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

1. SHERRY ELLIS, 2. CARLA RAINES, *Plaintiffs*, *v*. 1. DANIEL HOLTZCLAW, individually, 2. THE CITY OF OKLAHOMA CITY, a municipal corporation, *Defendants*.	Case No.: CIV-16-019-HE

RESPONSE OF DEFENDANT HOLTZCLAW TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant, Daniel Holtzclaw, hereby objects to the motion of the Plaintiffs for partial summary judgment (Doc. 107).

The motion is based on a theory that Holtzclaw, a former police officer, was "found guilty" of sexual offenses in an administrative employment proceeding conducted by the Oklahoma City Police Department pursuant to its policies and procedures. As argued below, Holtzclaw maintains his innocence, continues to do so, and the legal theory proffered by the Plaintiffs is inadequate to support its motion.

STATEMENT OF UNCONTESTED FACTS

Holtzclaw addresses the statement of facts as proffered by the Plaintiffs in their motion:

1. Admitted.
2. Denied.
3. Denied.
4. Admitted.
5. Admitted.
6. Admitted.
7. Admitted.
8. Admitted.
9. Admitted.
10. Admitted.
11. Admitted.
12. Admitted.
13. Admitted.
14. Admitted.

In paragraphs 2 and 3 of the Motion, the Plaintiffs assert that Holtzclaw committed sexual assaults against Plaintiffs Raines and Ellis.

HOLTZCLAW'S ASSERTION OF UNCONTESTED FACTS

1. In his sworn deposition in this civil case, Holtzclaw denied guilt in sexually assaulting the Plaintiffs. *See* Doc. 107-4 at page 182.

2. Plaintiffs "candidly admit" in their own Motion that "Officer Holtzclaw denies their claims" in this civil lawsuit. Doc. 107 at page 1.

3. Holtzclaw's administrative termination hearing by the police department took place prior to his criminal trial in state district court, which thus prevented him from defending himself fully in that proceeding and participating fully as the due process protections envisioned. Doc. 107-4 at page 181-82.

4. Holtzclaw was convicted by a jury in state court, but has appealed that jury verdict and his direct appeal is not yet final because he has sought review in the United States Supreme Court via Petition for a Writ of Certiorari which is still pending. *See Holtzclaw v. Oklahoma*, No. 19-843 (U.S.) (Distributed for conference of March 6, 2020).

ARGUMENT AND AUTHORITY

The Plaintiffs have outlined the general legal principles applicable to motions for partial summary judgment. Doc. 107 at 4-5. However, application of those principles to this case compels the conclusion that the motion must be denied.

It appears to Holtzclaw that, since his convictions in the state court criminal

case are not yet final, the Plaintiffs have attempted an end-run around this problem by attempting to treat the administrative action by the Oklahoma City Police Department and its Chief of Police as supporting its claim of collateral estoppel.

The Plaintiffs rest their assertion on the legal principles found in *University of Tennessee v. Elliott*, 478 U.S. 788 (1986), and *Salguero v. City of Clovis*, 366 F.3d 1168 (10th Cir. 2004). The Plaintiffs are incorrect for two reasons: 1) the Oklahoma City Department Review Board and the Chief of Police are not a proper "state agency" to trigger collateral estoppel; and 2) Holtzclaw did not have a full and fair opportunity to litigate the issues in that hearing.

First, in *University of Tennessee v. Elliott*, 478 U.S. 788, 799 (1986), the Supreme Court held that "when a state agency 'acting in a judicial capacity...resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate...federal courts must give the agency's fact-finding the same preclusive effect to which it would be entitled in the State's courts."

The "state agency" at issue in *Elliott* was a state Administrative Law Judge who heard evidence and made findings of fact. Similarly, in *Salguero*, the "state agency" at issue was a five-member City Grievance Board which reviewed allegations of criminal conduct by a police officer.

Holtzclaw argues that the "state agency" in his case–the Oklahoma City

Department Review Board and ultimately the Chief of Police–cannot constitute a proper state agency to support the collateral estoppel assertions of the Plaintiffs.

This is so because the Review Board and the Chief of Police are not separate and disinterested parties or finders of fact apart from its employee Holtzclaw. Instructive is *Salguero*, which found that a five-member Board of the City acted in a judicial capacity. The Board in that case was separate from the city personnel director and the city manager which has upheld the termination.

Here, the Review Board and the Chief of Police acted in an inquisitorial manner on an issue of employment with the police department, not as a neutral fact-finder or disinterested party to a litigation. The Police Department, and the Chief of Police who ultimately approved of Holtzclaw's termination, clearly had institutional interests in protecting its own reputation and public perception that were adverse to Holtzclaw.

In Holtzclaw's view, the "state agency" under *Elliott* must be, at a minimum, a quasi-judicial body acting as an impartial finder of fact as opposed to what Holtzclaw experienced, which was his employer making determinations on his job performance. *See* Doc. 107-4 at page 182 (Holtzclaw's testimony about testifying at the hearing: "I would have to go against the board of higher-ups, meaning the chief, his right-hand man, basically everone that's throwing me under the bus and I would

have to do that, and by me doing that, that's just a waste of time.") Police are traditionally investigative agencies, not judicial ones. In this case, the Chief of Police made the final determination. This Court cannot accept that the Chief of Police was a proper judicial entity to the extent that collateral estoppel would apply.

Moreover, the Plaintiffs have made no showing that the authority of the police department and the hearing under its policies and procedures were authorized under state statutory authority as required by *Salquero*. The Board and the Chief of Police are creature of municipal law which followed policies and procedures enacted by the City of Oklahoma. The Plaintiffs have not argued or shown that this was done pursuant to state statute.

Second, Holtclaw asserts that he did not in fact have a full and fair opportunity to litigate the issues at the administrative hearing as required under *Elliott* and *Salguero*. This is so because the administrative hearing was held prior to the state court criminal trial. *See* Doc. 107-5 (termination letter from the Chief of Police dated January 8, 2015). Holtzclaw's jury trial in the criminal case began on November 2, 2015.

Thus, because of the timing of the administrative hearing, Holtzclaw was not provided a full and fair opportunity to litigate the issues because he was placed in the position of having to simply observe the termination hearing because active

participation would give the State a litigation advantage in the criminal trial and force Holtzclaw to give up constitutional rights and litigation strategy.

As Holtzclaw testified at his deposition in this case when questioned about why he did not testify or participate at the administrative hearing:

> Q. You think it's a waste of time to tell your side of the story in response to 29 allegations of sexual misconduct as a police officer?
>
> A. As a lawyer yourself, you would understand that me doing that would give information to the prosecution who's trying to give me 263 years that I received now for something wrongful that I did not do, and that I would be determined to die in prison to 263 years for something I didn't do and tip my hand to the prosecution, you know that as well as I do.
>
> Q. Okay. So in fear of incriminating yourself by what you said, you chose to say nothing in the administrative process before the City of Oklahoma City, is that correct?
>
> A. You would have to talk to my FOP lawyer about that, because due to the advice of counsel.
> ....
>
> Q. Not asking what the advice of counsel was now, I'm just asking, did you tell your story in the administrative process?
>
> A. It's been so long, I can't eve remember, I think I pretty much sat there and listened.

See Doc. 107-4 at pages 182, 184. The Tenth Circuit in *Salguero* stated that the inquiry into whether a party had a full and fair opportunity to litigate an issue will

often "focus on whether there were significant procedural limitations in the prior proceeding, whether the party had incentive to litigate fully the issue, or whether effective litigation was limited by the nature or relationship of the parties." *Id*. (*quoting Murdock v. Ute Tribe of Uintah & Ouray Reservation*, 975 F.2d 683, 689 (10th Cir. 1992)).

Here, although Holtzclaw may have had a strong incentive to litigate the issues, he also was placed in a position by the State and the City whereby these governmental agencies attacked him at different times, forcing him to forego defense at the administrative hearing to defend the criminal case. Holtzclaw believes that this is what the Tenth Circuit meant in *Salguero* by effective litigation being limited by the nature or relationship of the parties, and also the presence of procedural limitations.

CONCLUSION

There exists issues of material fact that cannot be resolved at the summary judgment pre-trial level. Thus, the motion of the Plaintiffs must be denied.

DATED this 20th day of February, 2020.

Respectfully submitted,

/s/ James L. Hankins

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of February, 2020, I electronically transmitted the attached Notice of Appeal to the Clerk of Court using the ECF System for filing. Based on the records currently in the file, the Clerk of the Court will transmit a Notice of Electronic Filing to the following ECF Registrant:

Mark E. Hammons
Rick Smith
Sherri Katz
Mary Goff

/s/ James L. Hankins
James L. Hankins