p. 1 and PC Affidavit of Davis, p. 10, Exhibit 22.) When interviewed, Ms. Raines denied, at least five times, that she exposed herself to the officer. (Gregory Trial Testimony, p. 2236.) She further admitted that the officer never asked or instructed her to show him her breasts. (Raines Trial Testimony, pp. 2172, 2177-2178, 2180-2181, 2197-2198.)

[4] *See* note 6 on p. 9.

10. On August 13, 2014, Florene Mathis, (aka Lynn Gibson, hereinafter "Mathis") was contacted while she was in the Oklahoma County Jail because Holtzclaw had run her name on March 25, 2014, and April 14, 2014. (08/14/14 Davis Report, OCPD Case No. 14-066183 (001), Exhibit 24.) She told the detectives that when Holtzclaw stopped her, she was under the influence of alcohol and crack cocaine, and that he fondled her breasts. She could not recall the date. (Count 7 on p. 2 and PC Affidavit of Davis, p. 11, Exhibit 22; Mathis Trial Testimony, pp. 2293-2303, 2326-2330.)

11. On August 27, 2014, Rosetta Grate was contacted because Holtzclaw ran her name on April 24, 2014. She advised she was stopped by an officer while walking the streets "looking for a date" and admitted she had a crack pipe on her. She says the officer took her home and raped her. She said he told her "it was better than going to County [jail]." (08/29/14 Information Counts 8 & 9 on pp. 2-3, Exhibit 22; Grate Trial Test. pp. 2525-2546, Test. of Davis, pp. 2731-2737, 2767.)

12. In early October 2014, Det. Davis contacted Regina Copeland because her name was on the list. On October 13, 2014, she was interviewed and advised that after she had been drinking, she was pulled over by an officer for "a rolling stop."[5] The officer told her he could smell alcohol on her and told her to expose herself, which she did. The officer allowed her to take her car to a house because he was taking her to detox. She parked and got in his car, and he eventually stopped, got her out of the car and raped her. She admitted

[5] Through the OCPD computers, the detectives determined this occurred on April 25, 2014. Ms. Copeland could not recall the date. (Copeland Trial Testimony, pp. 2813, 2840-2841.)

to the detectives she had looked up the stories about Holtzclaw on the internet prior to her interview but after the initial contact. (11/04/14 Second Amended Information Count 29 on p. 7 and PC Affidavit of Davis, pp. 17-8, Exhibit 25; Davis Trial Testimony, pp. 2928-2930; Copeland Trial Testimony, pp. 2814-2830; 10/16/14 Davis Report, Case No. 14-085523 (001) at p. 3, Exhibit 26; Exhibit 1, but see Copeland's denial of looking up the stories until after interview at pp. 2863-2864.)

13. On August 1, 2014, Det. Davis contacted Sherry Ellis whose name was on the list because on May 7, 2014, Holtzclaw had run it. (08/13/14 Davis Report, OCPD Case No. 14-066104 (001), Exh. 27; Exh. 1) She advised Det. Davis she was walking on the street when an officer stopped her at 22nd Street and Highland and asked to search her, which she agreed. He ran her name and located outstanding City arrest warrants. The officer asked, "what are we going to do about this?" and forced her to perform oral sex on him and then raped her. She advised the detectives it was a black officer. (Ellis Trial Testimony, pp. 2982-2984, 2987-2988, 2996, 2999; Information Counts 10 and 11 on p. 3 and PC Affidavit of Davis, p. 10, Exhibit 22; 11/19/14 Third Amended Information Counts 33 and 34 on p. 8, Exhibit 28.)

14. On October 2, 2014, Syrita Bowen was contacted because her name was on the list. She said she was "a victim and would call back." When she did not, the detectives interviewed her mother who said she told her that an officer threatened to put her in jail for being a street walker if she did not perform oral sex on him. After she talked to her (then) attorney, her pastor, and DA Prater, she was interviewed by the detectives on October 9, 2014. (10/06/14 Davis Report, OCPD Case No. 14-083092 (001), Exhibit 29; Exhibit 1.)

She admitted that on an unknown date (later determined to be May 21, 2014), she was stopped by an officer and given the choice of jail or detox because she admitted she had been drinking. She said the officer made her perform oral sodomy and raped her. She admitted seeing the news of Holtzclaw's arrest and still did not report it because she was a convicted felon and a drug user. She was afraid of retaliation by other officers. (Counts 27 and 28 on pp. 6-7 and PC Affidavit of Davis on pp. 15-16, Exhibit 25; Bowen Trial Testimony, pp. 3344-3356, 3361-3366, 3373; Davis Trial Testimony, pp. 3491-3493.)

15. On May 24, 2014[6], Terri Morris was interviewed by patrol officers when Mr. Shelton called 911 during a domestic disturbance. She was high on crack cocaine, and advised the officers that 3-4 days earlier an officer (who she described at 6 feet tall, stocky, dark skinned white male, 40 years of age)[7] had picked her up near the City Rescue Mission after she had smoked crack and raped her. (05/24/14 Thomas Report, OCPD Case No. 14-041539 (001), Exhibit 30; 06/18/14 Gregory Report, 14-041539 (009), Exhibit 31; Exhibit 1.) Lt. Holland contacted the on-call Sex Crimes Lieutenant[8] and "ran" down the facts of Ms. Morris' complaint to him. He decided not to send an investigator to the scene. (Holland

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[6] Det. Davis admitted that the Morris complaint was not her investigation (Davis Trial Testimony, pp. 1141-1142.) She knew very little about the Morris case. *Id.* She first became aware of the investigation of Holtzclaw on June 18, 2014. *Id.* Davis Deposition, pp. 263-265). She used May 8, 2014 in her Affidavit because that was the date Det. Gregory determined Holtzclaw assaulted Morris, not the date the OCPD started its investigation of Holtzclaw (*id.* p. 264-265).

[7] Holtzclaw is half Caucasian and half Japanese. He was 27 years old at the time of the assaults. (07/24/14 Gregory Report, OCPD Case 14-041539 (028), Exhibit 33 Interview of Holtzclaw, p. 48, Exhibit 32).

[8] Pursuant to OCPD "call out" procedures. See September 8, 2011 Memo from then OCPD Deputy Chief Kuhlman. Sex Crimes is detailed at p. 3, Exhibit 34; Exhibit 1.

Trial Testimony, pp. 3195-3203.) On May 27, 2014, this case was assigned to Det. Gregory. (Gregory Deposition, pp. 191; Wenzel Deposition, p. 35; Gregory Trial Testimony, pp. 2304-6.) His efforts to contact Ms. Morris and investigate her complaint are detailed in his dispositive motion. In summary, it was not until July 10, 2014, when Ms. Morris advised the OCPD of the correct location where this sexual assault occurred that the detectives were able to determine that the date of the rape was May 8, 2014, because that was the date an officer—Holtzclaw—ran her name from that location. (Information Count 12, p. 3 and PC Affidavit of Davis on p. 9, Exhibit 22; Third Amended Information Counts 35 and 36, Exhibit 28; Facts 5-14 in Defendant Gregory's Motion for Summary Judgment; Gregory Depo, pp. 201-202.) Plaintiffs' counsel continues to misrepresent the OCPD's investigation into Ms. Morris' complaint. After Ms. Morris signed the refusal to prosecute form on June 3, 2014, but before Ms. Ligons was assaulted on June 18, 2014, OCPD received a call from the husband of a woman who claimed she had been sexually assaulted by an OCPD officer. (*See* note 2 herein on p. 3.) Lt. B. Taylor was sent to interview this woman, and she admitted the vehicle used by the men who assaulted her did not look like an OCPD patrol vehicle and the uniforms worn by the "officers" did not look like Lt. Taylor's uniform. (*See* 06/04/14 Taylor Report, OCPD Case No. 14-44803 (000), Exhibit 35; Exhibit 1). By the end of the interview, the victim agreed that the men were police impersonators. (*See* p. 4, Exhibit 35.) Yet, Plaintiffs' counsel believes that Holtzclaw should have been arrested and terminated because he made contact with a woman who initially claimed the incident occurred on a different date and location, refused to be interviewed, and signed a refusal to prosecute form.

16. On August 14, 2014, Detectives Davis and Valari Homan contacted Plaintiff Johnson because her name was on the list. (Johnson Trial Test., pp. 3497, 3498-3504, 3505-3518.) (08/15/14 Davis Report, OCPD Case No. 14-066583 (001), Exh. 36; Exh.1.) She said an officer stopped her twice while she was walking. (*Id.* at 3498-3504.) Nothing happened the first time, but during the second (May 26, 2014), he stopped her after 2:00 a.m. and started fondling her but stopped when she said, "[s]top, you aren't supposed to do that." *Id.* (Counts 13 and 14 on pp. 3-4 and PC Affidavit of Davis p. 11, Exhibit 22.)

17. On September 16, 2014, Plaintiff Lyles' probation officer called OCPD and said Ms. Lyles was claiming an OCPD officer forced her to perform oral sodomy on him and then raped her. (Her name was on the list, but the detectives could not locate her.) Holtzclaw had run her name on April 9, May 6, and June 18, 2014. The detectives interviewed her and determined that this rape occurred on June 18, 2014. (Amended Information Counts 17-20 on pp. 4-5 and PC Affidavit of Davis, p. 11-12, Exhibit 20; Lyles Trial Testimony, pp. 3604, 3615-3626, 3636; Davis Trial Testimony, pp. 3674-3678, 09/17/14 Davis Report, OCPD Case No. 14-076818 (001), Exhibit 37; Exhibit 1.)

18. On June 18, 2014, Plaintiff Ligons reported early in the morning of this date that she was driving (without a license) when an officer in a patrol car stopped her for swerving. First, under pretext of performing a search, he made her expose her breasts, then exposed himself and ultimately made her perform oral sodomy on him and left. (Information Counts 15 and 16 on p. 4 and PC Affidavit of Davis, p. 10, Exhibit 22; Ligons Trial Testimony, pp. 461, 479, 495-496, 507-509, 517-522, 543.)

19. Ms. Ligons went to the closed OCPD Springlake Station. She then called her

cousin whose son was an OCPD officer. He told his mother to tell her to call 911 to report it. She did not call 911. (Ligons Deposition, pp. 75, 130-131.) She found two OCPD police vehicles, one occupied by a patrol lieutenant, and reported the assault. *Id*. The lieutenant called the sex crimes lieutenant. Ms. Ligons was taken to Southwest Medical Center for a rape exam. (Ligons Testimony, pp. 517-522.) Det. Davis, the on-call sexual assault detective was advised and went to the hospital where she interviewed Ms. Ligons, who advised Det. Davis where the assault occurred. (Davis Trial Testimony, pp. 751, 755-759, 762, Davis Deposition, pp. 97-98, 102.) The actions of these officers were consistent with the OCPD "call-out" procedure and how Chief Citty wanted criminal sexual misconduct allegations against an officer investigated. (Exhibit 34; Citty Deposition, pp. 284-285.)

20. After this interview, Det. Davis conferred with Det. Gregory because she knew that he was attempting to investigate Plaintiff Morris' claim of sexual assault by a police officer. The Automatic Vehicle Locator (AVL) on all black 2nd Shift Springlake police cars was checked by command for locations of officers' vehicles. (Davis Deposition, pp. 170-171.) None were at this location; however, the detectives determined Holtzclaw had turned his MDC (Mobile Data Computer) off, which turns off the AVL, when he left the Springlake station, before this assault occurred. (Davis Preliminary Hearing Testimony, pp. 120-121; Davis Trial Testimony, pp. 840-842; p. 9, Exhibit 32; Exhibit 1.)

21. The detectives met Holtzclaw at the Springlake Station on June 18, 2014, just before shift began at 4:00 p.m, and he agreed to an interview. (Davis Trial Testimony, p. 802.) During the interview, he admitted that on the night in question he turned off his AVL before he stopped Ms. Ligons because she was swerving, and he thought she was

intoxicated.[9] (Video Recording and Transcript of Holtzclaw Interview, pp. 6, 9, 36-37, 40-3, Exhibit 32) He denied that he sexually assaulted her. He admitted that he had on the same uniform pants as the night before. The pants were taken from him. (*Id.* pp. 75-77, Exhibit 32.) He was placed on administrative leave. (*Id.* pp. 83-88, Exhibit 32, Exhibit 1.)

22. Holtzclaw's pants were analyzed for DNA revealing DNA from an unknown female. All known victims' DNA was compared. (Davis Trial Testimony, pp. 3891-3.)

23. On October 10, 2014, Adaira Gardner called OCPD and reported that she was walking down the street with her friends, and an officer stopped them and ran them for warrants. She had several. The officer asked where she was staying, and she gave the address of her mother's house. He let her go but later stopped her again. He put her in his car and took her to her mother's house. He let her out and told her he would have to search her for drugs. He fondled her breasts, penetrated her vagina with his finger and eventually raped her. (Exhibit 25, Counts 30-32 on pp. 7-8 and PC Affidavit of Davis, pp. 19-20; Gardner Trial Testimony, pp. 3748, 3752-3, 3755, 3759, 3767-73; 10/27/14 Davis Reports, 14-083072 (001) and (004), Exhibits 39 and 40; Exhibit 1.) Her name was on the list, but the OCPD had not been able to locate her. Her DNA "matched" the DNA on Holtzclaw's pants. (Taylor Trial Testimony, pp. 4026-4029, 4040-4045, 4048-4049.)

A. Facts of the Investigation into the Sexual Assaults

As an aide to the Court, please see the attached chart outlining the sexual assaults

[9] The detectives found a security camera that recorded the traffic stop, but the "encounter" between Holtzclaw and Ms. Ligons is not seen. (Video, Exhibit 38; Davis Preliminary Hearing Testimony, p. 124-125.)

committed by Defendant Holtzclaw. (Exhibit 53, Chart)

24. On May 27, 2014, Ms. Morris' complaint was assigned to Det. Gregory of the Sexual Assaults Unit for investigation. OCPD Command checked with OCPD Dispatch to see which officer ran her name and came up with two: one by Officer Sellers on April 11, 2014, who does not match the description of the assailant as described by Ms. Morris (Gregory Trial Testimony, pp. 3266; 3311); and the other by Holtzclaw on May 8, 2014. Later, "Command" checked the AVLs of those patrol cars, and neither officer was at the location reported by Ms. Morris. (*Id*. at p. 3212, 3214-3217, 3222; Gregory Deposition, pp. 236, 241.) Plaintiff Morris refused to cooperate until July 10, 2014, when she gave Det. Gregory the correct location of the assault. (07/25/14 Gregory Report, OCPD Case No. 14-041539 (027) at pp. 1-2, Exhibits 41 and 1; Gregory Trial Testimony, pp. 3207-3212.)

25. After Ms. Ligons' complaint, the OCPD was able to determine that Holtzclaw was the officer who stopped her. The investigators obtained the names of all black females Holtzclaw reported he had stopped from January 2014 to June 18, 2014. They were contacted and interviewed. Thirty-three said nothing inappropriate happened. The stories of those who did complain were checked as to Holtzclaw's contact with Dispatch and his vehicle's AVL. (Muzny Trial Testimony, pp. 2385-2389, 2393 and Davis, Trial Testimony, p. 2425.)

26. Holtzclaw was interviewed only once on June 18, 2014. After that, he refused any further interviews. (Davis Deposition, pp. 127-128.)

27. On August 29, 2014, the DA filed 16 charges against Holtzclaw (Exhibit 22) and he was arrested by Det. Gregory. (08/26/14 Gregory Report, 14-041539 (028), Exhibit

33; Exhibit 1.) This Information was amended three times adding counts against him (Exhibits 20, 22, 25, 28), twice, because the OCPD learned of additional victims, and once, because the Judge conducting the preliminary hearing believed that there was probable cause to believe Holtzclaw committed additional crimes. (Counts 33-36, 11/19/14 Third Amended Information, Exhibit 28.)

28. On October 24, 2014, Holtzclaw was given notice of OCPD's 29 allegations against him. (10/24/14 Pre-Determination Hearing Notice, Exhibit 42; Exhibit 1.)

29. After his predetermination hearing, he was fired on January 8, 2015. (12/31/14 Jester Memo to Citty, Exhibit 43; Termination Letter, Exhibit 44.)

B. Facts of City's Hiring and Training of Police Officers

(*See* note 1 of Defendant Citty's Motion for Summary Judgment and Brief)

1. The City Council stated in OCPD Policy 665.10, entitled "Recruitment," under Policy 665.00, entitled "Personnel" (which has no body):

> The Department seeks to obtain qualified police officers. To obtain the highest caliber of candidates possible, it is essential that the Department participate in the recruitment process. To this end, the Department maintains an active formal recruitment program; however, an officer in his daily contact with the public is the Department's best recruiter. By his demeanor and enthusiasm, he favorably impresses and attracts the type of individual, which the police service needs. Because of his experience and knowledge, he is able to counsel persons who show an interest in law enforcement careers and to encourage applications by those who appear qualified.

(OCPD Policy 665.00-665.10, Exhibit 45; Exhibit 1.)[10]

[10] Pursuant to § 43-4 of the Municipal Code, the City Council enacts policies for the police department and the Chief of Police can enact procedures.

2. In order to be employed by the City as an officer, a candidate must:

A. Be a citizen of the United States (or have declared intent to become a citizen)
B. Be 21-45 years of age
C. Possess a high school diploma or GED certificate
D. Possess a valid drivers' license
E. Good moral character
F. Must have suitable emotional stability (author's note: must submit to the California Personality Inventory (CPI) and the Minnesota Multiphase Personality Inventory (MMPI) to determine if the applicant is suitable to perform law enforcement duties)
G. Meet the requirements of the Oklahoma Police Pension and Retirement System
H. Must be able to safely perform essential functions of the position of Police Officer with or without reasonable accommodation
I. Must be able to safely perform essential functions without posing a direct threat to the safety of the Police Officer, fellow Police Officers or the public.

(OCPD Procedure 424.20 (last revised in 1998) (all OCPD Procedure 424.00, Exhibit 46); see also the November 1, 2009 effective date version of 70 O.S. § 3311.

3. According to OCPD Procedure 424.40, the OCPD's Recruiting Unit's responsibilities are:

…
to interview, test, and evaluate police applicants.
After completion of an employment application, a Police Recruiter will review the application to determine if the applicant meets the minimum requirements for the position of Police Officer. In addition, the Police Recruiter will evaluate the applicant's suitability for proceeding to successive selection steps.
Applicant screening may include the following progressive steps:
A. Job related tests
B. Background investigation book
C. Stability rating procedure
D. Polygraph
E. Physical fitness evaluation
F. Personal history questionnaire
G. Psychological evaluation
H. Background investigation

I. Employment assessment board
J. Medical examination
K. Academy induction

(Exhibit 46; Exhibit 1.)

4. OCPD procedure 424.50 "Employment Assessment Board" states: "Recruiting investigators will provide board members with results of background investigations. Candidates will be interviewed by board members, who will make an employment recommendation to the Chief of Police." (Exhibit 46 at p. 2; Exhibit 1.)

5. Holtzclaw's recruit training is described in Defendant Citty's Brief at pages one through five filed in this case.

6. 70 O.S. § 3311, effective 2008, required that full-time police officers attend and complete 25 hours of continuing law enforcement training every year, including 2 hours on mental health issues. Again, there was nothing on sexual assaults by officers. The OCPD's requirements are consistent with this law. (OCPD Policy 670.30, In-Service Training, Exhibit 47; OCPD Procedure 436.0, Exhibit 48, In-Service Training; and 436.05 Attendance, Exhibit 48; Exhibit 1.)

7. Recruits are issued digital copies of the OCPD Operations Manual, which contains current OCPD Policies, Procedures, and Rules. Officers are directed to be familiar with the contents of it and to keep it updated with new policies, procedures and rules as issued. (OCPD Policy 030.0 - Review, Exhibit 49; OCPD Procedures 113.10 - Responsibility; 113.20 - Distribution of the Operations Manual; and 113.30 - Update of Operations Manual (Procedures 113.0-113.30, Exhibit 50); OCPD Rules 100.0 - Compliance with Policies, Exhibit 51; Exhibit 1.)

8. In March 2007, the OCPD was accredited by the Commission on Accreditation for Law Enforcement Agencies, Inc., (CALEA.) This agency reviewed the various activities of the OCPD and found that the OCPD's use of force regulations "are thorough and require… an investigation by a supervisor of the next highest rank." (p. 22, Chapter 1 of CALEA's January 15, 2007 Assessment Report, Exhibit 52.) It further describes the review process for each use of force (*Id.)* They found the OCPD had a "very comprehensive Code of Conduct" (p. 26, Chapter 26, Exhibit 52); an "emphasis on quality training" which was "very evident" (p. 27, Chapter 33, Exhibit 52) and states IA's investigations "are very thorough, well documented, and consistent with agency directives…" (p. 30, Chapter 52, Exhibit 52.) On March 17, 2010 and March 17, 2013, CALEA again awarded the OCPD Accreditation. (All 3 accreditation letters, attached as Exhibit 56; Exhibit 1.)

9. OCPD Procedure 230.0, entitled "Arrest Procedure," states in part:

> 230.10 WHEN A PERSON CAN BE ARRESTED
> In accordance with the existing Oklahoma State Statutes and Municipal Ordinances, a police officer may arrest persons when:
> A. A felony has been committed and he reasonably believes that the person to be arrested has committed a felony or is committing a felony.
> B. He reasonably believes that a felony has been or is being committed and reasonably believes that the person to be arrested has committed or is committing it.
> C. He has a warrant commanding that such person be arrested.
> D. He has probable cause to believe that a warrant for the person's arrest has been issued in the state or in another jurisdiction for a felony committed therein;
> E. A warrant for the arrest has been issued and is held by another peace officer for execution.
> F. On a misdemeanor not committed in his presence when the misdemeanor is specified by Statute to be one where the officer may arrest on probable cause, and probable cause for the arrest is known to

the officer at the time of arrest.

G. For a misdemeanor or City ordinance violation committed in his presence.

This procedure does not authorize or allow officers to seize persons to have them perform sex acts on them. (OCPD Procedure 230.0, Exhibit 57; Exhibit 1.)

10. OCPD Policy on the Use of Force (OCPD Policy 554.0-554.60, Exhibit 58; Exhibit 1) states in part:

> 554.20 LEGAL REQUIREMENTS (Revised 8/03) (Revised 9/05)
> State law provides for situations within which police officers may use force to accomplish their required duties. State law does not provide that police officers must use force, nor does it eliminate the civil consequences of use of excessive force. In the performance of their duties, no officer will use more force in any situation than is reasonable and necessary under the existing circumstances. Any force used will be in accordance with the State law and established departmental policies. Physical techniques of custody and control should never be used to punish.
>
> Officers may use only the amount of force that is reasonably necessary to:
>
> A. Affect a lawful arrest.
> B. Prevent the escape of a person lawfully arrested.
> C. Apprehend a person who has escaped from lawful arrest.
> D. Protect themselves or others from danger of death or bodily harm.

11. As of December 20, 2013, The City had adopted the following police department Policies: 105.0, Mission Statement (OCPD Policy 105.0, Exhibit 59); 110.0, Primary Objective (OCPD Policy 110.0, Exhibit 60); 205.0, Standard of Conduct; 205.10, Law Enforcement Code of Ethics; 205.15, Oath of Office (Policies 205.0-205.15, Exhibit 61); 220.0, Respect for Constitutional Rights (OCPD Policy 220.0, Exhibit 62); 285.0, Allegations of Employee Misconduct; 285.10, Objectives of Personnel Investigations (Policies 285.0-285.10, Exhibit 63); and 287.0, Discipline (Policy 287.0, Exhibit 64;

Exhibit 1.)

12. Other OCPD procedures that are relevant to this lawsuit include Complaints against Police Department Employee (OCPD Procedure 143.0, Exhibit 65); Use of Force Investigations (OCPD Procedures 150.0-150.18, Exhibit 66); and procedures regarding discipline and retraining: 170.0, Disciplinary Action; 170.10, Verbal Counseling; 170.15, Transfer; 170.25, Progressive Disciplinary Actions; 170.30, Reprimands for Cause; 170.45, Probation; 170.50 Reduction of Salary Rate for Cause; 170.60, Demotion to a Designated Rank or Grade for Cause; and 170.70, Termination of Employment. (Procedures 170.0–170.70, Exhibit 67; Exhibit 1.) Additionally, the OCPD has adopted its own procedure prohibiting sexual harassment/discrimination. (OCPD Procedures 103.0-103.42, Exhibit 68; Exhibit 1.)

13. As of December 20, 2013, the OCPD had adopted Rules relevant to Plaintiff's claims: OCPD Rule 115.0, Neglect of Duty (OCPD Rule 115.0, Exhibit 69); OCPD Rule 120.0, Truthfulness/Cooperation and OCPD Rule 125.0 Duty to Report Misconduct (OCPD Rules 120.0 and 125.0, Exhibits 70 and 71); 348.0, Use of Force (OCPD Rule 348.0, Exhibit 72); and 470.0, Constitutional Rights (OCPD Rule 470.0, Exhibit 73; Exhibit 1.)

STATEMENT OF THE CASE

Plaintiffs' First Amended Complaint [Doc. No. 8] appears to allege unreasonable seizures, violations of due process and equal rights protections, and the right to bodily integrity and privacy. According to the First Amended Complaint, Plaintiffs' allegations against the City are contained in the First Cause of Action: "Fourth and Fourteenth

Amendments Seizure/Deprivation of Liberty/Failure to Supervise/Unlawful Use of Force," Second Cause of Action "Fourth and Fourteenth Amendment (sic) Seizure/Deprivation of Liberty" (¶¶ 56 and 58); Third Cause of Action "Fourth and Fourteenth Amendment (sic) Unlawful Use of Force" (¶¶ 61, 62 and 64); the Fourth Cause of Action "Conspiracy to Interfere with Fourth and Fourteenth Amendment (sic) Rights[,]" however, the City is not listed as a conspirator at ¶ 68; the Fifth Cause of Action "Fourth and Fourteenth Amendment (sic) Failure to Supervise;" Sixth Cause of Action "Fourth and Fourteenth Amendment (sic) Municipal Liability;" and the Seventh Cause of Action "Fourth and Fourteenth Amendments Municipal Liability – Failure to Train." [Doc. No. 8.]

Plaintiffs Ligons and Hill and former Plaintiff Bowen allege three state law claims against the City: Ninth Cause of Action: "Assault and Battery," Tenth Cause of Action: "Negligent Supervision," and Eleventh Cause of Action: "False Arrest/Imprisonment."[11] Plaintiffs' allegations under state law have one "common" allegation, that Holtzclaw was acting within the scope of his employment. [See ¶¶ 108, 117 and 126, Doc. No. 8.]

ARGUMENTS AND AUTHORITIES

PROPOSITION I

DEFENDANT CITY IS ENTITLED TO JUDGMENT ON PLAINTIFFS' 42 U.S.C. § 1983 CLAIM

In *Graham v. Connor,* 490 U.S. 386, 394 (1989), the Court stated, …"("The first inquiry in any § 1983 suit" is "to isolate the precise constitutional violation with which [the

[11] On April 25, 2017, this Court dismissed Plaintiffs' Eight (sic) Cause of Action – one under the Oklahoma Constitution. [Doc. No. 27].

defendant] is charged")"…[citing to *Baker v. McCollan,* 443 U.S. 137, 140, 144, n. 3 (1979)]. In *Schneider v. City of Grand Junction Police Dept.,* 717 F.3d 760 (10th Cir. 2013), the plaintiff alleged a Fourteenth Amendment "substantive due process right to bodily integrity." *Id.* at 763. Whether the sexual assaults are seizures and uses of force or violations of a substantive due process right would make a difference as to which policies, procedures and police training is provided to this Court.

This Defendant does not challenge that Holtzclaw may have violated the Plaintiffs' Fourteenth Amendment rights. Holtzclaw's subjective intentions are not an issue in a Fourth Amendment case. *Whren v. U.S.,* 517 U.S. 806 (1996.) The City's policies and procedures on arrests are consistent with state law, which is a higher standard than the Constitution requires (*see Franklin v. Thompson,* 981 F.2d 1168, 1170 and n. 3 (10th Cir. 1992).) The policies and procedures require a misdemeanor (ordinarily) occur in the officer's presence. The City's policy on use of force has been repeatedly upheld by this Court and the Tenth Circuit Court. *Carr v. Castle,* 337 F.3d 1221 (10th Cir. 2003), and *Fuston-Lounds v. Torres,* 217 Fed. Appx. 755 (10th Cir. 2007.)

The City's policies on Code of Ethics and Use of Force, and the OCPD's procedures on arrests do not authorize an officer to detain a person for the purpose of sexually assaulting them. The OCPD's training does not authorize this type of action and, in fact, advises the recruit that it would be a violation of state law to use his office for such purposes. (Citty Motion for Summary Judgment Fact 11 filed in this case.)

There is or was nothing in Holtzclaw's background that would have alerted a police chief that Holtzclaw would commit such crimes. (Exhibit 1; Davis Trial Testimony, pp.

1121-1122.) The OCPD did not fail to investigate his background.

In *Jennings v. City of Stillwater,* 383 F.3d 1199 (10th Cir. 2004), the Court rejected a failure to investigate cause of action (as least as to the one plaintiff.) Regarding Plaintiffs' claim that the incident involving Ms. Campbell was "notice," the City was unaware that Ms. Campbell would later claim that Holtzclaw sexually assaulted her. (See Defendant Citty's Motion for Summary Judgment at pp. 8-9; See also letter of Melvin Hall dated September 21, 2018, Exhibit 74; Plaintiffs' Response to Lt. Bennett's Motion and Brief for Summary Judgment, Doc. 159.) In any event, its policies require investigations of alleged police misconduct and of an officer's use of force. It is not deliberately indifferent to the rights of its citizens.

Plaintiffs' Sixth Cause of Action alleges Defendant Citty ratified the other Defendants' actions as "within policy." It is unclear which actions of Defendants were supposedly ratified. To suggest that Citty ratified Holtzclaw's acts (as to these Plaintiffs) is incredulous. The complaints were investigated. Plaintiffs' misrepresentations of those events and of the alleged notice is telling— it appears they believe if the true facts were alleged, then it would not support their claims. The OCPD attempted to investigate Ms. Morris' complaint but was unable to do so, initially, based upon her failure to cooperate. When Ms. Ligons came forward, the OCPD investigated her claims, identified the officer, interviewed him, placed him on administrative leave, found other victims, arrested him, gave its investigation to the DA to prosecute him, and fired him. This is not ratification.

As detailed in Defendant Citty's Brief in Support of his Motion for Summary Judgment, Plaintiffs, in their First Amended Complaint, misrepresent the Armstrong

"incident" (¶ 21(a)), and the facts of Ms. Campbell's complaint (¶ 21(b)(iii.) Plaintiffs further misrepresent Defendant City's Answer at Footnotes 3 and 5 of their Amended Complaint. [Doc. Nos. 8 and 16]

The Tenth Circuit's decision in *Schneider v. City of Grand Junction Police Dept.,* 717 F.3d 760 (10th Cir. 2013), is controlling on the Plaintiffs' claims under 42 U.S.C. § 1983. Plaintiffs herein allege at ¶¶ 50-53 that the City is liable because it failed to properly screen applicants; failed to train its recruits not to abuse their power, etc.; failed to supervise them; and failed to discipline them[12].

Plaintiffs' allegations are redundant and incorrect, which makes them difficult to address. City will attempt to do so by addressing the possible theories of municipal liability.

Policy:

In *Monell v. New York Dept. of Social Services,* 436 U.S. 658 (1978), the Supreme Court held that a municipality could be liable under 42 U.S.C. § 1983. The Court rejected a theory of *respondeat superior.* Instead, the Court held that a municipality could be liable for an unconstitutional policy or custom that caused the constitutional injury. Plaintiffs fail to allege any written policy of The City that would cause a police officer to abuse his authority to seize or sexually assault a detainee. In *Schneider,* the Court "assumed without deciding" that the plaintiff had produced sufficient evidence of an unconstitutional policy

[12] At ¶ 50, Plaintiffs allege "Defendant City failed to prosecute officers who committed sexual assaults against women." There is no "failure to prosecute" cause of action under 42 U.S.C. § 1983. *Dohaish v. Tooley,* 670 F.2d 934 (10th Cir. 1982). More importantly, the City cannot enact ordinances that are state law felonies. 11 O.S. § 14-111(B). The District Attorney is separate from the City and it cannot be responsible for his acts. See *Bryson v. Gonzales,* 534 F.3d 1282, 1289 (10th Cir. 2006).

or custom. *Id.* at 770.

Defendant City has provided this Court with its policies that prohibit any such conduct. (Exhibits 58-59, 61-62, 68-72) Even if this Court disagrees, that is not the end of the inquiry. In *Schneider,* the Court stated at 769-773:

> In later cases, the Supreme Court required a plaintiff to show that the policy was enacted or maintained with deliberate indifference to an almost inevitable constitutional injury. *See Brown,* 520 U.S. at 403, 117 S.Ct. 1382; *see also City of Canton v. Harris,* 489 U.S. 378, 389…(1989).
>
> * * *
>
> To establish the causation element, the challenged policy or practice must be "closely related to the violation of the plaintiff's federally protected right." Schwartz, at § 7.12[B]. This requirement is satisfied if the plaintiff shows that "the municipality was the 'moving force' behind the injury alleged." *Brown,* 520 U.S. at 404, 117 S.Ct. 1382.
>
> * * *
>
> …"Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." *Id.* (*Brown v. Bryan County*) at 405, 117 S.Ct. 1382. "The causation element is applied with especial rigor when the municipal policy or practice is itself not unconstitutional, for example, when the municipal liability claim is based upon inadequate training, supervision, and deficiencies in hiring." Schwartz, at § 7.12.
>
> * * *
>
> On the personal side, the sergeant conducted a home visit, reviewed Officer Coyne's personal history statement, and contacted his personal references. The one reference who responded gave a positive report of Officer Coyne. Further, the sergeant performed a criminal-history check, which showed no criminal history or law enforcement contacts, and he reviewed a psychological suitability report. The sergeant concluded that Officer Coyne was eligible for employment.
>
> Neither of the faults alleged by Ms. Schneider made the investigation inadequate. *** Consequently, the hiring claim against the City must be based on Chief Gardner's actions or inactions. As discussed above, the

> background investigation was not inadequate, and, as with PSA Dyer, there is no evidence that Chief Gardner was deliberately indifferent. *See id.*, 520 U.S. at 415-16, 117 S.Ct. 1382 (stating that the county was not liable for the sheriff's hiring decision because the plaintiff had not shown that the sheriff acted with deliberate indifference.) Moreover, no evidence suggested that the City had actual or constructive notice of the need for any additional background investigation. *See Barney,* 143 F.3d at 1307 ("The deliberate indifference standard may be satisfied when the municipality has actual or constructive notice that its action or failure to act is substantially certain to result in a constitutional violation, and it consciously or deliberately chooses to disregard the risk of harm.") Accordingly, we agree with the district court that no reasonable jury could find that the City acted with deliberate indifference in its decision to hire Officer Coyne.

Plaintiffs have no evidence of an unconstitutional policy or of deliberate indifference of the City. Instead, Plaintiffs' counsel has repeatedly argued that Defendant City's employees violated (please note these alleged violations are Plaintiffs' counsel's interpretation) OCPD Procedures in interviewing Ms. Campbell/Brown and/or Plaintiff Morris. They were repeatedly told that a violation of police procedure is not relevant, yet repeatedly ignored that authority and wasted witnesses' time (and this Court's) by their response to Lt. Bennett's dispositive motion. (See this author's letter to Plaintiffs' counsel dated January 25, 2019, citing to *Davis v. Scherer*, 468 U.S. 183, 194 (1984), *Tanberg v. Sholtis*, 401 F.3d 1151 (10th Cir. 2005), *Romero v. Board of County Commissioners*, 60 F.3d 702 (10th Cir. 1985) cert. denied, 516 U.S. 1073 citing *Wilson v. Meeks*, 52 F.3d 1547, 1554 (10th Cir. 1995) remanded on other grounds and affirmed at 98 F.3d 1247 (10th Cir. 1996), Exhibit 85). A reading of case law makes it clear that the written policy must have caused the employees to take unconstitutional action, not an alleged violation of procedure by the employee, otherwise there would only be *respondeat superior* liability.

Custom:

The challenged custom must be "well settled"… *Schneider* at p. 770, quoting Martin A. Schwartz, *Section 1983 Litigation Claims & Defenses,* § 7.06[A] (2013). All claims of sexual assault by OCPD officers are investigated, and, as proven by both the Martinez complaint and Ms. Ligons' complaint regarding the sexual assault on June 18, 2014, officers have been prosecuted. Plaintiffs fail to offer any evidence of any such defective custom or any evidence that it is widespread. (See Plaintiffs' Discovery Responses, Exhibits 75-84.)

Hiring:

Regarding hiring, the Court in *Schneider, Id.* at 771-72, cited to the U.S. Supreme Court's decision in *Bd. of Cnty. Comm'rs of Bryant v. Brown,* 520 U.S. 397 (1997) and stated:

> In *Brown,* the Supreme Court discussed the standards of evaluating whether a policymaker's hiring decision reflects deliberate indifference:
>
> > A plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision. Only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute "deliberate indifference."
>
> 520 U.S. at 411, 117 S.Ct. 1382, *Brown* addressed the proof necessary to show deliberate indifference when the background investigation was inadequate. *See id.* at 401, 411, 117 S.Ct. 1382. Here, however, the record does not support a finding that the background investigation of Officer Coyne was inadequate.

Pursuant to City policy, the OCPD conducted a full background investigation of Holtzclaw,

including checking with previous employers, reviewing financial records and possible criminal records. Holtzclaw took a polygraph, the CPI and the MMPI (Exhibits 89-91, filed under seal.) There was nothing in his background to suggest he would commit these sexual assaults. The City could not be said to be deliberately indifferent in hiring him.

Training:

> "[T]here are limited circumstances in which an allegation of a 'failure to train' can be the basis for [municipal] liability under § 1983." *City of Canton,* 489 U.S. at 387, 109 S.Ct. 1197. "[T]he inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Id.* at 388, 109 S.Ct. 1197. A municipality can be liable where "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Id.* at 390, 109 S.Ct. 1197.

(*Schneider, Id.* at 773.) The City's training of its officers includes training that the sexual assault of a prisoner in his/her custody is a criminal act, and criminal acts are not authorized.

In *Schneider*, the Court stated at 773-774:

> …Ms. Schneider argues that GJPD should have trained its officers not to have sexual relationships with women they meet in the course of doing their jobs.
>
> ***
>
> ...As we stated in analogous circumstances, "[s]pecific or extensive training hardly seems necessary for a jailer to know that sexually assaulting inmates is inappropriate behavior." *Barney*, 143 F.3d at 1308; *see also Andrews v. Fowler*, 98 F.3d 1069, 1077 (8th Cir. 1996) ("In light of the regular law enforcement duties of a police officer, we cannot conclude that there was a patently obvious need for the city to specifically train officers not to rape young women.".)
>
> Moreover, Office Coyne was, in fact, instructed against relationships with women he met on duty.

***

> We agree with the district court that Ms. Schneider cannot show that the City acted with deliberate indifference to the risk of what happened to her in the manner it trained its officers.

As established by Facts 9-12 in Defendant Citty's Motion for Summary Judgment, recruits are trained that it is a violation of state law to have sex with a person in their custody.

Supervision:

In *Schneider,* the Court affirmed the grant of judgment to the defendants on the lack of supervision claim even though it was "stronger" than any of her other claims (*Id.* at 779) based upon the one prior claim of off-duty sexual misconduct by the officer who eventually raped her. Plaintiffs offer no evidence of a prior sexual assault by Holtzclaw. Instead, they rely upon the allegations in a state law petition, *Campbell v. City of Oklahoma City*, filed after the OCPD determined that Holtzclaw had sexually assaulted women and arrested him. (Petition, Attachment-Petition) This allegation is not in Lt. Bennett's use of force report, Plaintiff's medical records, or her Notice of Tort Claim. (Campbell's Medical Records, Exhibit 25, filed under seal; Bennet's Use of Force Investigation Packet, Exhibit 26; Campbell Tort Claim, Exhibit 27 attached to Defendant Gregory's Motion for Summary Judgment and Brief in Support filed herein). There is no evidence of deliberate indifference regarding the City's supervision of Holtzclaw. *Bryson v. City of Oklahoma City*, 627 F.3d 784 (10th Cir. 2010). Further, Plaintiff cannot offer evidence of or even allege any other officer who was supposedly inadequately (constitutionally) supervised.

Ratification:

Under 42 U.S.C. § 1983, a governmental party may be liable when it "subjects or causes to be subjected" any person to the deprivation of any right secured by the United States Constitution. Therefore, there is an issue of causation which requires proof that the defendant's actions were the direct cause of the plaintiff's injury. Any action which was taken after-the-fact cannot subject or cause a plaintiff to be subjected to an injury. *Cordova v. Aragon,* 569 F.3d 1183, 1194 (10th Cir. 2009); *Waller v. City and County of Denver*, 932 F.3d 1277 (10th Cir. 2019).

In *Pembaur v. City of Cincinnati,* 475 U.S. 469 (1986), the Supreme Court held that a single decision by a municipal policymaker that resulted in an unconstitutional harm could support municipal liability. However, it stated, "[M]unicipal liability under § 1983 attaches where-and only where-a deliberate choice to follow a course of action is made [by policymakers] from among various alternatives." *Id.* at 483-484. There is nothing indicating that this decision can be an after-the-fact decision. In fact, *Pembaur* does not dispense with the causation requirement, and therefore does not lend itself to an interpretation that an after-the-fact decision or alleged approval could assess liability to a municipality.

In *City of St. Louis v. Praprotnik,* 485 U.S. 112 (1988), the Supreme Court in an employment case, held that ratification may be a viable municipal theory of liability. This case involved an employee, Praprotnik, who had had violated a policy restricting employees from engaging in work for private clients. Praprotnik was reprimanded but subsequently appealed the reprimand to an internal review board and had it reversed. Later Praprotnik was transferred to another division, which he also appealed, but the internal

review board refused to hear his appeal and Praprotnik filed suit. The Court stated, "If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final." *Id.* at 127. The Court also stated at 126, "If the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from *respondeat superior* liability." This theory may be fine in an employment case as the plaintiff's alleged injury, loss of pay and/or promotion, or termination which can be rectified by the municipality before any "real" harm is done. But such is not the case in a use of force or sexual assault case. A supervisor's after the event action could not prevent injury. *Cordova, Id. and Waller, Id.* In any event, the City did not approve the "basis" of the events, *i.e.,* that Holtzclaw illegally seized and sexually assaulted Plaintiffs.

Proof of causation is required before Plaintiffs can prevail on their theory of ratification, and Plaintiffs cannot prove a genuine issue of material fact with regard to whether there is a direct causal link between any actions of the City in approving whoever's actions Plaintiffs believe are ratified—the City denies it ratified Holtzclaw's actions. Therefore, the City's actions or inactions cannot be the moving force behind the violation. *Monell,* 436 U.S. at 694 (liability attaches under § 1983 when execution of government's policy or custom inflicts the injury); *Dempsey v. City of Baldwin,* 143 Fed. Appx. 976 (10th Cir. 2005) (cited pursuant to Tenth Cir. R. 32.1) (final policymaker must not only approve decision, but also must adopt basis for the decision and ratification must be the moving force, or cause, of the alleged constitutional violation.)

In *Butler v. City of Norman,* 992 F.2d 1053 (10th Cir. 1993), the Tenth Circuit found

that a failure to discipline a single officer for a violation of a person's constitutional rights is not sufficient to impose liability upon the municipality, nor should it on the police chief.

PROPOSITION II

DEFENDANT CITY IS ENTITLED TO JUDGMENT ON PLAINTIFFS' STATE LAW CLAIMS

Plaintiffs Ligons and Hill (and former Plaintiff Bowen) filed notices of tort claim over their "involvement" with Holtzclaw. (Ligons' 06/17/15 Notice of Tort Claim, Exhibit 86; Hill's 12/29/14 Tort Claim Form, Exhibit 87) The remaining Plaintiffs did not, and Defendant City is entitled to Judgment on any state law claim against it asserted by any other Plaintiff because of those individuals' failure to comply with the notice of tort claim provisions. 51 O.S. §§ 156 and 157. (Affidavit of Frances Kersey, City Clerk of the City of Oklahoma City, Exhibit 88.) Compliance with the Notice statutes of the Governmental Tort Claims Act is jurisdictional. *Shanbour v. Hollingsworth,* 1996 OK 67, 918 P.2d 73.

Plaintiffs Ligons and Hill allege in each of the remaining State law causes of action that Holtzclaw was acting in the scope of his employment with The City (¶¶ 108, 117 and 126, Amended Complaint, Doc. No. 8.) Defendant City denies he was.

In *N.H. v. Presbyterian Church,* 1999 OK 88, 998 P.2d 592, 598-600, the Okla. Supreme Court addressed the issue of sexual assaults and scope of employment and stated:

> *Respondeat superior* is a legal doctrine holding an employer liable for the willful torts of an employee acting within the scope of employment in furtherance of assigned duties. Generally, an assault upon a third person is not within the scope of employment. Exceptions to the general rule exist if: 1) the act is fairly and naturally incident to the employer's business; 2) the act occurs while the employee is engaged in an act for the employer; or 3) the assault arises from a natural impulse growing out of or incident to the attempt to complete the master's business. Nevertheless, an assertion that an

> act is accomplished during an employment activity is insufficient to assess liability against the employer unless the act was done to accomplish the assigned work.
>
> * * *
>
> In *Rodebush,* the aide had to control a combative patient. The assault was an impulsive response to attempt to complete the patient's bath. Although Brigden's acts may have arisen from some "impulse" while he was supposedly approaching the children to bring them to the Presbyterian faith, no one contends that sexual acts with minors are in any manner authorized or condoned by the national organization.
>
> Our survey of national jurisprudence reveals that the majority of jurisdictions considering the issue of sexual contact between an ecclesiastic officer and a parishioner have held that the act is outside the scope of employment as a matter of law. We agree. Ministers should not molest children. When they do, it is not a part of the minister's duty nor customary within the business of the congregation. No reasonable person would conclude that Brigden's sexual misconduct was within the scope of employment or in furtherance of the national organization's business.
>
> Brigden acted for his own personal gratification rather than for any religious purpose. Brigden abused his position and exploited his special relationship with the children. It is inconceivable that Brigden's acts were of the nature of those which he was hired to perform. Because Brigden was acting outside the scope of his employment as a matter of law when the molestation occurred, we hold that liability may not be imposed under the doctrine of *respondeat superior.*

(Notes omitted.) It is not in the scope of employment for police to sexually assault anyone.

In *Schovanec v. Archdiocese of Oklahoma City,* 2008 OK 70, 188 P.3d 158, the Oklahoma Supreme Court reaffirmed its holding in *N.H.* that sexual assault was not within the scope of employment. However, the Supreme Court held that the employer could be liable for the sexual misconduct of an employee if the employer may have had reason to "foresee the servant's injurious conduct from past events…". (*id.* at 172). There is no such evidence in this case.

CONCLUSION

A Court's first inquiry in a § 1983 case is to determine the constitutional right at issue. In this case, that right is the Fourteenth Amendment right of bodily integrity, not the Fourth Amendment's right of reasonable seizure. Holtzclaw's use of force in the Armstrong and Campbell incidents is not relevant to this case. Even if Campbell told Bennett Holtzclaw was perverted (which is denied), perversion is not a crime. Because the assaults of Plaintiffs Hill and Barnes occurred prior to Ms. Morris' May 24, 2014 "report," her alleged notice is not relevant to those claims. In any event, OCPD attempted to investigate Ms. Morris' claim but could not due to her lack of cooperation by not giving the name of her assailant, the correct location (until July 10, 2014), or the correct date. OCPD teaches recruits that it is illegal and contrary to its policies to sexually assault a person in the officer's custody. The OCPD does attempt to investigate a person's complaint that an officer sexually abuses them.

The actions of Holtzclaw in sexually assaulting these women was not committed in good faith and therefore outside the scope of his employment (51 O.S. §§ 152(12) and 153), and the City cannot be liable on Plaintiffs' state law claims. (Only Plaintiffs Hill and Ligons' timely filed the required Notice of Tort Claims. The City cannot be liable on any state law claims of the other Plaintiffs.)

WHEREFORE, Defendant City is entitled to Judgment herein.

Respectfully Submitted,

Kenneth Jordan
MUNICIPAL COUNSELOR

/s/ Sherri R. Katz
Sherri R. Katz, OBA # 14551
Richard N. Mann, OBA #11040
Thomas Lee Tucker, OBA # 20874
Assistant Municipal Counselors
200 N. Walker Ave., 4th Floor
Oklahoma City, OK 73102
(405) 297-2451
sherri.katz@okc.gov
richard.mann@okc.gov
thomasltucker@okc.gov
Attorneys for Defendant City

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of September, 2021, I electronically transmitted the attached Defendant City's Motion for Summary Judgment and Brief in Support to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the ECF registrants on file herein.

/s/ Sherri R. Katz