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 CHIEF CITTY'S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

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, Citty and Gregory

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Federal Statutes

Federal Rules

State Statutes

DEFENDANT CHIEF CITTY'S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

COMES NOW a Defendant, Bill Citty, and pursuant to Rule 56 of the Federal Rules of Civil Procedure (FRCP) and the doctrine of qualified immunity, respectfully requests that this Court grant him Judgment herein as there is no issue of material fact, and he is entitled to Judgment as is more fully set out in his Brief in Support submitted herewith.

BRIEF IN SUPPORT

MATERIAL FACTS NOT IN DISPUTE[1]

1. On or about June 14, 2011, Holtzclaw expressed interest in joining the Oklahoma City Police Department. Under OCPD Policies and Procedures, because of the tremendous amount of investigatory work that must be done before a person can be hired

[1] The facts of Holtzclaw's employment, training, and the OCPD's supervision are also applicable to Defendant City of Oklahoma City's Motion for Summary Judgment and are not repeated therein but are incorporated by reference. They are set out in this Brief based upon the Tenth Circuit's opinion in *Schneider v. Grand Junction Police Dept.,* 717 F.3d 760 (10th Cir. 2013), because Defendant Citty ultimately made the decision to hire Holtzclaw.

In responding to City's et al.'s discovery, Plaintiffs' denied that they had alleged that the City failed to properly screen or test applicants and refused to answer the Interrogatory. See Response to Interrogatory No. 13, p. 5 in Plaintiffs' Responses to Defendant City et al.'s Second Set of Interrogatories attached as Exhibit 1 . Plaintiffs did allege such a claim. See ¶¶ 50(a) and 51 of Doc. 8. Defendants City and Citty request the Court grant them judgment on this claim because it did screen applicants and because of Plaintiffs' refusal to cooperate with discovery.

Additionally, these Defendants asked Plaintiffs about their "failure to train claim" and Plaintiff's Answer to Interrogatory No. 14 at *Id.* fails to list any "claim" (much less evidence) regarding training recruits not to sexually assault females. Again, Defendants City and Citty request judgment on this claim as it is not true and for Plaintiffs' failure to cooperate with discovery.

as a police officer, the potential recruit must first pass a polygraph test, a physical fitness test and the California Psychological Inventory ("CPI") before they complete the application. (Affidavit of Chief Citty, Exhibit 2.)

2. On June 25, 2011, Holtzclaw took the CPI and he was given a 28 in total rating points. Mr. Dupuis advised the OCPD, in part, "He (Holtzclaw) would be responsible, dependable, and able to follow the rules." (CPI Report of Allan L. Dupuis, July 5, 2011, Exhibit 3, filed under seal; Exhibit 2.)

3. On June 25, 2011, Holtzclaw filled out an application and provided the OCPD with his past residences so that the OCPD could check with the appropriate law enforcement agencies to see if he had a criminal record. Other than four traffic offenses in 2004-2005, nothing was reported. He was required to provide his credit history report. Holtzclaw underwent a background investigation (Applicant Investigative Report, Exhibit 4)[2]; a polygraph examination (Exhibit 5, filed under seal); and a psychological evaluation (Exhibit 3), among other things. (Exhibit 2.) After the OCPD determined that Holtzclaw was the officer sexually assaulting the women, Detective Davis re-checked to see if Holtzclaw had ever been involved in something like this while he lived in Enid, Oklahoma and eastern Michigan. There were no such accusations. (Trial Testimony of Davis, pp. 1121-2.)

4. Holtzclaw was required to list his present and former employers. All were

[2] The entire application file contains 187 pages. For ease of the Court, and its staff, only the investigative report is attached. The remaining file will be provided if relevant.

interviewed. (Exhibit 4; Exhibit 2.)

5. Holtzclaw was also required to provide the names of his girlfriend, two neighbors, a social acquaintance, and two references. Again, all were interviewed by investigators for the OCPD. (Exhibit 4; Exhibit 2.)

6. Holtzclaw was required to take and pass the MMPI. (Exhibit 6, filed under seal; Exhibit 2.)

7. The Applicant Investigative Report was assembled and given to the OCPD Employment Assessment Board. (Exhibit 4; Exhibit 2.)

8. On July 14, 2011, Holtzclaw appeared before the OCPD Employment Assessment Board (made up of a deputy chief and four majors). (OCPD Procedure 424.50, Assessment Board, Exhibit 7; Exhibit 2.) All recommended that he be hired. Chief Citty agreed. (Exhibit 2.)

9. Holtzclaw was employed by the City as a police recruit on September 16, 2011, and received police training at the OCPD Training Academy from that date until April 12, 2012 for a total of 1128 hours. (Exhibit 2; Syllabus of OCPD Recruit Class #128, Exhibit 8; OCPD Policies 670.0, Training; and 670.10, Recruit Training; OCPD Policies 670.0-670.20, Exhibit 9; and OCPD Procedures 431.0, Recruit Academy; and 431.10, Major Grades; OCPD Procedures 431.0-431.10, Exhibit 10.)

10. At the time of his training, State law required only 600 hours of law enforcement training to be commissioned as a police officer. *Oklahoma Session Laws 2007*, Chapter 360, § 6 attached. State law listed several required subjects upon which recruits had to be trained—prevention of sexual assaults by officers is not such a subject.

70 O.S. § 3311(E). However, 70 O.S. § 3311.5(B) and (C) stated:

> B. By January 1, 2008, CLEET, pursuant to its authority granted by Sections 3311 and 3311.4 of this title, shall include in its required courses of study for law enforcement certification a minimum of six (6) hours of evidence-based sexual assault and sexual violence training. A portion of the sexual assault and sexual violence training shall include instruction presented by a certified sexual assault service provider.
>
> C. By January 1, 2012, every active full-time peace officer, previously certified by CLEET pursuant to Section 3311 of this title, shall be required to attend and complete the evidence-based sexual assault and sexual violence training provided in subsection B of this section.

These courses instructed an officer what to do with a rape victim and OCPD Recruit Class #128 received such training. (Exhibit 8; Training Outline for Criminal Investigations – Sexual Assault, Exhibit 11; Exhibit 2.)

11. During Holtzclaw's training academy, officers received training in the following subjects: OCPD Policy 205.0, Code of Conduct; OCPD Policy 205.10, Law Enforcement Code of Ethics; OCPD Policy 205.15, Oath of Office (OCPD Polices 205.0-205.15, Exhibit 12); OCPD Policy 554.00-554.60, Use of Force (Exhibit 13); OCPD Procedures 103.0 through 103.42, generally, Sexual Harassment (Exhibit 14); and OCPD Procedure 230.0-230.10, Arrest Procedures (Exhibit 15); (Exhibit 2.). The training on Sexual Assaults described above included that it was a crime under Oklahoma law for an officer to sexually assault or sexually batter someone in the officer's custody. (Exhibit 11 at p. 3(A)(7) Rape and p. 7(K) Battery; Exhibit 2.) Additionally, in a class entitled "Major Crimes," the recruit was again trained that the statutory prohibition of rape included when the victim was under the legal custody of a law enforcement officer. (Training Outline Major Crimes, at p. 11, Section X(A)(7), Exhibit 16; Exhibit 2.) Holtzclaw was also trained

on the probable cause, laws of arrest, and use of force. (Exhibits 17-19, respectively.) At p. 6 of the outline on Use of Force, the trainee is taught that any force used to commit a crime is not a reasonable use of force. (Exhibits 19 and 2.)

12. Following his graduation from the Police Academy, Holtzclaw, as do all OCPD recruits, received approximately 4 months of additional training with Field Training Officers. (OCPD Policy 670.20, Field Training and Evaluation Program, Exhibit 9; Procedures 434.0, Field Training Evaluation Unit; and 434.10, Field Training Evaluation Program, Exhibit 20; Exhibit 2.) After graduation from the academy and the FTO program, a new officer is on probation until successfully completing the probationary period and is "cleared" by the OCPD Probation Review Board, which also consists of four OCPD majors and a deputy chief. (OCPD Procedure 160.20, Probation Review Board, Exhibit 21; Exhibit 2.)

13. In April 2013, Holtzclaw appeared before the OCPD Probation Review Board. It was determined that his performance was satisfactory, and he was recommended for permanent status as a police officer. Chief Citty agreed. (End of Probation Memo of Chief Citty, April 8, 2013, Exhibit 22; Exhibit 2.)

14. On May 1, 2013, at approximately 8:46:42 p.m., Darnell Armstrong called the City's 911 center and stated that he thought he lost his mind; he seen (sic) dragons; that people are following him; that dead people were following him; that he was on drugs, that he wanted to kill himself; and that his mother was the only person he trusted. He refused to answer any questions. (Incident Detail, OCPD Incident No. 13-35649, at p. 2, Exhibit

23; 911 tape, Exhibit 24; Exhibit 2.)[3]

15. Mr. Armstrong gave the call taker an address of 1449 N.W. 98th, but the "land" line he called from gave an address of 1421 N.W. 99th Street. This call was assigned to Officer Dutton at 8:59 p.m. with Officer Tabiai assigned as backup at 9:08 p.m. (Exhibit 23; Exhibit 2.)

16. Both Valencia Maiden (the mother of Mr. Armstrong) and Jean Griffin (his grandmother) were present during part of this incident. Both completed third party affidavits/statements regarding the need to take Mr. Armstrong into protective custody. See 43A O.S. § 5-207(C). (Affidavits, Exhibit 25; Exhibit 2.)[4]

17. Ms. Maiden and Ms. Griffin were interviewed by members of the OCPD Homicide Unit after this incident. Ms. Griffin told the investigator "I didn't see anything they done wrong. They were just trying to help him." (Depo. of Griffin, pp. 69 and 82; Video of Jean Griffin Interview, Exhibit 27; Exhibit 2.) She denied seeing any officer try to "hit or punch Armstrong." (Exhibit 27; Exhibit 2.) Both Ms. Griffin and Ms. Maiden

[3] Defendants deny this incident is relevant however, because of Plaintiffs' allegations, they must advise the Court of the facts of it. See ¶ 21(a) of Plaintiffs' First Amended Complaint. (Doc. 8). According to Plaintiffs' Response to Defendant Bennett's dispositive motion, Plaintiffs' latest theory is that Holtzclaw (and others) conspired to harm black females. (Doc 159 at pp. 23-25). Darnell Armstrong was not a black female.

[4] Ms. Maiden was asked to admit the truthfulness of statements made in these affidavits. She denied them. (Maiden's Response to Defendant City's Request for Admissions, Exhibit 26, p. 4 at request nos. 19-20.) Both admitted they filled out the affidavits. (Depo. of Maiden, pp. 74-5; 105-7, and Griffin, pp. 58-61.) Please note that 43A O.S. § 5-207(C) and the affidavits refer to criminal sanctions for lying. In any event, under *Scott v. Harris,* 550 U.S. 372 (2007), a court is not required to ignore evidence made contemporaneously when a plaintiff later denies those "facts."

attempted to assist the officers by holding the decedent's legs until Holtzclaw arrived and relieved them. (Exhibit 27; Exhibit 2.)

18. Ms. Maiden admitted that she told Mr. Armstrong he was going to the hospital either with them (Maiden and/or Griffin) or the police, and that the police did not want him to ride with her because her car had four doors. (Report of Benavides, OCPD Case No. 13-035649, at pp. 2 and 3, Exhibit 28; Exhibit 2.) The police were afraid Mr. Armstrong would jump out and wanted him to go with Ms. Griffin because her car was a two-door.[5] (Video of Interview of Maiden, Exhibit 29; Exhibit 2; Depo. of Griffin, p. 26.) He refused. She stated the officers tackled Mr. Armstrong;[6] that the officers got one handcuff on him but were struggling to get the other on; that she (and Ms. Griffin) tried to assist by holding his legs; that the officers finally put something on his ankles[7] and made her and Ms. Griffin go into the house. She denied seeing the officers "hit, punch or kick Clifton." (Exhibit 28 at p. 4; Depo. of Maiden, pp. 73; Exhibit 29; Exhibit 2.) When asked if she saw the officers do anything wrong, she said she did not see it and was not saying they did, however, she could not see it all because she was made to go into the house which was strange. (Exhibit 28 at p. 4; Exhibit 29; Exhibit 2.) After the incident, Ms. Maiden had someone take photos of her depicting the position Armstrong was in at various time during the incident. Exhibit 30 is a photo that is an accurate representation of the position

[5] Mr. Armstrong would have to get into the back seat of the car.
[6] Mr. Armstrong got into a football stance and "rushed" one of the officers.
[7] Holtzclaw applied the hobble restraint because Mr. Armstrong was trying to kick the officers. The OCPD changed to this hobble restraint after *Cruz v. City of Laramie, Wyoming*, 239 F.3d 1183 (10th Cir. 2001) prohibited "hogtying." (Exhibit 2.)

Armstrong was in after the hobble was applied. (Depo. of Maiden, pp. 108-9; Depo. of Griffin, p. 64.) Ms. Griffin conceded Armstrong's feet were more than 12 inches from his hands. (Depo. of Griffin, pp. 64-5.) The Medical Examiner's office attributed the cause of the death of Clifton Armstrong to Excited Delirium Syndrome due to Methamphetamine Toxicity. (Medical Examiner's Report, Exhibit 31.) Chief Citty was aware of this incident immediately after it occurred; the Medical Examiner's opinion as to cause of death; the DA's decision; the OCPD Screening Board's decision on the officers' use of force; the lawsuit; and the Plaintiff's dismissal of it. (Exhibit 2.) Ms. Maiden dismissed her suit.

19. On November 5, 2013 at 18:26, Holtzclaw was assigned a stolen vehicle call and given the description of a suspect as "a black female wearing a red shirt with blue jeans." (Dispatch Tape, Exhibit 32; CAD Report, Exhibit 33; Exhibit 2.) As he approached the location of this call, he observed Ms. Demetria Campbell, a black female wearing a red sweatshirt and jeans. (Lt. Bennett's Use of Force Investigative Report, Exhibit 34; Report of Holtzclaw, Exhibit 34 at pp. 14-15 and 18-20; Exhibit 2). He stopped to investigate, but Ms. Campbell kept walking away from him. He eventually took her into custody by placing "her against the wall of (TJ's Seafood) at 2027 N.E. 23rd Street." (Exhibit 34 at p. 6; Exhibit 2; Depo. of Holtzclaw, pp. 96-8.) He advised dispatch he had a possible suspect in custody and was taking her to the scene. (Exhibit 32; Exhibit 2.) At the scene, the victim of the stolen car was interviewed and stated Ms. Campbell was not the suspect. Ms. Campbell was released. Holtzclaw failed to report his use of force. (Exhibit 33; Exhibit 2.)

20. At approximately 20:32 on November 5, 2013, a nurse from Presbyterian Hospital called the OCPD stating she had a patient who claimed she was assaulted by a

police officer and needed a supervisor. (Neither the nurse nor Ms. Campbell identified the officer by name (Depo. of Campbell, pp. 162-3).) Lt. Bennett was able to identify which officer Ms. Campbell was complaining on by checking with OCPD dispatch to see who was on the call of the stolen vehicle. (Presbyterian Nurse's Call to OCPD, Exhibit 35; Exhibit 33; Exhibit 2; Depo. of Bennett, 97-8.)

21. Lt. Bennett interviewed Ms. Campbell and Holtzclaw. He completed a Use of Force Report (Exhibit 33) as required by OCPD Procedures 150.0-150.17 (Exhibit 36; Exhibit 2). Because Lt. Bennett was not advised that Ms. Campbell (as she would later claim) felt the officer was "perverted" and because Lt. Bennett (and his chain of command and three majors who make up the OCPD Screening Committee[8]) believed that Holtzclaw used only the amount of force necessary to take Ms. Campbell into custody (investigative detention), Chief Citty was not made aware of this incident until Holtzclaw was identified as the officer who was sexually assaulting women in northeast Oklahoma City. (Depo. of Citty, pp. 180-1; Exhibits 1 and OCPD Procedures 150.00-150.17, Exhibit 36.) Lt. Bennett's Use of Force Report was reviewed by the OCPD Screening Committee. (OCPD Procedure 150.14, Exhibit 36; OCPD Procedure 160.40, Exhibit 37; Exhibit 2.) Ms. Campbell now claims she advised Lt. Bennett that Holtzclaw was "perverted," among other things. (Depo. of Campbell, pp. 133-4; 173-6; 178.) This is not in Lt. Bennett's report.

[8] In responding to Lt. Bennett's dispositive motion, Plaintiffs apparently concede that Lt. Bennett's report could not have advised the OCPD command of Campbell's alleged "sexual misconduct" claims. (Doc. 159 at p. 2). (See First Amended Complaint, ¶¶ i-xi, ¶ 21b (Doc. 8)).

(Exhibit 33.) He denies that she told him that. (Depo. of Bennett, pp. 82-3).

22. Pursuant to OCPD Procedure 143.0 (Exhibit 38), if a citizen complains of criminal misconduct by an OCPD officer, Chief Citty was advised and made a determination as to which unit in the OCPD would investigate the complaint—either the employee's supervisor, the Office of Professional Standards (IA), or that division of the OCPD who normally investigate that type of crime; i.e., in this case, the Sexual Assaults Unit because of their expertise with those statutes. (Exhibit 2; Depo. of Citty, pp. 48-9; 171-2; 283-4.) There was a citizen's complaint received about Holtzclaw on March 17, 2014 by a black male alleging false arrest, harassment, physical abuse and mental distress (Not sexual misconduct). It was investigated and determined to be "unfounded." (Administrative Investigation of Lt. Arthur Gregory, Exhibit 39; Exhibit 2,).

23. On March 31, 2014, Holtzclaw took and passed The City of Oklahoma City's internet test on the City's sexual harassment policy, which states:

> SECTION 403 - SEXUAL HARASSMENT
>
> 403.01 Sexual harassment occurs when unwelcome sexual advances, requests for sexual favors, and other inappropriate verbal or physical conduct or communication of a sexual nature which:
>
> (a) is made either explicitly or implicitly a term or condition of an individual's employment;
>
> (b) has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment; or
>
> 403.02 Sexual harassment can occur between supervisors and employees, co-workers, and employees and non-employees (e.g., citizens, contract laborers, vendors, etc.). Any employee who engages in such conduct is subject to disciplinary action, including termination. (Refer to PSB containing the Policy Prohibiting Discrimination and

> Sexual Harassment, Management Bulletin containing the Information Technology Acceptable Use Policy and Section 1203).

(Sexual Harassment Internet Test Certificate, 2014. Exhibit 40; Oklahoma City Personnel Policy 403, Exhibit 41; Exhibit 2.) In 2013, he took the test twice as he did not pass it the first time but did the second time. The employee's test answers are not saved, so it is unknown why he did not pass it the first time. (Sexual Harassment Test Results of 2013, Exhibit 42; Exhibit 2.)

24. Holtzclaw attended 58 additional hours of In-Service training since his graduation from the OCPD Recruit Academy through June 18, 2014, when he was placed on administrative leave. (In-Service Training Record of Holtzclaw, Exhibit 43; Exhibit 2.)

25. Det. Rocky Gregory had, prior to Ms. Morris' complaint, investigated other complaints of sexual assaults alleged against OCPD officers, including those against former officer Maurice Martinez. See Fact 4 of Defendant Gregory's Motion for Summary Judgment. (Exhibit 2.)

26. On May 24, 2014, when Ms. Morris complained of a possible sexual assault by an officer "three or four days earlier," Lt. Holland notified the on-call Assaults supervisor of Ms. Morris' complaint; however, he declined to send an investigator out.[9] (Trial Testimony of Holland, pp. 3195-3203;(Deputy Chief Kuhlman's Revised Call Out Procedures, September 8, 2011, Exhibit 45 at p. 3 "Sex Crimes" Please notice at p. 1, second full paragraph, the on-call Lieutenant is given "the discretion to call out an

[9] At the time of the May 24, 2014 complaint, Ms. Morris was apparently high on crack cocaine. (Report of Thomas, OCPD Case No. 14-041539 (001), Exhibit 44; Exhibit 2.)

investigator"; Exhibit 2). When Major Denise Wenzel was advised of this decision, she, based upon Chief Citty's previous order that this type of complaint be assigned to a sexual assault investigator, assigned it to Defendant Gregory on May 27, 2014 (Depo. of Wenzel, p. 35; 40-2.) Det. Gregory attempted to interview Ms. Morris but could not locate her until June 3, 2014. Ms. Morris could not identify the officer who assaulted her. She did not identify the actual date of the assault and also lied about the location. (See Defendant Gregory's Motion for Summary Judgment at pp. 7-13.)

27. On June 18, 2014, Ms. Ligons complained of a sexual assault by an OCPD officer to patrol officers, one of whom was a lieutenant, who called the "on-call" Sex Crimes lieutenant. Det. Davis was immediately assigned to investigate her claim because she was the on-call investigator. Det. Davis went to the hospital to interview Ms. Ligons where a rape "SANE" exam was conducted. Later, Det. Davis conferred with Det. Gregory because she was aware of his unsuccessful investigation into Ms. Morris' complaint. All OCPD police 2nd shift Springlake black vehicles were accounted for except Holtzclaw's and were not at the location of the assault. (Depo. of Kuhlman, p. 177-8.) With the aid of Dispatch and his interview on June 18, 2014, these detectives were able to determine that Holtzclaw had turned off his MDC (which turns off the AVL (GPS)) after he left the Springlake Station. *Id.* Holtzclaw admitted he had stopped Ms. Ligons but denied any sexual contact. (Interview of Holtzclaw Transcript, pp. 6-7; 13-5; 21-25; 36-7; 40-3, Exhibit 46; Video Recording of Holtzclaw Interview, Exhibit 47; Exhibit 2.)

28. Chief Citty immediately placed Holtzclaw on administrative leave, stripping him of his badge, his commission card, and his firearm. (Exhibit 46 at pp. 83-5; Exhibit

47; Exhibit 2.)

29. As a result of the OCPD's investigation into these sexual assaults,[10] the District Attorney filed numerous charges against Holtzclaw, and he was arrested on August 21, 2014. (Report of Det. Gregory, OCPD Case No. 14-041539 (028), Exhibit 53; Exhibit 2).

30. On October 24, 2014, Holtzclaw was given notice of a predetermination hearing with 29 allegations of misconduct arising from his sexual misconduct with 10 victims, including Plaintiff Hill (Allegations 1-5); Plaintiff Barnes (Allegations 7-11); Plaintiff Morris (Allegations 18-21); Plaintiff Johnson (Allegations 22-23); Plaintiff Lyles (Allegations 24-27); and Plaintiff Ligons (Allegations 28 and 29) (The OCPD had not identified the other 3 victims yet). (Notice of Predetermination Hearing, Exhibit 54.)

31. On December 11 and 23, 2014, a predetermination hearing was conducted on these allegations. Holtzclaw was present but did not participate. As a result of Deputy Chief Jester's December 31, 2014, memo to Chief Citty (Exhibit 55) and the evidence presented to this board, on January 8, 2015, Chief Citty sustained the allegations and terminated Holtzclaw's employment with the City. (Citty's Letter of Termination, January 8, 2015, Exhibit 56.)

32. Contrary to Plaintiffs' allegations (Doc. 8 at ¶ 42), the investigation was not

[10] Holtzclaw was initially charged with 16 crimes and arrested. The Information was amended 3 times charging him with 36 crimes. He was convicted of 18. *See* Information, Amended Information, Second Amended Information and Third Amended Information and Probable Cause Affidavits attached; (Exhibits 48-51), and Judgment and Sentence (Exhibit 52) in *State v. Holtzclaw*, CF-2014-5869.

conducted because Ms. Ligons' cousin is an OCPD officer. (Exhibit 2.) Even Ms. Ligons doesn't believe this allegation. (Depo. of Ligons, p. 74 referring to ¶ 42 of the First Amended Complaint filed in *Barnes et al*.; Defendant's Depo. Exhibit 3, *see* pp. 72-73.) (*See* also Sgt. Carter's report, OCPD Case No. 14-049050 (003), Exhibit 57, wherein he told his mother to tell Ms. Ligons to "call 911 and report it" and went back to sleep. (Exhibit 2.)

STATEMENT OF THE CASE

Plaintiffs' Amended Complaint appears to allege unreasonable seizures, violations of due process and equal rights protections, and the right to bodily integrity and privacy. Plaintiffs' Second Cause of Action is labeled "Fourth and Fourteenth Amendment (sic) Seizure/Deprivation of Liberty" (¶¶ 56 and 58); the Third Cause of Action is labeled "Fourth and Fourteenth Amendment (sic) Unlawful Use of Force" (¶¶ 61, 62 and 64); the Fourth Cause of Action is labeled "Conspiracy to Interfere with Fourth and Fourteenth Amendment (sic) Rights[,]" apparently alleging there was not a timely investigation of Plaintiff Morris' May 11, 2014 [sic] report; ¶ 70 but see ¶ 74, wherein it appears that Plaintiffs allege that there are 14 victims (including Campbell), not 13; the Fifth Cause of Action is labeled "Fourth and Fourteenth Amendment (sic) Failure to Supervise." At ¶ 83, Plaintiffs allege that this failure to supervise[11] violated their liberty interest as they were "unlawfully seized in violation of the Fourth and Fourteenth Amendments…" (¶ 83). The Sixth Cause of Action is labeled "Fourth and Fourteenth Amendment (sic) Municipal

[11] The subheading of this cause alleges it is brought against "all Defendants." Plaintiffs' fail to allege in this cause (¶¶ 75-84) which Defendant is or was Holtzclaw's supervisor.

Liability," subheading of "All Defendants"; and the heading of the Seventh Cause of Action is labeled "Fourth and Fourteenth Amendments Municipal Liability – Failure to Train." Plaintiff Ligons admitted she had no evidence of Chief Citty participating in a conspiracy (Depo. of Ligons, p. 86) and his actions in terminating Holtzclaw does not sound like ratification. (Depo. of Ligons, p. 89-93 and Defendant's Deposition Exhibits 8 and 10). Plaintiff Morris admitted she has no evidence of Chief Citty participating in a conspiracy (Depo. of Morris, p. 88-9) and his actions in terminating Holtzclaw does not sound like ratification (Depo. of Morris, pp. 83-5 and Defendant's Deposition Exhibits 14-16). Plaintiff Lyles does not know why she sued Chief Citty except he was a "lieutenant" over Holtzclaw (Depo. of Lyles, pp. 76-7). She has no evidence of a conspiracy (Id. at 78) and does not know what ratification means (p. 80) but thinks his actions afterwards, including his letter terminating Holtzclaw is ratification. (Depo. of Lyles, pp. 85-6 and Defendant's Deposition Exhibit 8.) Plaintiff Barnes does not know how Chief Citty ratified Holtzclaw's actions. (Depo. of Barnes, p. 104.) Plaintiff Hill does not know what ratification means (Depo. of Hill, p. 91-2) or if his actions afterwards sounds like ratification. (Id. at 92-8 and Defendant's Deposition Exhibit 11-3.) Plaintiff Johnson also does not know if Chief Citty's actions afterward were ratification. (Deposition of Johnson, p. 83 and Defendant's Deposition Exhibits 8-10.)

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). Even if Holtzclaw unlawfully seized Plaintiffs, the Amended Complaint fails to advise (even with its

misrepresentations) Chief Citty how he is responsible for such unreasonable seizure. The OCPD has a constitutional policy on arrests (see *Franklin v. Thompson,* 981 F.2d 1168, 1170 and n. 3 (10th Cir. 1992)); one that requires a misdemeanor (ordinarily) occur in the officer's presence, which is a higher standard than "probable cause" under the Constitution, and its training is consistent with its policy. There is no respondeat superior in § 1983 claims.

The City's policies on Law Enforcement 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 sexual assault, or actually sexually assaulting or raping a person. (Exhibits 12, 13, and 15.) 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. (Exhibits 11, 16 and 19.)

There is or was nothing in Holtzclaw's background that would have alerted a police chief that Holtzclaw would commit such crimes. The OCPD did not fail to investigate Holtzclaw's background. (Facts 1-13 herein.)

In *Jennings v. City of Stillwater,* 383 F.3d 1199 (10th Cir. 2004), the Court rejected a failure to investigate cause of action (at least as to the one plaintiff). Chief Citty was unaware of Ms. Campbell's initial complaint that Holtzclaw physically assaulted her or her later claim that he sexually assaulted her until she filed her lawsuit on July 31, 2015, in Oklahoma County District Court in *Campbell v. City of Oklahoma City, et al.,* CJ-2015-4217 (Exhibit 2).

Since Plaintiffs misrepresent the facts of the Armstrong incident and his cause of death, it is impossible to respond, other than to state what should be obvious. An alleged (but denied and unproven) use of excessive force is not relevant to later sexual assaults.

Plaintiffs' Sixth Cause of Action alleges Chief Citty ratified the other Defendants' actions as "within policy." It is unclear which actions of Defendants were supposedly ratified. To suggest that Chief Citty ratified Holtzclaw's acts is just even more incredulous. The complaints were investigated. Again, Plaintiffs' misrepresentations of those events and of the alleged notice is telling—obviously 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 based upon her failure to cooperate. When Ms. Ligons came forward, the OCPD investigated her claims; identified the officer as Holtzclaw; interviewed him; immediately placed him on administrative leave; found numerous other victims; investigated all victims' claims; presented its investigation to the District Attorney who filed charges against him; arrested Holtzclaw; and, then Chief Citty fired him. This is not ratification.

Plaintiffs, in their First Amended Complaint, misrepresent the Armstrong "incident" (¶ 21(a)); the facts of Ms. Campbell's complaint (¶ 21(b)(iii), namely, that OCPD was advised that Holtzclaw had an erection; ¶ (vi); that a nurse demanded that a supervisor come to the hospital; ¶ (vii); that Ms. Campbell gave Lt. Bennett the name of Holtzclaw as her alleged assailant; ¶ (x); that Holtzclaw was not questioned about the complaint of Ms. Campbell; ¶¶ (x) and (xi);that Holtzclaw sexually assaulted Ms. Campbell; that the OCPD opened an investigation into Holtzclaw on May 8; that Ms. Morris complained on May 11;

that Ms. Morris reported to Gregory that Holtzclaw had committed a sexual assault on her; that, by monitoring equipment in Holtzclaw's car, the OCPD would know that he was sexually assaulting females. Plaintiffs further misrepresent Defendant City's Answer at Footnotes 3 and 5 of their Amended Complaint.

CONSTITUTIONAL RIGHT AT ISSUE

In *Graham v. Connor,* 490 U.S. 386, 394 (1989), the Supreme Court cited to its prior opinion in *Baker v. McCollan*, 443 U.S. 137, 140 (1979), and stated: "("The first inquiry in any § 1983 suit" is "to isolate the precise constitutional violation with which [the defendant] is charged")."

In *Pearson v. Callahan,* 555 U.S. 223, 231 (2009), the Court restated the general rule regarding qualified immunity by stating:

> The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. The protection of qualified immunity applies regardless of whether the government official's error is "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Groh v. Ramirez,* 540 U.S. 551, 567, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004) (KENNEDY, J., dissenting) (citing *Butz v. Econmou,* 438 U.S. 478, 507, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978) (noting that qualified immunity covers "mere mistakes in judgment, whether the mistake is one of fact or one of law")).
>
> Because qualified immunity is "an immunity from suit rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth,* 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L.Ed.2d 411 (1985) (emphasis deleted).

And at 555 U.S. 223, 244-45, the Court stated:

> …"The principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law. Police officers are entitled to rely on existing lower court cases without facing personal liability for their actions."

In *Wilson v. Layne,* 526 U.S. 603, 618 (1999), the Court stated, "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy."

PLAINTIFFS' FOURTH CAUSE OF ACTION

Plaintiffs' Fourth Cause of Action is labeled "Conspiracy to interfere with Fourth and Fourteenth Amendment Rights" and apparently claims there was some meeting of the minds of the individual Defendants (except, of course, the actual tortfeasor, Holtzclaw) from the time of Ms. Campbell's complaint and Ms. Ligons' complaint to cover up Holtzclaw's criminal actions.

Chief Citty asked Plaintiffs for evidence regarding this alleged conspiracy and received answers that appear to be a restatement of Plaintiffs' allegations, not facts. It is not clear why Plaintiffs believe that only African Americans can investigate claims of African Americans. It is unclear why Plaintiffs believe they have a constitutional right to an investigation of an incident involving some other person and that such investigation be conducted "to the same extent the other African American victims were investigated." It is unclear how Lt. Bennett's "determination" is applicable to this Defendant. It is not clear how or why Plaintiffs believe that they have a right, constitutional or otherwise, to have a DA prosecute anyone. In fact, they do not, unless they were the victim. In *Dohaish v.*

Tooley, 670 F.2d 934, 937 (10th Cir. 1982), the Court held:

> The ordinary citizen does not have a general interest justifying a lawsuit based on the criminal prosecution or non-prosecution of another. *Linda S. v. Richard D.,* 410 U.S. 614, 619, 93 S.Ct. 1146, 1149, 35 L.Ed.2d 536 (1973). Such a right is not recognized in the law and, indeed, it would be contrary to public policy to allow every private citizen to force the prosecutor to proceed with a case in pursuit of a private objective. The district attorney is sworn to uphold the law generally and does not have a duty to enforce the law for the purpose of providing satisfaction to a third person who has no direct legal interest.
>
> Even if such actions were permitted, only the victim would have the required legal standing to bring such an action. *See Warth v. Seldin,* 422 U.S. 490, 498-99, 95 S.Ct. 2197, 2204-05, 45 L.Ed.2d 343 (1975).

Lt. Bennett investigated Campbell's claim pursuant to OCPD Procedure Nos. 150.0–150.17 (Exhibit 36) as a use of force because that is how it was reported to him.[12] There is no constitutional right to an adequate investigation. (And it is denied that there was no adequate investigation.) See *Jennings v. City of Stillwater,* 383 F.3d 1199, 1205 (10th Cir. 2004), wherein the Court stated:

> The question in this case is whether the United States Constitution provides a cause of action for victims of crime when state or local law enforcement officials fail to perform a proper investigation. In general, federal courts are not entrusted with the responsibility of ensuring the effective enforcement of state criminal laws; that role falls to state and local law enforcement authorities. It is the duty of executive officials—not the courts—to take care

[12] Ms. Campbell claims she told Lt. Bennett that Holtzclaw was "perverted, prejudiced, racist, angry." (Depo. of Campbell, pp. 169-70; 174-8.) Her belated claim is not reflected in her medical records that night (Exhibit 58, filed under seal), Lt. Bennett's report (Exhibit 34), her note made that night (Exhibit 60), or her Notice of Tort Claim (Exhibit 59). (Depo. of Campbell, pp. 155-6; 196-197.) Exhibit 1 to her deposition (Exhibit 60 herein) is a copy of her own handwritten statement of what she told Bennett. The statement also does not support Plaintiff's claim that Campbell advised Bennett that Holtzclaw "sexually" assaulted her.

> that criminal laws are faithfully executed. *See* U.S. Const., art. II, § 3; *see Morrison v. Olson,* 487 U.S. 654, 690, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).
>
> Plaintiff puts forward three alternative legal theories for a constitutional cause of action against the police officers who allegedly mishandled or sabotaged the case against her alleged assailants, and the City of Stillwater.
>
> * * *
>
> Sympathetic though we are to a young person who has undergone such an ordeal, exacerbated by the alleged dereliction of duty on the part of the police who are employed to protect her, we conclude that none of these legal theories can be sustained. (Note omitted.)

ARGUMENTS AND AUTHORITIES

PROPOSITION NO. I: DEFENDANT CITTY IS ENTITLED TO JUDGMENT ON PLAINTIFFS' FOURTEENTH AMENDMENT CLAIM(S)

A. Hiring

In the case of *Schneider v. City of Grand Junction Police Dept.,* 717 F.3d 760 (10th Cir. 2013)[13], the Court dealt with a "§ 1983 action against city police department and police officer's supervisors alleging that inadequate hiring and training of officer, inadequate investigation of prior sexual assault complaint against him, and inadequate discipline and supervision of him caused her to be raped." (*Id*. at 760, syllabus not a part of opinion.) Regarding the claims against the supervisor, the Court stated at 767-68:

> We have referred to claims against supervisors as based on "supervisory liability," *see, e.g., Meade v. Grubbs*, 841 F.2d 1512, 1527 (10th Cir. 1988), though this label can be misunderstood as implying vicarious liability. "Section 1983 does not authorize liability under a theory of respondeat superior." *Brown v. Montoya,* 662 F.3d 1152, 1164 (10th Cir. 2011). For this reason, the Supreme Court has suggested the term "supervisory liability" is

[13] In responding to Lt. Bennett's dispositive motion, Plaintiffs' cite to this opinion but ignore its holdings. (Doc. 159 at p. 28).

> "a misnomer." *Ashcroft v. Iqbal,* 556 U.S. 662, 677, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). "Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Id.*
>
> The plaintiff therefore must show an "affirmative link" between the supervisor and the constitutional violation. *Dodds v. Richardson,* 614 F.3d 1185, 1195 (10th Cir. 2010). This requires, for example, more than "a supervisor's mere knowledge of his subordinate's" conduct. *See Iqbal,* 556 U.S. at 677, 129 S.Ct. 1937. This notion is embodied in the three elements required to establish a successful § 1983 claim against a defendant based on his or her supervisory responsibilities: (1) personal involvement; (2) causation, and (3) state of mind.
>
> * * *
>
> *Iqbal,* however, articulated a stricter liability standard for this first element of personal involvement. *See Dodds,* 614 F.3d at 1199. In *Iqbal,* the Supreme Court explained that "[b]ecause vicarious liability is inapplicable to … § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." 556 U.S. at 676, 129 S.Ct. 1937.
>
> "[W]e have not yet had occasion to determine what allegations of personal involvement … meet *Iqbal*'s stricter liability standard." *Dodds*, 614 F.3d at 1199. (Note omitted.)

The *Schneider* Court assumed that Ms. Schneider had presented sufficient evidence of the first element, "personal involvement." Chief Citty denies that these Plaintiffs can prove any element of supervisory liability against him. Chief Citty denies that he created any policy or custom that would cause an officer to believe he could "get away with sexual assaults" of citizens; and it is repugnant to suggest otherwise. (*See* Facts of Det. Gregory's investigation of former officer Martinez in Defendant City of Oklahoma's City's Motion for Summary Judgment and Brief in Support.) Chief Citty had each complaint investigated by a supervisor, IA or the Sexual Assaults Unit. (Fact 1.) Recruits are instructed that any such assault is Second Degree Rape in violation of the State's criminal code (Exhibit 11.)

It is also a violation of OCPD and City policies. (Exhibit 54.)

In *Schneider*, regarding the second and third elements, the Court stated at 768-69:

> The second element requires the plaintiff to show that the defendant's alleged action(s) caused the constitutional violation. As we said in *Dodds,* nothing in *Iqbal* "altered the Supreme Court's previously enunciated § 1983 causation … analysis." *Dodds,* 614 F.3d at 1200. "A plaintiff [must] establish the 'requisite causal connection' by showing 'the defendant set in motion a series of events that the defendant knew or reasonably should have known would cause others to deprive the plaintiff of her constitutional rights.'" *Id.* at 1185 (quoting *Poolaw v. Marcantel,* 565 F.3d 721, 732-33 (10th Cir. 2009)); *see also Starr v. Baca,* 652 F.3d 1202, 1218 (9th Cir. 2011)….
>
> * * *
>
> The third element requires the plaintiff to show that the defendant took the alleged actions with the requisite state of mind. Precisely what state of mind is required for individual liability depends on the type of claim a plaintiff brings. *See Iqbal,* 556 U.S. at 676…; *Dodds,* 614 F.3d at 1204-05. Ms. Schneider asserts a violation of her right to bodily integrity, which is a substantive-due-process claim. See *Abeyta ex rel. Martinez v. Chama Valley Indep. Sch. Dist., No. 19,* 77 F.3d 1253, 1255 (10th Cir. 1996). In the district court, the parties agreed that the applicable state of mind for a substantive due process claim is deliberate indifference, and the district court employed that standard.
>
> On appeal, no one challenges the use of the deliberate-indifference standard. We therefore assume without deciding that deliberate indifference is the applicable state of mind. This is consistent with our approach in *Dodds,* which also concerned a substantive due process § 1983 claim, where we declined to consider whether deliberate indifference was the correct standard because neither party challenged the district court's use of that standard. 614 F.3d at 1205. We assumed without deciding, as we do here, that deliberate indifference is the standard for a claim of violation of substantive due process. *Id.*
>
> " '[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Bd. of Cnty. Comm'rs v. Brown,* 520 U.S. 397, 410, … (1997). Deliberate indifference can be satisfied by evidence showing that the defendant "knowingly created a substantial risk of constitutional injury." *Dodds,* 614 F.3d at 1206.

In keeping with their "scatter shot" allegations of constitutional violations (and without any evidence), Plaintiffs allege the usual deficiencies: hiring, training and supervision. 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.

In this case, the OCPD (as it does with all recruits who pass the initial tests) conducted a full background investigation of Holtzclaw, including checking with previous employers, reviewing financial records and conducting a full criminal records search. Hotlzclaw took and passed the CPI, the MMPI and a polygraph test (Exhibit 3, 5 and 6). Facts 1-13. There was nothing in his background to suggest he would commit these sexual assaults. In any event, Chief Citty could not be said to be deliberately indifferent.

B. Training

Regarding training, the Court in *Schneider,* at 773-74, stated:

> …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, Officer 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.

The City (and Chief Citty) did train its officers not to sexually assault its citizens.

C. Supervision

Regarding supervision, the record in *Schneider* revealed that a woman previously claimed that the officer had sexually assaulted her while he was off duty. The officer denied that the sexual activity was non-consensual (the female admitted that the encounter started as consensual but ended with non-consensual sexual activity). The Court stated:

> We agree that Chief Gardner's disciplinary decision did not reflect deliberate indifference.
>
> As the district court noted, the evidence regarding the V.W. complaint was equivocal. The court explained that the medical evidence was inconclusive, V.W. was an unreliable witness who admitted that the encounter began consensually, and the deputy district attorney determined there was

> insufficient evidence for a criminal conviction. Officer Coyne maintained that the entire encounter was consensual, and he passed a polygraph test to that effect. It is only in hindsight, with knowledge of the assaults on Ms. Schneider and A.L., that the scales may have tipped in favor of V.W.'s version of events. Whether Chief Gardner acted with deliberate indifference must be based on what he knew then, not what is known now.

(*Id.* at 776.) Chief Citty was not aware of Ms. Campbell's claim of physical assault until after Ms. Ligons came forward. He was not advised that she claimed it was a sexual assault until her lawsuit was filed.[14] *S*ee Lt. Bennett's Use of Force Report (Exhibit 34), Ms. Campbell's Notice of Tort Claim (Exhibit 59), and her lawsuit (Exhibit 61). (In *Schneider,* the chief did discipline the officer for having a sexual relationship with the female. *Id.* at 777.) That opinion does not deal with a situation with an unrelated complaint in which the chief's subordinates believed nothing occurred that would violate OCPD policy (or state law).

D. 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).

[14] Or until these Plaintiffs filed their lawsuit.

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, found 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. In dealing with this employment case, 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 sexual assault case. A supervisor's after the event action could not prevent injury. In any event, Chief Citty 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 Chief Citty in approving whoever's actions Plaintiffs believe are ratified—Chief Citty denies he ratified Holtzclaw's actions. Therefore, Chief Citty's actions or inactions cannot be the moving force behind the violation. *Monell v. New York Dept. of Social Services,* 436 U.S. 658 (1978) 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 10th 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.) See also *Cordova v. Aragon,* 569 F.3d 1183, 1194 (10th Cir. 2009) ("basic principles of linear time prevent us from seeing how conduct that occurs after the alleged violation could have somehow caused the 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.

Plaintiffs' allegation of ratification is unfounded.

PROPOSITION NO. II: CHIEF CITTY IS ENTITLED TO JUDGMENT ON QUALIFIED IMMUNITY.

A. Hiring, Training, Supervision, and Investigation of Complaints

Chief Citty asserts that he is entitled to rely upon the U.S. Supreme Court's decision in *Bd. of Cnty. Comm'rs of Bryant v. Brown, id.*, and the Tenth Circuit's decisions in *Schneider v. City of Grand Junction Police Dept.,* 717 F.3d 760 (10th Cir. 2013), and *Jennings v. City of Stillwater,* 383 F.3d 1199 (10th Cir. 2004), as evidence that the City's hiring, training, supervision of its officers, investigations of incidents and complaints is lawful. He certainly cannot be said to be "deliberately indifferent." In *Wilson v. Layne,* 526 U.S. 603, 618 (1999), the Court stated:

> …[b]etween the time of the events of this case and today's decision, a split among the Federal Circuits in fact developed on the question whether media ride-alongs that enter homes subject the police to money damages. (Citations omitted.) If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.

Chief Citty is entitled to rely upon the Courts' decisions in *Bd. of Cnty. Comm'rs of Bryant v. Brown*, 520 U.S. 397 (1997), *Jennings v. City of Stillwater*, 383 F.3d 1199 (10th Cir. 2004), and *Schneider v. City of Grand Junction Police Dept.,* 717 F.3d 760 (10th Cir. 2013). See also *McGuire v. Cooper*, 952 F.3d 918 (8th Cir. 2020).

B. Plaintiff's Conspiracy Claim

In 2017, the United States Supreme Court decided *Ziglar v. Abbasi,* 582 U.S. __, 137 S.Ct. 1843 (2017). In *Ziglar,* the Court stated at 1867-1868:

> When two agents of the same legal entity make an agreement in the course of their official duties, however, as a practical and legal matter their acts are attributed to their principal. And it then follows that there has not been an

> agreement between two or more separate people. See *id. (Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984)), at 771, 104 S.Ct. 2731 (analogizing to "a multiple team of horses drawing a vehicle under the control of a single driver").

In *Ziglar,* at 137 S.Ct 1868-1869, the Court held the officials were entitled to qualified immunity on a § 1985(3) claim given the lack of clearly established law regarding whether the intra corporate doctrine applies to that type of conspiracy. Therefore, when the Court stated at 1869, "[t]hese consideration suggest that officials employed by the same governmental department do not conspire when they speak to one another and work together in their official capacities[,]" the Court could not be referring to official capacity in the sense that official capacity is just another way of naming the entity the employee worked as a defendant since that entity is not entitled to qualified immunity. *Owen v. City of Independence,* 445 U.S 622 (1980) and *Starkey ex rel. A.B. v. Boulder County Social Services,* 569 F.3d 1244 (10th Cir. 2009). All the alleged conspirators were City employees assigned to the OCPD. The actions allegedly occurred in 2013-14, some three years prior to the United States Supreme Court holding that "Under these principles, it must be concluded that reasonable officials in petitioners' positions would not have known, and could not have predicted, that 1985(3) prohibited their joint consultations and the resulting policies that caused the injuries alleged." Chief Citty is entitled to qualified immunity on Plaintiff's conspiracy claim.

CONCLUSION

WHEREFORE, Chief Citty is entitled to Judgment herein.

Respectfully submitted,

KENNETH JORDAN
Municipal Counselor

By: /s/ Richard N. Mann
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 14 day of September, 2021, I electronically transmitted the attached document 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/ Richard N. Mann