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' MOTION FOR RECONSIDERATION OF ORDER GRANTING DEFENDANT CITY'S MOTION FOR SUMMARY JUDGMENT

COME NOW the Plaintiffs, by and through their attorneys of record, and, under the terms of Federal Rule of Civil Procedure 60, hereby submit this Motion for Reconsideration of Order Granting Defendant City's Motion for Summary Judgment [Doc. 405]. In support of their Motion, Plaintiffs submit as follows:

ARGUMENT & AUTHORITIES

I. VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE PLAINTIFFS, A REASONABLE JURY COULD RETURN A VERDICT IN THEIR FAVOR.

In deciding in favor of the City on its motion for summary judgment, the Court made several determinations of fact, weighed the credibility of witness statements, and drew inferences favorable to the City. However, the Court was required to view all evidence "in the light most favorable to the non-moving party" and draw all reasonable inferences in the non-moving party's favor in determining whether "a reasonable jury could return a verdict for the non-moving party."

[Doc. 405, p. 2 (quoting *Carter v. Pathfinder Energy Servs., Inc.*, 662 F.3d 1134, 1141 (10th Cir. 2011))].

As demonstrated below, the evidence and arguments offered by Plaintiffs in response to the City's motion for summary judgment, viewed in the light most favorable to them, could lead a reasonable jury to conclude that the City maintained unconstitutional policies and customs that led to violations of their federal rights. Consequently, Plaintiffs respectfully request that the Court reconsider its Order granting the City's motion for summary judgment [Doc. 405].

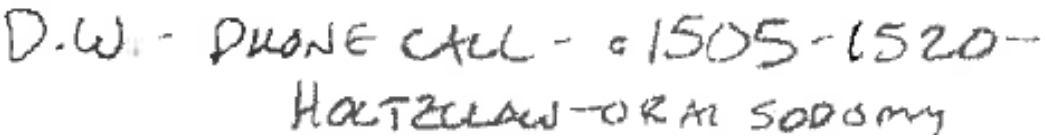
A. Viewed in a Light Most Favorable to Plaintiffs, the Evidence Demonstrates a Reasonable Jury Could Conclude the City's Response to Terri Morris' Report of Sexual Assault Reflected Deliberate Indifference.

For example, the Court found that Plaintiffs had failed to offer sufficient evidence to demonstrate a triable issue of fact on the issue of deliberate indifference with respect to supervision of Holtzclaw, noting that OCPD monitored Holtzclaw more closely "once it had information it viewed as sufficiently specific and credible," (i.e., Jannie Ligons' allegations). This reasoning required the Court to infer that OCPD did not view Ms. Morris' allegations as "sufficiently specific and credible." However, Plaintiffs' evidence suggests they did, and that they disregarded it in spite of that.

First, the inclusion of Holtzclaw in a photo lineup investigators attempted to show Terri Morris—even if the purpose was to "eliminate" him as a suspect (as is the City's position)—suggests investigators had some level of belief in the theory that he could have been the perpetrator based on the information they had. Otherwise, they would not have prepared the photo lineup with Holtzclaw in it. This inference is supported by the fact that the photo lineup did not contain a photo

of Jeff Sellers, whom investigators also identified has having had a recent contact with Terri Morris. [*See* Docs. 388-5, 388-28].

Second, when Major Wenzel advised Deputy Chief Kuhlman of the allegations, he wrote in his notebook "Holtzclaw – oral sodomy." He did not write "OCPD officer – oral sodomy" or anything of the sort. ***He identified Holtzclaw by name.***



[*See* Excerpts from Notebook of Johnny Kuhlman (filed herewith as **Exhibit 1**)].

As another example, part of the Court's finding that the City's investigation into Terri Morris' report of sexual assault did not support an inference of deliberate indifference depended in part on the Court's belief that "she indicated it had happened three or four days before." [Doc. 405, pp. 5-6]. While that may be true of the first contact she had with OCPD, that is not what she told Detective Gregory on June 3, 2014. In the videotaped interview offered as Exhibit 2 to Plaintiffs' Motion, Ms. Morris clearly indicated she was not sure of when the assault occurred, and that it could have happened in the "first, second, [or] third week [of May]." [Doc. 388, p. 12, ¶ 21]. She made this statement on the same day OCPD ceased investigative efforts, even though they knew her contact with Holtzclaw fell squarely into that window. [*See* Doc. 388, p. 13, ¶ 26].

In sum, whether the City had "sufficiently specific and credible information" to be put on notice of Holtzclaw's propensity for sexual misconduct three weeks prior to when he assaulted

Jannie Ligons, Kala Lyles, and Adaira Gardner was a question for a jury to determine, and a reasonable jury could find in favor of Plaintiffs on the issue.

B. Viewed in a Light Most Favorable to Plaintiffs, the Evidence Could Lead a Reasonable Jury to Conclude That Holtzclaw Was Not Monitored Any More Closely as Part of the Early Intervention Program.

The Court's finding that Plaintiffs failed to demonstrate a genuine dispute of material fact as to whether OCPD's supervision of its officers reflected deliberate indifference was based in part on its reasoning that "officers, like Holtzclaw, who had more than a set number of uses of force in a particular time period were monitored more closely via the Early Intervention Program," and that even if the program was not thorough enough, that would not suggest deliberate indifference. However, Plaintiffs' evidence demonstrates that although the Early Intervention Program exists, officers flagged for it actually *were not* monitored any more closely. Rather, their *prior* complaints and uses of force were simply re-reviewed. [Doc. 388, p. 14, ¶ 37]. In fact, not even the whole investigation packet for each incident was re-reviewed—only the supervisor narratives.[1] [Doc. 388, p. 15, ¶ 38]. As Plaintiffs explained in their Motion, supervisors' narratives need not have included the account of the subject of the use of force in the supervisor narrative, even when that account conflicted with the involved officer's. [Doc. 388, p. 15, ¶ 40]. This superficial collective review of past incidents was the only "monitoring" involved in the Early Intervention Program, and, in reality, it did not involve any real monitoring at all—especially not the EIP-flagged officers' actions moving forward. This, according to Plaintiffs' expert on police practices, fell short of what

[1] Sometimes, the supervisor narratives were not even re-reviewed, but only the information contained in the notification sent by the Office of Professional Standards, which included the most basic information, like "the case number, the dates . . . the supervisors that were involved with it, different names and things like that." [*See* Doc. 388, p. 15, ¶ 38].

"every competent Law Enforcement agency . . . throughout the nation" employs. [Doc. 388, p. 18, ¶ 63].

Importantly, Plaintiffs offered an expert opinion that the City's supervision of its officers, particularly Holtzclaw, fell short of the "well-known methods [that] have been required" in the police profession "and established for decades" among "every competent police administrator and commander," and the City offered no expert testimony to the contrary. This alone should have lead the Court to conclude that a reasonable jury could find in favor of the Plaintiffs on the inadequacy of OCPD's Early Intervention Program.

C. Viewed in a Light Most Favorable to Plaintiffs, the Evidence Could Lead a Reasonable Jury to Conclude OCPD's Use-of-Force Review Process Was a Sham.

In determining Plaintiffs failed to demonstrate a genuine dispute of material fact as to whether OCPD acted with deliberate indifference, the Court reasoned that "it is undisputed the department had in place a review process for uses of force and that it used it." But having and using a review process is insufficient to avoid municipal liability. As the Third Circuit held in *Beck v. City of Pittsburgh*, 89 F.3d 966 (3d Cir. 1996) (which Plaintiffs cited in their brief), "The mere fact of investigation for the sake of investigation does not fulfill a city's obligation to its citizens." *Id.* at 974. Rather, "The investigative process must be real. It must have some teeth." *Id.*

Plaintiffs offered evidence to show that OCPD's process for reviewing use-of-force incidents amounted to rubber-stamping the involved officer's conclusions and lacked any substance. Specifically, they pointed to testimony by Major Mike Hoskins, who served on the Screening Committee that reviews OCPD use-of-force investigations, stating that in the case of conflicting accounts in a use-of-force investigation, the Screening Committee would, by default, take the officer's word over the word of the subject of the use of force. [Doc. 388, p. 14, ¶ 34].

This statement was corroborated by the fact that Lieutenant Brian Kyle Bennett took Holtzclaw's word over Demetria Campbell's in preparing his supervisor narrative, a part of the use-of-force investigation packet that is reviewed by the Screening Committee. [Doc. 388, pp. 8-9, ¶¶ 2, 3, 5]. It was further corroborated by the fact that the Screening Committee, in a separate use-of-force investigation review involving Holtzclaw, ignored the statement of a completely independent witness that corroborated an arrestee's allegation that one of the officers had slapped her. [Doc. 388, p. 10, ¶¶ 11-12].

In short, Plaintiffs submitted sufficient evidence to demonstrate a genuine dispute of material fact as to whether OCPD's personnel investigations reflected deliberate indifference to the rights of those with whom its officers come into contact. To reiterate the Third Circuit's holding in *Beck*:

> "[W]e cannot look to the mere existence of superficial grievance procedures as a guarantee that citizens' constitutional liberties are secure. Protection of citizens' rights and liberties depends on the substance of the . . . investigation. ***Whether those procedures had substance was for the jury's consideration.***"

Beck, 89 F.3d at 974 (emphasis added).

D. Viewed in a Light Most Favorable to Plaintiffs, the Evidence Could Lead a Reasonable Jury to Conclude OCPD's Complaint Referral and Investigation Process Was Inadequate.

Another facet of the Court's reasoning for finding Plaintiffs had failed to raise a genuine dispute of material fact with respect to deliberate indifference was its suggestion that OCPD's complaint referral and investigation process did not reflect deliberate indifference because "a process which involves screening and resolution of complaints at the initial supervisory level where possible strikes the court as thoroughly unremarkable." [Doc. 405, p. 5]. This assumes that complaints received at the initial supervisory level are in fact screened and resolved. There are two

problems with this conclusion. First, it is undisputed that first-line supervisors were not empowered to unilaterally impose discipline, and that discipline was a decision to be made by the Chief of Police or his designee—certainly someone higher up the chain of command. [*See* Doc. 368-10]. It follows that when complaints were "resolved" at the initial supervisory level, the resolution necessarily could not have involved any form of discipline, even in cases where discipline was warranted. The *only* resolution that could have been made by initial supervisors was placating the complainant. Importantly, placating a complainant does nothing to protect the public from problematic policing, yet OCPD's procedures required no further action be taken when a complaint—no matter how egregious—could be resolved to the complainant's satisfaction, whatever that even means. These "resolved" complaints were not even required to be documented so as to become a part of officers' performance reviews, or the Early Intervention Program's re-review of past incidents.

This was true even of complaints involving conduct that would be considered criminal if perpetrated by a civilian. For example, Plaintiffs offered evidence that Holtzclaw had received an informal citizen complaint in December 2013 wherein an arrestee accused him of stealing money from her wallet. [*See* Doc. 388, p. 17, ¶ 55; Doc. 388-42]. The City produced no evidence that this complaint was formally documented or investigated, or that it was considered as part of the Early Intervention Program re-review process of Holtzclaw's past incidents. It was also true of complaints as egregious as racially discriminatory policing, which Holtzclaw's supervisor, Arthur Gregory, listed as an example of a type of complaint he would not send up the chain of command. [*See* Doc. 388, p. 17, ¶ 58].

The second problem with the Court's conclusion is, if it were acceptable for police departments to screen all complaints at the initial supervisory level without providing any sort of criteria for what kinds of complaints should still be documented and sent up the chain of command (even if solely for documentation purposes), then they could shield themselves from virtually all constitutional liability by "resolving" all complaints at the initial supervisory level and keeping their policymakers in the dark, which would prevent any plaintiff from ever prevailing on a municipal liability claim for a custom or policy other than a written, formally enacted one, and much of the jurisprudence surrounding municipal liability claims would be rendered superfluous.

Plaintiffs' evidence shows that OCPD's formal, written policy allowed complaints of any type or level of egregiousness to be essentially ignored, as long as the first-line supervisor could reach a "satisfactory disposition" with the complainant. A reasonable jury could conclude from Plaintiffs' evidence on this issue that OCPD's complaint referral and investigation process was inadequate and fell short of constitutional standards.

II. THE COURT APPLIED AN ERRONEOUS STANDARD IN DETERMINING WHETHER A GENUINE DISPUTE OF MATERIAL FACT EXISTED AS TO WHETHER HOLTZCLAW ACTED WITHIN THE SCOPE OF HIS EMPLOYMENT WHEN HE STRIP-SEARCHED JANNIE LIGONS.

In granting the City's summary judgment motion on Jannie Ligons' state law claims, the Court reasoned that " Ligons cites to no authority for the remarkable assertion that having a woman expose her breasts and pull down her pants is a normal incident of a traffic stop and that is plainly not the case." The Court's finding on this issue is problematic because Plaintiffs were not required to prove what was a "normal incident" of a traffic stop, as that is not the standard for determining whether an officer was acting within the scope of their employment. Under the Oklahoma

Governmental Tort Claims Act, an employee acts within the scope of his employment while performing "the duties of the employee's office or employment or of tasks lawfully assigned by a competent authority . . . ." Okla. Stat. tit. 51, § 152(12). It is indisputable that searching for contraband is within the duties of a police officer's employment. Otherwise, there would be no need for the Fourth Amendment, and the courts would never have formulated a standard for determining when a strip search violates it and when it does not.

Moreover, Plaintiffs presented evidence that Holtzclaw had performed a strip search during a traffic stop before [*see* Doc. 388-43], and it is undisputed that he was not disciplined for it. If strip searches during traffic stops are "plainly" not within an officer's scope of employment, then Chief Citty's complete lack of corrective action in the face of *actual knowledge* that Holtzclaw had done *just that*—even prior to the date Ms. Morris came forward to report her assault—then the conclusion that the City was deliberately indifferent to constitutional rights violations resulting from Holtzclaw's persistent abuses of power should be inescapable based on that fact alone.

Because Holtzclaw was engaged in a search when he forced Ms. Ligons to expose herself, the Court should have left the issue of whether he was acting within the scope of his employment for a jury's determination.

III. THE COURT SHOULD HAVE REMANDED THE CASE BACK TO STATE COURT AFTER DISPOSING OF PLAINTIFFS' FEDERAL CLAIMS.

Even if the Court declines to reconsider its decision on Plaintiffs' federal claims, it should vacate its decision on Plaintiffs' state law claims and remand the case back to state Court. In *Brooks v. Gaenzle*, 614 F.3d 1213, 1229-30 (10th Cir. 2010), the Tenth Circuit "held that the district court erred in granting summary judgment against the plaintiff on a state tort claim because only the

state-law issue was left for decision after [it] affirmed dismissal of the federal claims. [The Court] said that the district court should decline to exercise supplemental jurisdiction over that claim because the state-law issue was 'best left for a state court's determination.'" *Aery v. Bd. of Cty. Comm'rs of Tulsa Cty.*, No. 16-5176 (10th Cir. 2017) (quoting *Brooks*)). Because this case was initially filed in state court and removed to federal court based on federal-question jurisdiction, then if the Court declines to vacate its Order granting summary judgment on Plaintiffs' federal claims against the City, it should remand the case back to state court for disposition of the state-law claims.

CONCLUSION

In deciding to grant the City's motion for summary judgment, the Court made improper determinations of fact relating to the issue of deliberate indifference that should have been left to a jury, neglected to view the evidence in a light most favorable to Plaintiffs by drawing inferences in favor of the City and its positions, and applied an erroneous legal standard to Plaintiffs' state law claims. For these reasons, Plaintiffs respectfully request that the Court reconsider its Order, vacate it, and enter an order denying the City's motion for summary judgment.

Respectfully submitted,

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