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

TABATHA BARNES, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. CIV-16-0184-HE
	)	
THE CITY OF OKLAHOMA CITY, a municipal corporation, *et al.*,	)	
	)	
Defendants.	)	

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT CITY OF OKLAHOMA CITY'S MOTION FOR SUMMARY JUDGMENT

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RESPONSE TO DEFENDANT CITY'S STATEMENT OF MATERIAL FACTS

1. Undisputed, but immaterial. The Martinez case involved allegations of ***child*** sexual abuse, which carries an entirely different perception than sexual misconduct against adult women.

2. Undisputed, but this statement should be disregarded. These documents were not produced to Plaintiffs in discovery.

3. Undisputed.[1]

4. Disputed and immaterial. Plaintiffs object to this statement because it is an argument, not a statement of undisputed material fact.

5. Undisputed. However, Plaintiffs object to the exhibits cited in support of this statement, as they are hearsay to the extent offered to prove the truth of their contents.

6. Disputed. Holtzclaw was not interviewed as part of the Early Intervention Program [**Ex. 1**, 139:17-146:10], and his UOF investigations were not "re-reviewed." Captain Arthur Gregory testified that he only reviewed what was in the packet sent to him by the Office of Professional Standards, which included essentially only statistical information about each incident, and no narrative. [**Ex. 1**, 139:17-140:8, 141:2-142:15].

7–14. Undisputed.

15. Undisputed, but immaterial. Ms. Morris later told Detective Gregory that she was assaulted the "first, second, third week [of May], somethin', I don't know." [**Ex. 2**]. Additionally,

[1] In violation of the Court's order [Doc. 227 in *Barnes*, No. CIV-16-184-HE] directing City to produce documents relating to sexual misconduct allegations against OCPD officers, City produced only cherry picked reports and summaries thereof, making it impossible for Plaintiffs to assess the thoroughness, timeliness, and extent of these investigations. As such, the Court should disregard the portions of this statement that go beyond the fact that 13 complaints of sexual misconduct were made, and that OCPD took no disciplinary action against any of them.

the report involving a police imposter is immaterial, as the investigators did not believe the officer who assaulted Ms. Morris was an imposter. [*See* **Ex. 3**, 170:18-171:1]. In fact, the investigators suspected Holtzclaw was the perpetrator enough to include his picture in a photo lineup with photos of other officers who were not even on duty at the time Ms. Morris was believed to have been assaulted. [**Ex. 5**; **Ex. 6**]. Further, although Ms. Morris refused to be interviewed, Detective Gregory believed she had really been assaulted by an OCPD officer. [**Ex. 3**, 170:18-171:1].

16-18. Undisputed.

19. Undisputed, except for the statement that the actions of the officers who were called out to investigate Ms. Ligons' allegations was how Chief Citty wanted criminal sexual misconduct allegations against officers to be investigated. Multiple officers testified that the call-out procedures are mere guidelines, and that they ultimately have discretion. [**Ex. 4**, 60:3-8**; Ex. 9**, 51:21-55:9; **Ex. 11**, 78:9-17]. Further, Chief Citty has praised the investigators' actions in investigating the allegations lodged against Holtzclaw, saying they were thorough.

20-29. Undisputed.

Response to City's Facts of City's Hiring & Training of Officers

1-4. Undisputed.

5-6. Undisputed, but immaterial.

7. Undisputed.

8. Undisputed, but immaterial. Further, Plaintiff objects to these exhibits, as the CALEA reports are hearsay.

9-11. Undisputed.

12. Undisputed, but immaterial. OCPD's procedure prohibiting sexual harassment/discrimination only addresses such conduct that is directed toward fellow employees. [Doc. 362-41].

13. Undisputed.

ADDITIONAL FACTS PRECLUDING SUMMARY JUDGMENT

Investigation into Campbell U.O.F. Incident

1. In November 2013, Holtzclaw apprehended Ms. Demetria Campbell at a fast food restaurant, claiming she met the description of a suspect. As Ms. Campbell persistently asked what was going on, Holtzclaw ignored her, slammed her head into a brick wall, handcuffed her, threw her in the backseat of his patrol car, and drove her to the reporting party to be identified. [**Ex. 14**, 132:4-135:2].

2. Although OCPD procedure requires officers to report uses of force to a supervisor [Doc. 362-36, § 150.01], Holtzclaw did not report his encounter with Ms. Campbell. [Doc. 362-34, p. 4]. Instead, Ms. Campbell, who was at the hospital, asked a nurse to call and ask for a supervisor. Lieutenant Bennett was the supervisor who responded to the call. Ms. Campbell reported to him that Holtzclaw had slammed her head into a brick wall, and that he was hateful, aggressive, and perverted. [**Ex. 14**, 132:4-135:2]. She also indicated that she was so fearful of what Holtzclaw would do to her that she urinated on herself in the backseat of his patrol car. [**Ex. 14**, 135:1-2; Doc. 362-34, p. 2].

3. Despite the existence of an OCPD policy that requires a thorough follow-up investigation of all use-of-force incidents [Doc. 368-10, §§ 150.0, 150.12], Bennett, who was the responding supervisor tasked with investigating the UOF incident involving Ms. Campbell (not Holtzclaw's regular supervisor), did not respond to the scene where Ms. Campbell was accosted by Holtzclaw just a couple of hours prior. He never even attempted to seek out witnesses or uncover independent evidence, even though Holtzclaw's and Ms. Campbell's statements starkly conflicted. [**Ex. 7**, 216:8-23; Doc. 362-34, pp. 2-3, 18-20].

4. Pursuant to OCPD procedures, Bennett's investigation into the Campbell UOF Incident was submitted to the Screening Committee that is made up with members of command staff and responsible for reviewing UOF investigations to determine whether the force used was justified and appropriate. [Doc. 368-11; Doc. 362-34, p. 1; Doc. 362-36, § 150.14]. As part of this review, the Screening Committee is also empowered to identify other, non-force-related policy/procedure violations and to notify the offending employee's chain of command. [Doc. 368-11; Doc. 362-36 at § 150.14; **Ex. 13**].

5. Even though it was apparent from the investigation reports relating to the Campbell UOF Incident that Bennett had not even attempted to investigate beyond taking the involved parties' statements, the Screening Committee signed off on the investigation without raising any complaint about the thoroughness of Bennett's investigation—or lack thereof. [**Ex. 16**, 176:6-13; Doc. 362-34, pp. 1, 4-6].

6. Pursuant to OCPD procedure, Chief Citty was responsible for making the final disposition of the incident. [Doc. 362-36, § 150.17].

7. Bennett did not receive any discipline for failing to investigate Ms. Campbell's allegations. [**Ex. 16**, 176:6-13].

8. Holtzclaw did not receive any discipline for his actions during the Campbell UOF Incident, but he received verbal counseling for failing to notify a supervisor of the use of force. [**Ex. 18**; **Ex. 19**; **Ex. 13**; Doc. 362-36 at § 150.01].

9. Notably, at the time of the Campbell UOF Incident, of which Holtzclaw failed to notify a supervisor, Holtzclaw had already been involved in multiple UOF incidents after which a supervisor had been notified, suggesting he knew such incidents needed to be reported but deliberately refrained from doing so following his UOF against Ms. Campbell. [*See* **Ex. 20**; **Ex. 21**; **Ex. 22**; **Ex. 23**].

10. Ms. Campbell has testified that when Holtzclaw arrested her, she could feel that he had an erection as he had her pushed up against the wall. [**Ex. 14**, 51:8-53:13].

Investigation into Washington U.O.F. Incident

11. In another UOF incident in which Holtzclaw was involved, the arrestee, a Black woman, claimed one of the two officers involved hit her in the face. [**Ex. 24**, p. 7]. A passerby who happened to be driving by at the time of the incident, who was also a Black woman, called OCPD on her own initiative to report that she had just witnessed an OCPD officer slap a woman in the face so hard it made her fall back. [**Ex. 24**, p. 6].

12. Despite the statement of the independent witness, the Screening Committee accepted the officers' version of the events—that the woman was not slapped—and determined all force used was justified and appropriate. [**Ex. 24**, pp. 1-3]. Again, the Screening Committee rubber-stamped the investigating supervisor's conclusion without ever questioning the discrepancies in the statements of the people involved. [**Ex. 24**].

Investigation into Allegations of Sexual Assault by Ms. Morris

13. On May 24, 2014, Plaintiff Terri Morris reported to OCPD that she had been raped by an OCPD officer. [**Ex. 25**, p. 1].

14. The responding officers called their supervisor, Lieutenant Michelle Holland, to the scene. [Doc. 362-63, 3196:16-23]. In accordance with OCPD *written* policies and procedures, Lt. Holland immediately notified both the on-call sex crimes supervisor and the Watch Commander[2]

[2] The Watch Commander assumes command of field operations in the absence of command staff (e.g., at night). The Watch Commander is responsible for "[n]otif[ying] or caus[ing] to be notified, higher level command personnel of matters relating to major crimes and/or incidents . . . and any injuries caused by [OCPD] officers. . ." and for "[i]nvestigat[ing], or caus[ing] to be investigated, complaints against police personnel." [**Ex. 26**].

of Ms. Morris' allegations. [Doc. 362-63, 3198:14-23; Doc. 362-45; *see also* **Ex. 26**]. In spite of these notifications, neither one called an investigator to respond to the scene [**Ex. 25**, p. 28].

15. During her first statement to police regarding the sexual assault, Ms. Morris reported that the officer who had assaulted her was a white male with "darker skin[]," "black hair" and appeared to be about 40 years old," [Doc. 362-44]. Ms. Morris said the officer was about 6'0" tall, was "muscular & big," and was clean shaven. [**Ex. 25**, p. 19]. She also said the officer "ran her for warrants" prior to assaulting her. [Doc. 362-44].

16. When notified about Ms. Morris' allegations on or about May 25, 2014, the Division Commander of the Investigations Bureau, Major Denise Wenzel, affirmatively decided that an investigation into allegations that a yet-to-be-identified OCPD officer had raped a woman on duty could wait until May 27, 2014—after the Memorial Day weekend. [**Ex. 10**, 40:5-24 40:5-24 ("***It wasn't something that couldn't keep until Tuesday.***"); **Ex. 9**, 47:18-49:25, 59:1-8].

17. An investigator was not assigned to the case until three (3) days after Ms. Morris reported her assault to police. [**Ex. 25**, p. 4]. When Chief Citty was briefed on the allegations, he directed the Investigations Bureau to continue the criminal investigation instead of Internal Affairs. [**Ex. 10**, 161:6-18].

18. While OCPD investigators were enjoying their holiday weekend, Holtzclaw raped another woman—Plaintiff Carla Johnson—on May 26, 2014. [**Ex. 10**, 40:5-24; **Ex. 27**; Doc. 362-54; Doc. 362-51].

19. As Gregory tried to contact Ms. Morris, members of the Sex Crimes Unit, as well as Major Wenzel, checked OCPD databases to determine if Ms. Morris had any recent documented contacts with OCPD. [**Ex. 25**, pp. 10-14, 21-24]. The last person to have documented contact with Ms. Morris was Holtzclaw, on May 8, 2014. [**Ex. 28**]. Further, though Ms. Morris had also been in contact with another officer in early April, Holtzclaw was the only OCPD officer

to have run Ms. Morris' name for warrants during the month in which Ms. Morris says she was assaulted. [**Ex. 28**].

20. Based on this information and the suspect description Ms. Morris provided, Sex Crimes Lt. Tim Muzny compiled a photo lineup of potential suspects. [**Ex. 25**; **Ex. 4**, 189:17-193:13; **Ex. 3**, 80:21-81:3; **Ex. 5**].

21. When Gregory finally was able to make contact with Ms. Morris to interview her about the allegations she had made days before, Ms. Morris stated that she was assaulted in the "first, second, third week [of May], I don't know." [**Ex. 2**]. Ms. Morris also stated that the officer who assaulted her was in his "thirties, forties, fifties, I don't know." [**Ex. 2**].

22. Gregory asked Ms. Morris to look at a photo lineup, and she declined, indicating she was too scared. [**Ex. 2**; **Ex. 5**; **Ex. 3**, 194:1-21; **Ex. 25**, pp. 26-27].

23. A photo of Holtzclaw, who is a 6'0" darker skinned white male[3] with black hair and a big and muscular build [**Ex. 11**, 38:25-40:8], was among the six photos comprising the lineup Gregory attempted to show Ms. Morris. [**Ex. 5**; **Ex. 4,** 192:8-193:3].

24. When it became clear to Gregory that Ms. Morris did not want to pursue an investigation into her allegations, he provided a refusal to prosecute form, which she signed on June 3, 2014. [**Ex. 29**; **Ex. 2**; **Ex. 25**, pp. 26-27].

25. Even though Gregory subjectively believed Ms. Morris's report that she had been sexually assaulted by an OCPD officer [**Ex. 3**, 170:18-171:1], OCPD made no further effort to identify and apprehend the OCPD officer who assaulted Ms. Morris after she signed the refusal to prosecute form (that is, until after June 18, 2014, when Plaintiff Jannie Ligons came forward to

[3] Detective Gregory admitted Holtzclaw is darker than "pasty white," and Detective Davis acknowledged he was "medium color." Lieutenant Muzny believes he has darker skin. [**Ex. 3**, 55:3-56:10; **Ex. 88**, 144:6-17; **Ex. 4**, 128:5-129:21.

report she too had been sexually assaulted by an OCPD officer). [**Ex. 3**, 218:6-15, 235:8-18; **Ex. 4**, 164:7-167:20; **Ex.** Error! Reference source not found., 126:14-130:13].

26. After Ms. Morris signed the refusal to prosecute form on June 3, 2014, the investigation into her allegations ceased. [**Ex. 3**, 218:6-15, 218:6-15; **Ex. 4**, 182:13-25].

27. At that time, Chief Citty had the power pursuant to OCPD policies to open an administrative investigation and require Holtzclaw to submit to a polygraph to ascertain whether he was the perpetrator. [Doc. 368-64, § 143.0; **Ex. 11**, 175:7-12]. Nevertheless, even though he knew 1) Holtzclaw had been flagged for possible intervention under the EIP three (3) quarters in a row [**Exs. 20, 21, 22, 23**], 2) Holtzclaw largely fit the description Ms. Morris provided of the officer who assaulted her [**Ex. 11**, 38:25-40:8, 66:15-67:3], and 3) Holtzclaw was the last officer to have documented contact with Ms. Morris in the month in which she said she was assaulted [**Ex. 11**, 67:4-19], Chief Citty deliberately chose not to open an administrative investigation or subject Holtzclaw to a polygraph. [**Ex. 11**, 174:11-180:5].

28. Approximately two (2) weeks later, Holtzclaw struck again. In one (1) day, Holtzclaw sexually assaulted Jannie Ligons, Kala Lyles, and Adaira Gardner. [**Exs. 30**, **31**, **32**].

Failure to Supervise Officers

29. First-line supervisors' ability to oversee their subordinates' performance on a day-to-day basis is primarily limited to reviewing the officers' reports and activity cards, which the officers themselves generate. This means patrol officers control the content of virtually everything their supervisors see. [**Ex. 1**, 68:8-69:13; **Ex. 33**].

30. Supervisors do not monitor their subordinates' use of OCPD's records management system, which Holtzclaw used multiple times to make sure none of his victims had reported him to police. [**Ex. 34**; **Ex. 1**, 69:3-17; **Ex. 11**, 265:9-266:18, 271:3-272:11].

31. Supervisors also do not monitor subordinate officers' physical movements to ascertain whether they match up with what is included in officers' reports. [**Ex. 1**, 69:3-17; **Ex. 11**, 265:9-266:18].

32. First-line supervisors do not take all complaints against an officer up the chain of command. [**Ex. 1**, 158:22-159:17]. A supervisor who receives a complaint only needs to send it up the chain of command "[i]f a satisfactory disposition cannot be immediately reached with the complaining party." [Doc. 368-64].

33. A citizen complaint that involves any use of force is investigated as a use of force, not a complaint. [**Ex. 17**, 39:16-41:13; *see generally* Doc. 368-64 *and* Doc. 368-10].

34. Whenever a complainant or a subject of a use of force makes a statement that conflicts with the statement of the officer involved, the Screening Committee takes the word of the officer. [**Ex. 17**, 97:24-98:18].

35. To help identify "problem officers," OCPD has an Early Intervention Program ("EIP"), which was designed to, *inter alia*, "Increase[] Citizen Confidence and Support," "Reduce[] Lawsuit Exposure for the Officer, Supervisor, and the Department," "Seek[] to Correct / Improve[] Officer Performance," and "Allow[s] for a Collective Review of Identifiers." [**Ex. 35**].

36. EIP notifications are sent quarterly and annually. [Doc. 368-14]. An officer will be flagged for possible intervention in an EIP Quarterly Report if, in a single quarter, the officer is involved in "[f]our or more combined incidents to include use-of-force investigations, formal complaints, and/or administrative investigations." [Doc. 368-14]. An officer who is involved in "[t]en or more combined incidents . . . ." will be flagged in the EIP Annual Report. [Doc. 368-14].

37. A supervisor whose subordinate is flagged for the EIP is responsible for conducting a "collective review" of the officer's past incidents (complaints, UOF investigations, etc.) and analyze "alternatives the officer had at the time of the incident," "training issues (lack of or need

for)," "similarities in incidents," "other indicators of possible stress," and "any developing trends or patterns." [**Ex. 35**; Doc. 368-14, § 148.30].

38. Whenever a supervisor reviews a use-of-force investigation as part of an EIP review, they only review the investigating supervisor's narrative and the basic information that comes with the EIP notification, like "the case number, the dates . . . the supervisors that were involved with it, different names and things like that," from each investigation, rather than the whole investigation packet from each incident. [*See* **Ex. 1**, 139:17-143:7; **Ex. 36**; **Ex. 20**; **Ex. 37**].

40. This is true even though it is "not inappropriate" for a supervisor to include *only* the involved officer's account of what happened in their narrative, and to omit details from the arrestee's account. [**Ex. 1**, 106:1-117:1].

41. To obtain any other information about each incident, the supervisor must request it from the Office of Professional Standards [**Ex. 20**].

Inadequate Response to Complaints of Sexual Misconduct

42. Internal investigations are divided into categories: 1) administrative investigations; 2) formal complaint investigations; and 3) citizen complaint investigations [**Ex. 38**, p. 10]: Complaints "originate externally from the department," whereas, "[a]dministrative investigations originate internally as a result of identification of possible misconduct by an employee." [*Id.*].

43. In 2014, OCPD conducted 189 formal or citizen complaint investigations and 161 administrative investigations (which originate internally within OCPD). Approximately 48% of the administrative investigations were classified as "sustained." By contrast, ***only 7%*** of complaint investigations were classified as "sustained." The remaining 176 complaint investigations resulted in a classification of "unfounded" (30%), "exonerated" (8%), "not sustained" (48%), "withdrawn" (6%), or misconduct "not based on complaint" (1%). [**Ex. 38**, p. 10].

44. Personnel investigations that are handled by the Investigations Bureau are not handled any differently than investigations into allegations lodged against ordinary citizens. [**Ex. 39**, Resps. to Supp. Interrogs. Nos. 10, 11].

45. Investigators do not receive any special training on how to handle investigations into allegations of sexual misconduct by fellow officers. [**Ex. 39**, Resp. to Supp. Interrog. No. 2].

46. OCPD lacks any written policy governing how investigations into allegations against OCPD officers are to be handled when victims decline to cooperate. [**Ex. 39**, Resp. to Supp. Interrog. No. 3].

47. Of all the investigations into complaints of sexual misconduct against OCPD officers from 2011 through June 2014, ***zero*** resulted in discipline in any form. [**Ex. 40**].

48. Following criminal investigations into complaints of sexual misconduct against OCPD officers from 2011 through June 2014, Chief Citty hardly ever ordered administrative reviews, even when the DA declined to prosecute a case. [**Ex. 40**].

49. Several officers were allowed to resign in the midst of criminal investigations into allegations of misconduct lodged against them. [**Ex. 40**].

50. One officer, who was previously fired "for sexual contact" with prostitutes while on duty, was later rehired. [**Ex. 11**, 104:24-106:2].

51. Chief Citty would not place an officer on administrative leave pending investigation into allegations of sexual misconduct unless the evidence was strong enough or he "felt like it probably did happen." He would not do it in every case because he did not want to "label" an officer in case nothing happened. [**Ex. 11**, 107:5-108:8].

Failure to Supervise Holtzclaw

52. Holtzclaw was assigned to patrol the Springlake Division in a predominantly Black area. He worked second shift—that is, at night. [**Ex. 41**, 139:11-15, 110:17-22].

53. As a patrol officer, Holtzclaw preferred to work alone. [**Ex. 3**, 285:4-20].

54. Not even a full month after completing his probationary period, Holtzclaw was involved in an in-custody death on May 1, 2013. [Doc. 368-53].

55. In December 2013, a woman Holtzclaw arrested accused him of stealing $100 from her wallet between arresting and booking her. [**Ex. 42**]. City did not produce any evidence that this complaint was investigated, despite the fact that Holtzclaw was flagged for possible intervention in the 2013 EIP Annual Report. [*See* **Ex. 20**].

56. On or about May 1, 2014, Springlake Division Commander Major Brian Jennings advised Deputy Chief Tom Jester that Holtzclaw "pulled a guys [sic] pants off looking for marihuana on the side of the road." [**Ex. 43**]. Again, City produced no evidence that this incident was investigated, even though Holtzclaw was *again* flagged in the EIP report for the first quarter of 2014. [**Ex. 23**].

57. In 2013 alone, Holtzclaw was involved in twelve (12) UOF incidents. [Doc. 368-17].[4] He was involved in five (5) UOFs and one (1) formal complaint in the first quarter of 2014. [**Ex. 23**; Doc. 368-13].

58. In addition to having one (1) formal citizen complaint and being involved in eighteen (18) uses of force, Holtzclaw also generated *informal* complaints:

> I would get calls . . . this officer was driving too fast. This officer stopped me because I'm black. This officer didn't have any right to stop me. And did Daniel generate some of those? On occasion, but I don't have specifics.

[**Ex. 1**, 159:1-15; *see also* **Ex. 3**, 285:21-286:4].

[4] For perspective, this number represents approximately 2% of ***all*** UOF incidents that OCPD supervisors investigated in 2013. [*See* **Ex. 44**].

59. Because of his extraordinary number of incidents, Holtzclaw was flagged as a candidate for the EIP four (4) times after completing his probationary period. [**Exs. 20, 21, 22, 23**; Doc. 368-14, § 148.30].

60. Roger Clark, nationally renowned expert on police practices, has opined it was "apparent" that:

> [Holtzclaw] believed that the culture of the OKPD [sic] would bend in his favor (as obviously occurred in Ms. Campbell's complaint to Lieutenant Bennett) and protect him from investigation and/or punishment. This is further demonstrated in the record by the command staff routine practice of allowing officers that are subject to personnel investigations into allegations of sexual misconduct to resign in lieu of prosecution or disciplinary consequences.

[**Ex. 45**, p. 18].

61. Mr. Clark also explained that Holtzclaw's extraordinary number of incidents of use of force and complaints, and his placement in the EIP, should have "required a closer monitoring of his behaviors while on patrol," including "frequent reviews of his GPS in comparison to his assigned calls, careful checking of his reports, reviews of his radio transmissions, and interviews of subjects he dealt with in the field – especially detentions and arrests." [**Ex. 45**, pp. 19-20]. He also noted that these "well-known methods have been required and established for decades," and that "[e]very competent police administrator and commander knows how to implement them." [**Ex. 45**, p. 18].

62. Mr. Clark further found that OCPD's EIP "allowed supervisors to 'rubber stamp' officers' actions rather than meaningfully review them," and that, "as a result, Holtzclaw remained 'invisible' to any reasonable oversight." [**Ex. 45**, p. 22].

63. According to Mr. Clark, OCPD's EIP was not utilized as intended, despite "the necessity for a robust EIS-EWS (Early Intervention System or Early Warning System) has been a part of every competent Law Enforcement agency throughout the nation." [**Ex. 45**, p. 18].

ARGUMENT & AUTHORITIES

City is liable to Plaintiffs under 42 U.S.C. § 1983 for the role it played in facilitating Holtzclaw's violations of their civil rights. A municipality can be held liable for damages under § 1983 when "execution of the government's policy or custom, whether made by lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury . . . ." *Monell v. Dep't of Soc'l Servs.*, 436 U.S. 658, 695 (1978). There are several ways to prove the "policy" element of a *Monell* claim:

> A municipal policy or custom may take the form of (1) a formal regulation or policy statement; (2) an informal custom amounting to a widespread practice that although not authorized by written law or express municipal policy, is so permanent and well-settled as to constitute a custom or usage with the force of law; (3) the decisions of employees with final policymaking authority; (4) the ratification by such policymakers of the decisions—and the basis for them—of subordinates to whom authority was delegated subject to these policymakers' review and approval; or (5) the failure to adequately train or supervise employees, so long as that failure results from deliberate indifference to the injuries that may be caused.

Bryson v. City of Okla. City, 627 F.3d 784, 788 (10th Cir. 2010) (internal citations and alterations omitted). City points to numerous written policies and procedures it says disproves Plaintiffs' claim for municipal liability under § 1983. In pointing to these, City ignores that "Refusals to carry out stated actual policies could obviously help to show that a municipality's actual policies are different from the ones that had been announced." *St. Louis v. Praprotnik*, 485 U.S. 112, 130-31 (1988) (plurality); *see also Ware v. Jackson Cty.*, 150 F.3d 837, 882 (8th Cir. 1998) ("[T]he existence of written policies are [sic] of no moment in the face of evidence that such policies are neither followed nor enforced." As the Third Circuit aptly noted in *Beck v.City of Pittsburgh*:

> Formalism is often the last refuge of scoundrels; history teaches us that the most tyrannical regimes, from Pinochet's Chile to Stalin's Soviet Union, are theoretically those with the most developed legal procedures. The point is . . . only to illustrate that we cannot look to the mere existence of superficial grievance procedures as a

> guarantee that citizens' constitutional liberties are secure. Protection of citizens' rights . . . depends upon the OPS investigatory procedures.

89 F.3d 966, 974 (3d Cir. 1996). The Third Circuit continued, "***Whether those procedures had substance was for the jury's consideration.***" *Id.* (Emphasis added).

Despite the existence of facially constitutional written policies and procedures, City is liable under *Monell* for Holtzclaw's violations of these Plaintiffs' constitutional rights because the violations were caused by the City's failure to adequately supervise officers and respond to citizen complaints. Additionally, Chief Citty, City's final policymaker relating to questions of supervision and discipline of OCPD officers, acted with deliberate indifference to the rights of Plaintiffs Ligons and Lyles when he declined to open an administrative investigation into Plaintiff Morris' allegations and subject Holtzclaw to a polygraph examination. As a result of these policies, Holtzclaw was able to abuse the power granted to him as a police officer by sexually violating thirteen (13) victims over a period of six (6) months, all while avoiding detection or apprehension.

I. CITY IS LIABLE UNDER § 1983 BECAUSE ITS FAILURE TO ADEQUATELY SUPERVISE ITS OFFICERS & RESPOND TO CITIZEN COMPLAINTS CAUSED PLAINTIFFS' INJURIES.

Plaintiff's constitutional injuries were caused by a municipal policy maintained by the City in the form of a custom of failing to adequately supervise its officers and respond to citizen complaints. In the Tenth Circuit:

> A plaintiff seeking to establish municipal liability on the theory that a facially lawful municipal action has led an employee to violate a plaintiff's rights must demonstrate that the municipal action was taken with deliberate indifference as to its known or obvious consequences.

Schneider v. City of Grand Junction Police Dep't, 717 F.3d 760, 770 (10th Cir. 2013) (quoting *Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 410 (1997)) (internal alterations omitted).

A. Municipal Policy at Issue

City maintained an unwritten policy of failing to supervise its officers and adequately respond to citizen complaints of sexual misconduct. In proving a claim for failure to supervise under § 1983, "the focus must be on adequacy of the supervision in relation to the tasks the particular officer[] must perform." *S.M. v. Lincoln Cty*, 874 F.3d 581, 585 (8th Cir. 2017).

As the Eighth Circuit noted in *S.M.*, "there is always a risk of sexual assaults when male police officers exercise official authority over females." 874 F.3d at 589. But the area in which Holtzclaw worked and the time of day he patrolled especially created "an ideal environment" for him to "coerce sexually vulnerable females into unwanted sexual contact . . ." *Id.* At the time in question, Holtzclaw was a patrol officer assigned to the Springlake Division, where he patrolled in a predominantly Black, impoverished area of town. He worked alone and at night. As a patrol officer, his job duties necessarily entailed one-on-one contact with citizens on a daily basis.

In spite of these working conditions that made it easy for officers like Holtzclaw to engage in misconduct without being apprehended, City's supervision of OCPD officers was pitiful. OCPD did not provide supervisors access to the means necessary to keep track of their subordinates, and its policies limited supervision to conducting post-hoc reviews of reports and activity cards, which the subordinates themselves generate. This means supervisors only see what their subordinates want them to see. Plus, supervisors are unable to monitor their subordinates' use of police systems for suspicious searches (like officers' own names), and they are unable to check officers' AVL (GPS) data to confirm the veracity of officers' reports and logged activities. Even when officers are flagged as part of the EIP, supervisors do not monitor them any more closely; all they are required to do is collectively review past incidents to identify patterns.

Another problematic element of City's anemic supervision of its officers is how OCPD handles citizen complaints. To start, its procedure for investigating a complaint only requires the investigating supervisor to send the complaint up the chain of command if "a satisfactory

disposition cannot be immediately reached with the complaining party." There is no guidance as to what "satisfactory disposition" means or whose satisfaction is at issue. Additionally, complaints that involve uses of force do not get investigated as complaints; they only go through the use of force investigation and review process. The result is that some complaints do not get documented, and internal affairs never sees them. For officers flagged as part of the EIP, this is problematic because these informal complaints that are handled by the supervisor and disposed of without being sent through the chain of command are not part of the collective review of past incidents.

In addition, in any kind of he-said-she-said situation where the complainant's and officer's accounts of what occurred directly conflict with one another (as was the case in the Campbell use of force investigation), it is OCPD's practice to take the word of the officer as true in the absence of independent witnesses or video, etc. Consequently, in 2014, for example, less than 7% of complaints against officers were classified as "sustained." When you compare this percentage with the percentage of sustained findings among administrative investigations that originate *within* the department—that is, 48%—it becomes clear that OCPD only takes seriously those allegations that come from fellow members of the department and disregards citizen complaints as less credible. Findings of anything other than "sustained" mean nothing when you consider that investigating supervisors only give credence to the officer who was alleged to have engaged in misconduct, and not the complainant. Moreover, when a complaint that involves a use of force is made, the incident is investigated as a use of force, not a complaint. As a result, the Screening Committee only decides whether the force used was justified. It is not responsible for determining whether the officer engaged in misconduct or should be disciplined for doing so.

With respect to sexual misconduct complaints specifically, OCPD's record is particularly disturbing. Between 2011 and 2014, OCPD conducted approximately fifteen (15) investigations involving allegations of sexual misconduct by OCPD officers. Of these cases, none resulted in

discipline. When such misconduct cases were investigated criminally by the Sex Crimes Unit and the district attorney declined to file charges, Chief of Police Bill Citty rarely ordered administrative investigations to ascertain whether the officers being investigated violated any policies or procedures or needed to be disciplined. No police department should turn the other cheek to misconduct simply because it cannot be proven beyond a reasonable doubt in a criminal proceeding; the standard of proof in a disciplinary proceeding is less stringent, and the public still needs to be protected from abusive officers whose misconduct cannot be proven in court due to a lack of sufficient evidence to meet the exacting standard of proof beyond a reasonable doubt. Even the most robust investigations into allegations of misconduct are entirely useless if they are not accompanied by measures to protect the public, such as requiring additional monitoring for officers when the allegations against them were found to be "not sustained" or were withdrawn by the complainants that lodged them.

B. **Deliberate Indifference**

To prove deliberate indifference, it must be shown that the municipality had "actual or constructive notice that its action or failure to act [was] substantially certain to result in a constitutional violation," and it "consciously or deliberately cho[se] to disregard the risk of harm." *Schneider*, 771 F.3d at 771 (citing *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1998)). Notice may be shown either by pointing to the existence of a pattern of tortious conduct, or by proving "a violation of federal rights is a highly predictable or plainly obvious consequence of a municipality's action or inaction . . . ." *Barney v. Pulsipher*, 143 F.3d 1299, 1307-08 (10th Cir. 1998). Alternatively, deliberate indifference can be proven "through expert testimony that a practice condoned by the defendant municipality was 'contrary to the practice of most police departments' and was 'particularly dangerous' because it presented an unusually high risk that constitutional rights would be violated." *Vann v. City of New York*, 72 F.3d 1040, 1050 (2d Cir.

1995). City was on notice that additional supervision was necessary to prevent officers from sexually assaulting citizens they come into contact with on duty. For one, Holtzclaw engaged in a pattern of tortious conduct by committing various sex offenses against twelve (12) different women during twelve (12) different incidents over the course of a six (6)-month period. A reasonable jury could infer from the sheer number of incidents alone that City was on notice of the deficiencies in its supervision of its officers. Even before the sexual assaults that gave rise to this action, Holtzclaw was flagged as a potential candidate for the EIP three (3) times in a row for his extraordinary number of uses of force and complaints, including an in-custody death. According to expert Roger Clark, this should have required much closer supervision of Holtzclaw's activities.

Even setting aside Holtzclaw's own offenses, OCPD had received and investigated approximately fifteen (15) allegations of sexual misconduct by other officers from 2011 through 2014. Accordingly, City knew, or at the very least should have known, that its existing supervision measures were inadequate to prevent sexual assaults by on-duty officers, that additional monitoring was needed for officers on patrol, and that it was highly probable that failing to improve supervision would cause additional sexual assaults of additional victims.

C. **Causation**

In addition to identifying a particular municipal policy and proving deliberate indifference, a plaintiff seeking to hold a municipality liable under § 1983 must show "a direct causal link between the policy or custom and the injury alleged." *Bryson v. City of Okla. City*, 627 F.3d 784, 788 (10th Cir. 2010) (internal alterations omitted). This requires a plaintiff to show that the challenged policy was the "moving force" behind her injuries. *Bd. of Comm'rs v. Bryan Cty. v. Brown*, 520 U.S. 397, 404 (1997).

To ensure a municipality is not held liable solely for the acts of its employee, "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." *Schneider*, 717 F.3d at 770. "However, cause and effect is usually more clear in the failure to supervise context. " *Zartner v. City & Cnty. of Denver*, 242 F. Supp. 3d 1168, 1174 (D. Colo. 2017).

Here, it is clear that the level of supervision Holtzclaw (and other officers who engaged in sexual misconduct while on duty) was receiving was inadequate and that he would not have assaulted Plaintiffs had City implemented the supervisory measures needed to prevent constitutional violations. Moreover, City's longstanding practices of inadequate supervision of officers and taking officers' word at face value even when it conflicts with a complainant's account created an environment in which officers, including Holtzclaw, believed they could abuse their power and badge by sexually assaulting vulnerable women without fear of any real consequences. Further, as Holtzclaw got away with more and more (in part due to the fact that OCPD procedure does not require supervisors to document complaints and send them up the chain of command unless a "satisfactory disposition" cannot be reached with the complainant), he was emboldened by the lack of accountability and his misconduct escalated and increased in frequency. [**Ex. 3**, 288:8-291:22]. A reasonable jury could determine City's policy of failing to supervise officers, including Holtzclaw, was the moving force behind Plaintiffs' injuries.

II. CITY IS LIABLE TO PLAINTIFFS LIGONS & LYLES UNDER § 1983 BECAUSE CHIEF CITTY'S DECISION NOT PLACE HOLTZCLAW ON ADMINISTRATIVE LEAVE CAUSED THEIR INJURIES.[5]

With respect to Plaintiffs Ligons and Lyles, City is liable under a different theory—a decision of a final policymaker. After Ms. Morris came forward to report being sexually assaulted by an OCPD officer, Holtzclaw quickly became a suspect due to the facts that 1) he was the last

[5] Plaintiffs incorporate by reference the argument made in Plaintiffs' Response in Opposition to Defendant Citty's Motion for Summary Judgment.

OCPD officer to have documented contact with Ms. Morris in the month during which she was assaulted; and 2) he largely matched the description Ms. Morris provided of the officer who assaulted her. OCPD investigators even put Holtzclaw's photo in a lineup and attempted to have Ms. Morris identify him. When Ms. Morris declined to prosecute on June 3, 2014, and the criminal investigation ceased, Chief Citty consciously chose not to open an administrative investigation, subject Holtzclaw to a polygraph, or even place him on administrative leave pending the outcome of the investigation, out of fear of "labeling" him for no reason. This is true even though Holtzclaw was flagged on the EIP multiple times in his short tenure with OCPD. Fifteen (15) days later, Holtzclaw sexually violated Plaintiffs Ligons and Lyles, on June 18, 2014. For the same reasons City's policy of failing to supervise officers caused Plaintiffs' injuries, Chief Citty's decision not to take measures to protect citizens from additional sexual assaults was a moving force behind Plaintiffs' injuries.

III. CITY IS LIABLE TO PLAINTIFF LIGONS UNDER STATE LAW BECAUSE HOLTZCLAW WAS ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT WHEN HE WAS SEARCHING HER.

With respect to Plaintiff Ligons, City is liable under state law for Holtzclaw's activities to the extent he was acting within the scope of his employment. While it is clear Holtzclaw was not acting within the scope of his employment when he orally sodomized Ms. Ligons, it is equally clear that he *was* acting within the scope of his employment when he made her pull down her pants and pull up her shirt while searching for contraband during a traffic stop. Traffic stops are part of a patrol officer's duties, as is searching arrestees for contraband. Accordingly, at least with respect to the search, City is liable to Ms. Ligons.

CONCLUSION

Genuine disputes of material fact exist with respect to 1) the adequacy of OCPD's supervision of its officers, including Holtzclaw, 2) whether the City acted with deliberate indifference when it failed to improve supervision measures after it became apparent that they were not sufficient to prevent officers from sexually assaulting citizens, and 3) whether Chief Citty acted with deliberate indifference when he chose not to open an administrative investigation, place Holtzclaw on administrative leave, and subject him to a polygraph after Ms. Morris signed the refusal to prosecute. Accordingly, Plaintiffs respectfully request that the Court deny Defendant City's motion for summary judgment.

Respectfully submitted,

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