

FILED
UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

06 JAN 31 PM 2:47

CLERK-ALBUQUERQUE

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

LYNN BUCK, et al.,

Plaintiffs,

v.

NO. CIV 04-1000 JP/DJS

CITY OF ALBUQUERQUE, et al.

Defendants.

**DEFENDANTS' MOTION FOR PARTIAL
SUMMARY JUDGMENT No. III: DISMISSAL OF
PLAINTIFFS' MUNICIPAL LIABILITY (POLICIES, CUSTOMS,
PATTERNS, AND PRACTICES), FAILURE TO TRAIN, SUPERVISORY
LIABILITY, INJUNCTIVE RELIEF, AND *RESPONDEAT SUPERIOR* CLAIMS**

Defendants, City of Albuquerque, Mayor Martin Chavez, Nick Bakas, Gilbert Gallegos and Ray Schultz, through their counsel Deputy City Attorney Kathryn C. Levy and pursuant to Fed.R.Civ.P. 56 and D.N.M.LR-Civ. 56, state the following for their Motion for Partial Summary Judgment No. III: Dismissal of Plaintiffs' Municipal Liability (Policies, Customs, Patterns, and Practices), Failure To Train, Supervisory Liability, Injunctive Relief, and *Respondeat Superior* Claims:¹

UNDISPUTED MATERIAL FACTS

In the present case, there is no genuine issue of *material fact*, and Defendants are entitled to partial summary judgment as a matter of law. The undisputed material facts are as follows:

¹ As allowed by D.N.M.LR-Civ. 7.7, Defendants have combined this Motion with the memorandum in support thereof. As required by D.N.M.LR-Civ. 7.1(a), Defendants mailed a letter to Plaintiffs' counsel on January 27, 2006, to determine whether they concurred with or opposed this motion. Plaintiffs' counsel did not concur with this motion.

109

I. THERE IS NO ADMISSIBLE EVIDENCE WHICH SUPPORTS PLAINTIFFS' MUNICIPAL LIABILITY (POLICIES, CUSTOMS, PATTERNS, AND PRACTICES) CLAIMS AND SUPERVISORY LIABILITY CLAIMS.

1. There is no admissible evidence which supports Plaintiffs' claim that the "City of Albuquerque has a policy and practice of using unlawful and excessive force on protestors, including the misuse of pepper spray, mace, bean bag bullets, pepper balls and tear gas."

2. There is no admissible evidence which supports Plaintiffs' claim that the "City of Albuquerque failed to properly and adequately train and supervise its police force in how to handle peaceful demonstrations such as the one [described in Plaintiffs'] complaint."

3. There is no admissible evidence which supports Plaintiffs' claim that the "City of Albuquerque has a policy and practice of unlawfully denying anti-war protestors their First Amendment rights to gather and express their views in a public forum."

4. There is no admissible evidence which supports Plaintiffs' claim that the "City of Albuquerque has a policy and practice of unlawfully arresting peaceful protestors."

5. There is no admissible evidence which supports Plaintiffs' claim that the "City of Albuquerque has a policy and practice of unlawfully and maliciously prosecuting peaceful protestors."

6. There is no admissible evidence which supports Plaintiffs' claim that APD prohibits its officers from wearing name tags in an effort to prevent the identification of these officers during a protest.

7. The opinions expressed by Plaintiffs' police procedures expert, Lou Reiter, do *not* support Plaintiffs' municipal liability (policies, customs, patterns, and practices) claims:

- Q. Have you had an opportunity in this litigation and in the various cases in which the Albuquerque Police Department has been involved, to have an opportunity to review the training which the Albuquerque Police Department provides its officers in the use of force?
- A. In the use of force?
- Q. Yes.
- A. Through the years I have, yes.
- Q. And do you have an opinion regarding whether the use of force training which the Albuquerque Police Department provides its officers meets generally accepted police training?
- A. I believe it does.
- Q. Have you had an opportunity in this litigation, or other litigation, to examine what the Albuquerque Police Department trains its officers about the rights of protesters, demonstrators, and others who are involved in protected First Amendment activity?
- A. The only thing I've seen is the manual provision, the SOP provision. I haven't seen any training on that topic.
- Q. Would it be fair to say that as we sit here today you cannot give an opinion as to whether the Albuquerque Police Department, the way that it trains its officers regarding the rights of protesters, demonstrators, in their First Amendment context, meets generally accepted police standards?
- A. I haven't seen that training so I have no opinion.
- Q. Okay. In your review of the record in this particular case, did you find any material which suggests that the quality or quantity of training which the Albuquerque Police Department received was insufficient to meet generally accepted police standards?
- A. I've looked at very little information specifically to how they train persons to handle civil demonstrations. The one thing I am aware of, though, and that's from the POC report, is that there apparently, or at least there had been no documentation provided whether officers were trained or even authorized to use a pepper ball firearm.
- Q. Did you have an opportunity to review the office --the defendant officers' answers to Interrogatories and request for production in which they set forth their training they had received on various tools, tactics and techniques which they use?
- A. You know, those Interrogatory answers just weighed me down, and all the arguments that were going on, so I don't specifically recall what their answers were. I'm going on the fact that the POC report indicated that there, had this tool had not been authorized and that there was no training documents or records provided to the investigators or the POC.
- Q. In your review of the record, did you find any evidence to suggest that the

quality or quantity of training which the Albuquerque Police Department officers received in how to handle demonstrators, protesters, in a First Amendment context was deficient?

A. I didn't look at that training so I really can't answer that question. I didn't look at training lesson plans, that's what you would look for. All I looked at was the SOP, the SOP was reasonable.

Q. So as we sit here today you cannot give an opinion with regard to the quality or quantity of the training the Albuquerque Police Department gives its officers on First Amendment issues?

A. Correct.

* * *

Q. (By Mr. Robles) What evidence, if any, have you found in the review of the record in this particular case that the decision of the Albuquerque Police Department not to have names on the ballistic vests of the ERT officers and the SWAT officers, was developed to prevent the identification of the officers in those particular units?

MS. NICHOLS: Object as to form. You can answer.

A. I don't know that there was any decision, and I don't have an opinion that that was the decision of the department to consciously, as a department, have officers obscure their identification.

Q. (By Mr. Robles) In your review of the record in this particular case, did you find any policy or practice, procedure which the department should have known would have allowed police officers to fall victim to this Code of Silence?

A. I don't think anything in their policy or procedure.

Q. Okay. In your review of the record in this particular case and the other cases in which you were involved, have you found that the Albuquerque Police Department has either explicitly or implicitly allowed a pattern and practice for the use of excessive force?

MS. NICHOLS: Object as to form. But you can answer.

A. I have never opined that.

Q. (By Mr. Nichols)(sic) Is it your opinion in this case that there is a pattern and practice by the Albuquerque Police Department for the use of excessive force?

A. I've never opined that in the past. I looked at use of force specifically in this instance, so I didn't look at a pattern or practice which I interpret as being a systemic problem historically over a long period of time, and I don't have an opinion on that.

Q. So it would be fair to say that you found no evidence in the record in this particular case that there is a systemic problem in the Albuquerque Police Department regarding the use of excessive force?

- A. Not in this case, no.
- Q. In your review of the record in this particular case, did you find a systemic problem in which the Albuquerque, in the way in which the Albuquerque Police Department has dealt with crowd control issues?
- A. This is the only case I've looked at so I haven't looked at any other. I understand from Captain Gonzales that he's regularly had other occasions to command officers during events such as this. I have no information about any of those events. I don't know which events they police in the same posture that they did this one versus policing them without riot gear and simply as you would any other kind of parade or gathering or civil protest. So I don't know.
- Q. Would it then be fair to say that your review of the record has not revealed sufficient evidence upon which you could conclude that the manner in which the Albuquerque Police Department addresses crowd control issues is improper or fails to follow generally accepted police practices?
- MS. NICHOLS: Object as to form. But you can answer.
- A. I looked at only this case, I can't tell you any of the others.
- Q. (By Mr. Nichols)(sic) The question I asked is whether you found any evidence that suggests that the crowd control practices of the Albuquerque Police Department deviate from generally accepted police practices?
- A. I think only from some of the interviews with some of the civilians who said they had been to other protests where the response by the Albuquerque Police Department was not the same as this incident, where they had responded with a, in a manner to assist them in demonstrating, had provided support by even closing the street off, and they had done things in a different manner during other events prior to this one. But that's only from the civilians who were interviewed by POC.
- Q. Does your review of the record in this particular case suggest to you that the force used against protesters on March 20th, 2003 was an isolated incident?
- A. I don't know, I don't have an opinion one way or another.
- Q. Did you find any evidence in your review of the record that suggests that there are other incidents where the Albuquerque Police Department has used a level of force comparable to what was used on March 20, 2003 in other protests?
- A. I haven't read anything in the record one way or another on that.
- Q. Okay. In your review of the record, what evidence, if any, did you find that the Albuquerque Police Department follows crowd control policies which you believe are in conflict with the rights of the protesters to engage in free speech?
- A. In my opinion the actions of the officers, including the incident Commander Captain Gonzales in this case, were contrary to what their written policies are

on how they will handle civil disturbances, are contrary to the way they would document the uses of force. So from that perspective I'm saying this incident failed to follow their own written policies and procedures which I believe are consistent with generally accepted practices in law enforcement.

Q. So it would be fair to say that in review of the record in this case, there was no other evidence which would suggest to you that the manner in which the Albuquerque Police Department has handled other crowd control issues outside of the March 20, 2003 protest, violated generally accepted police practices regarding the rights of protesters to voice their opinion?

MS. NICHOLS: Object as to form. But you can answer.

A. I don't know anything about other protests or the way the APD responded.

See, Deposition of Lou Reiter, p. 11, l. 21 - p. 14, l. 7& p. 90, l. 11 - p. 94, l. 16, which is attached hereto as Exhibit J.

II. APD's POLICIES, TRAINING, AND SUPERVISION OF ITS OFFICERS MEETS CONSTITUTIONAL STANDARDS.

8. APD required Defendant Officers to pass an elaborate selection process and complete a basic police academy and field training officer program before they worked as non-probationary officers. *See Affidavit of Raymond Schultz, Raymond DeFrates, James Leroy Fox, Nicholas Gonzales, Daniel Mageterri, James Montoya, Shawn O'Connell, and Pablo Padilla, ¶ 102, which is attached as Exhibit A to Defendants' Motion for Partial Summary Judgment No. I: Dismissal of Plaintiffs' Official Capacity Claims Against Chavez, Bakas, Gallegos, and Schultz (hereinafter referred to as "MPSJ No. I"); Affidavit of Steven Hill, Charles Lopez, and Allen S. Hancock, ¶ 103, which is attached as Exhibit A to Defendants' Motion for Partial Summary Judgment No. II: Dismissal of Plaintiffs' § 1983 Wrongful Seizure and Arrest, Excessive Force, First Amendment, Retaliatory Prosecution, Malicious Prosecution and State Law False Imprisonment, Battery, and Malicious Abuse of Process Claims (hereinafter referred to as "MPSJ No. II"); Affidavit of Michael*

Fisher and James Perdue, ¶ 108, which is attached as Exhibit B to MPSJ No. II. See Fed. R. Civ. P. 10(c) (adoption by reference; exhibits); D.N.M.LR-Civ. 10.7 (Non-Duplication of Exhibits).

9. In addition to their basic training, APD also trained Defendant Officers regarding its use of force policy. See *MPSJ No. I, Exhibit A*, ¶ 103; *MPSJ No. II, Exhibit A*, ¶ 104; *MPSJ No. II, Exhibit B*, ¶ 109.

10. Moreover, APD continued to provide Defendant Officers with specialized training regarding the limits placed on their authority by the First and Fourth Amendments to the constitution after they left the APD police academy. See *MPSJ No. I, Exhibit A*, ¶ 104; *MPSJ No. II, Exhibit A*, ¶ 105; *MPSJ No. II, Exhibit B*, ¶ 110.

11. During the period of time prior to and during the incident which gave rise to this lawsuit, the APD maintained a policy regarding the use of force:

POLICY:

It is the policy of this Department that officers shall use only that force which is reasonably necessary to protect the sanctity of human life, preserve and protect individual liberties, and to effect lawful objectives. All officers will act in good faith in the exercise of force. The officers' options can range from a continuum of verbal persuasion to deadly force.

RULES AND PROCEDURES:

2-52-2 USE OF NON DEADLY FORCE

- A. Where force is warranted, officers should assess the incident in order to determine which technique or weapon will reasonably de-escalate the incident and bring it under control safely. Officers shall use only that force which is reasonably necessary to effect lawful objectives.
- B. Officers are permitted to use those defensive tactics and non deadly weapons with which they are trained, qualified, and certified with, as determined by Department training procedures, for the resolution of incidents.
- C. Every officer is expected to consider the use of Departmental

approved options, ranging from verbal techniques, hand control procedures, and non-lethal equipment which includes, but not limited to chemical agents and the baton.

- D. When a confrontation escalates suddenly, an officer may use any means or device at hand to defend him/herself, as long as the force is reasonable, given the existing circumstances.

* * *

2-52-8

USE OF LESS LETHAL MUNITIONS

- *A. Deployment of less lethal force options should correspond with the Reactive Control Model (RCM).** In order to determine which technique or weapon to reasonably de-escalate the incident and bring it under control safely personnel should:
- *1. Always consider the actions of the subject and the desired outcome when considering force options.**
 2. Use only that force which is reasonably necessary to effect lawful objectives.
- B. Officers will only use less lethal force munitions after receiving training in their proper use.
- C. Every effort will be made by officers deploying the munitions to inform other involved officers that a less lethal munitions is being used.

See Albuquerque Police Department's Standard Operating Procedure § 2-52 (Use of Force (Deadly Force , Non Deadly Force, Less Lethal Force)) attached hereto as Exhibit K.

12. During the period of time prior to and during the incident which gave rise to this lawsuit, APD maintained an internal affairs policy regarding the manner in which it investigated and reviewed an APD officer's use of force against a citizen and other violations of APD standard operating procedures. *See MPSJ No. I, Exhibit A, ¶ 105; MPSJ No. II, Exhibit A, ¶ 106; MPSJ No. II, Exhibit B, ¶ 111.*

13. Prior to the protest involving Plaintiffs, neither the APD Internal Affairs Unit nor an

APD supervisor had found that an APD officer's conduct at a demonstration violated APD's policies or procedures, including APD's use of force policy. *See MPSJ No. I, Exhibit A, ¶ 106; MPSJ No. II, Exhibit A, ¶ 107; MPSJ No. II, Exhibit B, ¶ 112.*

14. No court, either federal or state, has found that any APD officer's conduct during a protest (including the conduct of Defendant Officers) constituted excessive force, battery, or any other violation of federal or state law.

III. THERE IS NO ADMISSIBLE EVIDENCE WHICH SUPPORTS PLAINTIFFS' CLAIM FOR INJUNCTIVE RELIEF.

15. There is no admissible evidence which shows a real or immediate threat of future harm by the City against Plaintiffs.

16. There is no admissible evidence which suggests that the City will violate Plaintiffs' constitutional rights if they participate in another protest.

17. There is also no admissible evidence which suggests that the City will order or authorize officers to violate Plaintiffs' constitutional rights if they participate in another protest.

LEGAL ARGUMENT

Even when the evidence is viewed in the light most favorable to Plaintiffs, there is no evidence which proves that Defendants' official policy, unwritten customs, patterns or practices, training, or supervision caused Defendant Officers to allegedly violate Plaintiffs' constitutional rights. There is no evidence which shows that Defendants established an official policy, followed an unwritten custom, or knew of a pattern or practice which caused Defendant Officers to allegedly use excessive force against Plaintiffs. Further, Plaintiffs cannot show that the training which Defendants provided Defendant Officers was deliberately indifferent to or caused the violation of

Plaintiffs' constitutional rights.

With regard to Plaintiffs' supervisory liability claim against Defendants, there is no evidence which shows that Defendant Officers' supervisors either personally directed or had personal knowledge of and acquiesced in the alleged deprivation of Plaintiffs' constitutional rights. Plaintiffs' lack standing to seek prospective injunctive relief against the City because there is no evidence which shows a real or immediate threat of future harm by the City against Plaintiffs. Unable to establish liability on the underlying claims, Plaintiffs cannot pursue their tort claims against the City under a *respondeat superior* theory. For these reasons, this Court should grant Defendants' Motion for Partial Summary Judgment No. III.

I. THERE IS NO EVIDENCE WHICH SHOWS THAT DEFENDANTS ESTABLISHED AN OFFICIAL POLICY, FOLLOWED AN UNWRITTEN CUSTOM, OR KNEW OF A PATTERN OR PRACTICE WHICH CAUSED DEFENDANT OFFICERS TO ALLEGEDLY VIOLATE PLAINTIFFS' CONSTITUTIONAL RIGHTS.

Under Monell v. New York City Dept. of Social Services, 436 U.S. 658, 691 (1978), Plaintiffs may not hold Defendants vicariously liable under Section 1983 for the alleged torts of Defendant Officers solely on the basis of its employer-employee relationship with the alleged tortfeasors. To impose liability on Defendants under Section 1983, Plaintiffs must identify a municipal "policy" or a "custom" that caused Plaintiffs' alleged constitutional injury. Board of County Comm'rs of Bryan County v. Brown, 520 U.S. 397, 403 (1997); Pembaur v. Cincinnati, 475 U.S. 469, 479-81 (1986); Monell, 436 U.S. at 694. Moreover, the disputed "policy" or "custom" must also be the cause and moving force behind the alleged deprivation of Plaintiffs' constitutional rights. Brown, 520 U.S. at 404.

In this case, APD's policy regarding the use of force meets the applicable Fourth Amendment "use of force" standards set forth in Graham v. Connor, 490 U.S. 386 (1989). Moreover, there is no evidence which shows that APD has a "custom" of using force in a manner which is unconstitutional, widespread, permanent, and well settled. Finally, there is no evidence which shows that Defendants' use of force policies or customs were deliberately indifferent to Plaintiffs' Fourth Amendment right against the use of excessive force. The same is also true for APD's policy regarding the First Amendment rights of protestors.

A. THE LAW REGARDING SECTION 1983 "POLICY" AND "CUSTOM" CLAIMS.

With regard to their excessive force claim, Plaintiffs' key to recovering against Defendants under Section 1983 is demonstrating that a deprivation of Plaintiffs' constitutional right was inflicted pursuant to an official policy or custom. See, e.g., Flores v. Cameron County, 92 F.3d 258, 263 (5th Cir. 1996). The United States Supreme Court has expressly held that municipalities may be sued directly under Section 1983 where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." Monell, 436 U.S. at 690.² Plaintiffs may also sue Defendants "for

² With regard to Plaintiffs' "policy" claims, the Supreme Court has identified two types of "policies" under which a municipality may incur liability. Pembaur v. City of Cincinnati, 475 U.S. 469, 480-81 (1986). One type of "policy" is characterized by formal rules and understandings which constitute fixed plans of action to be followed under similar circumstances consistently and over time. Id. Another type of "policy" exists when a municipality takes a course of action tailored to a specific situation and not intended to control decisions in later situations. Id. at 481. Under this second type of "policy," a municipality can be liable only if the decision to adopt that particular course of action is properly made by that government's authorized decision makers. Id. Such
(continued...)

constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision making channels." Monell, 436 U.S. at 690-91.³

² (...continued)

"authorized decisionmakers" are defined to be officials "whose acts or edicts may fairly be said to represent official policy" and whose decisions may therefore give rise to municipal liability under Section 1983. Id. at 480 (quoting Monell, 436 U.S. at 694).

In Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986), the Supreme Court held that "municipal liability under § 1983 attaches where--and only where--a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." Accordingly, tortious conduct may become the basis for municipal liability under Section 1983 only if the conduct is pursuant to the municipality's "official policy." Id. at 479. Thus, the purpose of the "official policy" requirement is to distinguish between:

acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible.

Id. at 479 (footnote omitted; italics in the original). Therefore, the Court in Pembaur limited municipal liability to acts that are acts of the municipality -- "that is, acts which the municipality has officially sanctioned or ordered." Id. at 480; see also Weimer v. Schraeder, 952 F.2d 336, 341 (10th Cir. 1991), cert. denied, 505 U.S. 1210 (1992).

³ With regard to Plaintiffs' "customs" claim, a municipality may incur liability based upon "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.'" City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988) (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 167-68 (1970)). Consistent with the commonly understood meaning of custom, proof of random acts or isolated incidents are not sufficient to show the existence of a custom or policy. See, e.g., Butler v. City of Norman, 992 F.2d 1053, 1055-56 (10th Cir. 1993) (citing Santiago v. Fenton, 891 F.2d 373, 382 (1st Cir. 1989); Fraire v. City of Arlington, 957 F.2d 1268, 1278 (5th Cir.), cert. denied, 506 U.S. 973, (1992) (citation omitted)); Thompson v. City of Los Angeles, 885 F.2d 1439, 1443-44 (9th Cir. 1989). To demonstrate a municipal custom under Section 1983, Plaintiffs must at least show:

(continued...)

In Brown, the Supreme Court held that a municipality is liable only when the official policy or custom is the

“moving force” behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and deprivation of federal rights.

Brown, 520 U.S. at 404.

B. APD’S POLICY REGARDING THE USE OF FORCE MEETS THE APPLICABLE FOURTH AMENDMENT “USE OF FORCE” STANDARDS SET FORTH IN GRAHAM v. CONNOR, 490 U.S. 386 (1989).

In this case, Defendants’ use of force policy is consistent with constitutional principals established in Graham v. Connor, 490 U.S. 386 (1989). The issue in excessive force cases is “whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them” Graham, 490 U.S. at 397. Thus, a determination of the reasonableness of police conduct requires:

careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

Id. at 396.

³ (...continued)
a pattern of similar incidents in which citizens were injured or endangered by intentional or negligent police misconduct and/or that serious incompetence or misbehavior was general or widespread throughout the police force.

Fraire, 957 F.2d at 1278 (citing Languirand v. Hayden, 717 F.2d 220, 227-28 (5th Cir. 1983), cert. denied, 467 U.S. 1215 (1984)).

Modeled after the ruling in Graham, APD's Standard Operating Procedure regarding the use of force states, in pertinent part, the following:

2-52-2 USE OF NON DEADLY FORCE

- A. Where force is warranted, officers should assess the incident in order to determine which technique or weapon will reasonably de-escalate the incident and bring it under control safely. Officers shall use only that force which is reasonably necessary to effect lawful objectives.
- B. Officers are permitted to use those defensive tactics and non deadly weapons with which they are trained, qualified, and certified with, as determined by Department training procedures, for the resolution of incidents.
- C. Every officer is expected to consider the use of Departmental approved options, ranging from verbal techniques, hand control procedures, and non-lethal equipment which includes, but not limited to chemical agents and the baton.
- D. When a confrontation escalates suddenly, an officer may use any means or device at hand to defend him/herself, as long as the force is reasonable, given the existing circumstances.

See Exhibit K.

When compared to the controlling law, the APD's use of force policy is consistent with Graham's holding that § 1983 claims of excessive force must be analyzed by a reasonableness standard. 490 U.S. at 397. Therefore, Plaintiffs' claim that an officially promulgated policy caused Defendant Officers to use excessive force is both factually and legally insufficient to support Plaintiffs' policy claim.

- C. **THERE IS NO ADMISSIBLE EVIDENCE WHICH SHOWS THAT APD HAS A "CUSTOM" OF USING EXCESSIVE FORCE IN A MANNER WHICH IS UNCONSTITUTIONAL, WIDESPREAD, PERMANENT, AND WELL SETTLED.**

To prove its "custom" claim, Plaintiffs must show that APD has a "custom" of violating First

and Fourth Amendment rights in a manner which is unconstitutional, “widespread,” “permanent and well settled.” Praprotnik, 485 U.S. at 127 (quoting Adickes, 398 U.S. at 167-68). More specifically, Plaintiffs must show that a history of widespread *prior* abuse put the municipality on notice that it must take corrective action to prevent similar occurrences of misconduct in the future. Seamons v. Snow, 206 F.3d 1021, 1029 (10th Cir. 2000) (to impose liability for a Section 1983 policy or custom claim, a policy making official must have prior knowledge of or involvement in the misconduct of a subordinate); Barney v. Pulsipher, 143 F.3d 1299, 1307 (10th Cir. 1998) (without evidence of prior acts of misconduct, a pattern of violations did not exist to put the county on notice that its training program was deficient).

To the extent that prior incidents exist, a “custom” that is “widespread,” “permanent and well settled,” Praprotnik, 485 U.S. at 127 (quoting Adickes, 398 U.S. at 167-68), means more than a few isolated incidents over the course of several years, see Jojola v. Smith, 55 F.3d 488, 491 (10th Cir. 1995). Rumors or assertions by third parties will not provide the actual knowledge required as a predicate for liability under Section 1983. Jojola, 55 F.3d at 490-91. Moreover, a plaintiff must show that the prior incidents had merit in order to establish that the City had notice of the alleged unconstitutional custom. Brooks v. Scheib, 813 F.2d 1191, 1193 (11th Cir. 1987); Lewis v. Board of Sedgwick County Commissioners, 140 F. Supp.2d 1125, 1138 (D. Kan. 2001). “Indeed, the number of complaints bears no relation to their validity.” Brooks, 813 F.2d at 1193.

Standing alone, Defendant Officers’ alleged violation of Plaintiffs’ constitutional rights on March 20, 2003 is insufficient to create an official policy or practice which would render Defendants liable under a municipal liability theory. Oklahoma City v. Tuttle, 471 U.S. 808, 814 & 823-24

(1985). Even if the City failed to discipline Defendant Officers for their alleged violation of Plaintiffs' rights in this matter, this is an inadequate basis upon which to support an actionable municipal liability claim. Butler v. City of Norman, 992 F.2d 1053, 1055-56 (10th Cir. 1993) (citing Santiago v. Fenton, 891 F.2d 373, 382 (1st Cir. 1989)). Therefore, there is no evidence which shows that APD has a "custom" of using force in a manner which is unconstitutional, widespread, permanent, and well settled.

D. THERE IS NO ADMISSIBLE EVIDENCE WHICH SHOWS THAT DEFENDANTS' USE OF FORCE POLICIES OR CUSTOMS WERE DELIBERATELY INDIFFERENT TO PLAINTIFFS' FIRST AND FOURTH AMENDMENT CONSTITUTIONAL RIGHTS.

To establish liability, Plaintiffs must show that APD's action or inaction resulted from "deliberate indifference to the rights of the plaintiff." Jenkins v. Wood, 81 F.3d 988, 994 (10th Cir. 1996); Brown, 520 U.S. at 407. To prove "deliberate indifference," Plaintiffs must show that APD's action or inaction "reflects a 'deliberate' or 'conscious' choice by a municipality." City of Canton v. Harris, 489 U.S. 378, 389 (1989). Plaintiffs may also satisfy the deliberate indifference standard by showing that the municipality has actual or constructive notice that its action or failure to act is substantially certain to result in a constitutional violation, and it consciously or deliberately chooses to disregard the risk of harm. Brown, 520 U.S. at 407-08. "A showing of negligence or even heightened negligence will not suffice." Id. at 407.

In this case, however, there is no evidence to support the claim that Defendants officially promulgated a policy or made a conscious decision to follow a custom which caused Defendant Officers to allegedly violate Plaintiffs' constitutional rights. APD required Defendant Officers to

pass an elaborate selection process and complete a basic police academy and field training officer program before they worked as a non-probationary officer. In addition to their basic training, APD also trained Defendant Officers regarding its use of force policy. Moreover, APD continued to provide Defendant Officers with specialized training regarding the limits placed on their authority by the First and Fourth Amendments to the constitution after they left the APD police academy. Therefore, Plaintiffs' claim that an officially promulgated policy or custom caused Defendant Officers to violate Plaintiffs' constitutional rights is both factually and legally insufficient to support Plaintiffs' municipal liability claim.

E. THERE IS NO EVIDENCE WHICH SHOWS THAT DEFENDANTS' "PROTESTOR" POLICIES OR CUSTOMS REGARDING PROTESTORS WERE DELIBERATELY INDIFFERENT TO PLAINTIFFS' FIRST AMENDMENT RIGHTS OF FREE SPEECH AND ASSEMBLY AND FOURTH AMENDMENT RIGHTS AGAINST EXCESSIVE FORCE, ILLEGAL SEIZURE, AND MALICIOUS PROSECUTION.

There is no admissible evidence which supports Plaintiffs' claim that the "City of Albuquerque has a policy and practice of unlawfully denying anti-war protestors their First Amendment rights to gather and express their views in a public forum." There is no admissible evidence which supports Plaintiffs' claim that the "City of Albuquerque has a policy and practice of unlawfully arresting peaceful protestors." There is no admissible evidence which supports Plaintiffs' claim that the "City of Albuquerque has a policy and practice of unlawfully and maliciously prosecuting peaceful protestors." There is no admissible evidence which supports Plaintiffs' claim that APD prohibited its officers from wearing name tags in an effort to prevent the identification of these officers during a protest. Therefore, there is no evidence which shows that

Defendants' "protestor" policies or customs were deliberately indifferent to Plaintiffs' First Amendment rights of free speech and assembly and Fourth Amendment rights against illegal seizure and malicious prosecution.

II. AS A MATTER OF LAW, PLAINTIFFS CANNOT SHOW THAT THE TRAINING WHICH DEFENDANTS PROVIDED DEFENDANT OFFICERS WAS DELIBERATELY INDIFFERENT TO OR CAUSED THE VIOLATION OF PLAINTIFFS' FIRST AMENDMENT RIGHTS OF FREE SPEECH AND ASSEMBLY AND FOURTH AMENDMENT RIGHTS AGAINST EXCESSIVE FORCE, ILLEGAL SEIZURE, AND MALICIOUS PROSECUTION.

Even when the evidence is viewed in the light most favorable to them, Plaintiffs cannot show that the training which Defendants provided Defendant Officers was deliberately indifferent to or caused the violation of Plaintiffs' First Amendment rights of free speech and assembly and Fourth Amendment rights against excessive force, illegal seizure, and malicious prosecution.

A. THE LAW REGARDING SECTION 1983 "FAILURE TO TRAIN" CLAIMS.

In City of Canton, Ohio v. Harris, the Supreme Court held that the "inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." 489 U.S. 378, 388 (1989) (footnote omitted). In order to hold a municipality liable under Section 1983 for the acts of its employees under a theory of inadequate training, a plaintiff must show:

(1) the officers exceeded constitutional limitations . . .; (2) the [constitutional deprivation] arose under circumstances that constitute a usual and recurring situation with which police officers must deal; (3) the inadequate training demonstrates a deliberate indifference on the part of the city towards persons with whom the police officers come into contact; and (4) there is a direct causal link between the constitutional deprivation and the inadequate training.

Allen v. Muskogee, Okla., 119 F.3d 837, 841-42 (10th Cir. 1997), cert. denied, 522 U.S. 1148 (1998)

(citing Zuchel v. City and County of Denver, 997 F.2d 730, 734-35 (10th Cir. 1993)).

In City of Canton, the Court further stated that inadequate training may represent “city policy” if the municipality fails to respond to a known need:

it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policy makers of the city could reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.

Id. at 390 (citations omitted).

B. THERE IS NO EVIDENCE WHICH SHOWS THAT THE TRAINING WHICH DEFENDANTS PROVIDED DEFENDANT OFFICERS WAS DELIBERATELY INDIFFERENT TO PLAINTIFFS' FIRST AMENDMENT RIGHTS OF FREE SPEECH AND ASSEMBLY AND FOURTH AMENDMENT RIGHTS AGAINST EXCESSIVE FORCE, ILLEGAL SEIZURE, AND MALICIOUS PROSECUTION.

In this case, there is insufficient evidence to show that Defendants displayed deliberate indifference to the constitutional rights of its citizens in the manner with which it trained Defendant Officers. APD required Defendant Officers to pass an elaborate selection process and complete a basic police academy and field training officer program before they worked as non-probationary officers. In addition to their basic training, APD also trained Defendant Officers regarding its use of force policy. Moreover, APD continued to provided Defendant Officers with specialized training regarding the limits placed on their authority by the First and Fourth Amendments to the constitution after they left the APD police academy. In short, the totality of the evidence does not approach the City of Canton standard: that “the inadequacy be ‘so obvious’ and ‘so likely to result in the violation

of constitutional rights, . . . that the city can be said to have been deliberately indifferent.”

C. THERE IS NO EVIDENCE WHICH SHOWS THAT THE TRAINING WHICH DEFENDANTS PROVIDED DEFENDANT OFFICERS CAUSED THE ALLEGED VIOLATION OF PLAINTIFFS’ FIRST AMENDMENT RIGHTS OF FREE SPEECH AND ASSEMBLY AND FOURTH AMENDMENT RIGHTS AGAINST EXCESSIVE FORCE, ILLEGAL SEIZURE, AND MALICIOUS PROSECUTION.

Plaintiffs also lack evidence to prove the element of “moving force.” The evidence in this case does not establish even a remote link between Defendant Officers’ training and the alleged violation of Plaintiffs’ constitutional rights. Specifically, there is no evidence to support the theory that the training which Defendant Officers received was the “moving force” behind the alleged violation of Plaintiffs’ First Amendment rights of free speech and assembly and Fourth Amendment rights against excessive force, illegal seizure, and malicious prosecution. Having no evidence which identifies a deficiency in Defendants’ training program for Defendant Officers which caused Plaintiffs’ alleged constitutional injury, Plaintiffs’ failure to train claim is subject to dismissal as a matter of law.

III. WITH REGARD TO PLAINTIFFS’ SUPERVISORY LIABILITY CLAIM AGAINST DEFENDANTS, THERE IS NO EVIDENCE WHICH SHOWS THAT CHAVEZ, BAKAS, GALLEGOS, AND SCHULTZ EITHER PERSONALLY DIRECTED OR HAD PERSONAL KNOWLEDGE OF AND ACQUIESCED IN THE ALLEGED DEPRIVATION OF PLAINTIFFS’ CONSTITUTIONAL RIGHTS.

A supervisory position alone is an insufficient basis upon which to impose liability, because “there is no concept of strict supervisor liability under Section 1983.” Jenkins v. Wood, 81 F.3d 988, 994 (10th Cir. 1996) (citing Ruark v. Solano, 928 F.2d 947, 950 (10th Cir. 1991) (further citations and quotations omitted). “In other words, it is not enough for a plaintiff merely to show

a defendant was in charge of other state actors who actually committed the violation. Instead, just as with any individual defendant, the plaintiff must establish ‘a deliberate, intentional act by the supervisor to violate constitutional rights.’” Jenkins, 81 F.3d at 994-95 (quoting Woodward v. City of Worland, 977 F.2d 1392, 1399 (10th Cir. 1992), cert. denied 509 U.S. 923 (1993)) (further citations and quotations omitted).

In order to state a cause of action under Section 1983 for failure to supervise, a plaintiff must provide “allegations of personal direction or of actual knowledge and acquiescence” in the alleged constitutional deprivation by the supervisor. Woodward, 977 F.2d at 1400 (quoting Andrews v. City of Philadelphia, 895 F.2d 1469, 1478 (3rd Cir. 1990)); Rizzo v. Goode, 423 U.S. 362, 371 (1976) (supervisory liability requires an “affirmative link [between the supervisor and the subordinate] showing [the supervisor’s] authorization or approval of such misconduct.”). Negligence and even gross negligence on the part of the supervisor is not enough to create liability. Woodward, 977 F.2d at 1399 & n 11 (citing Daniels v. Williams, 474 U.S. 327, 330 (1986); Archuleta v. McShan, 897 F.2d 495, 497 (10th Cir. 1990)). “The Supreme Court has made it clear that liability under § 1983 must be predicated upon a ‘deliberate’ deprivation of constitutional rights by the defendant.” Woodward, 977 F.2d at 1399 (citing City of Canton, 489 U.S. at 389; Daniels, 474 U.S. at 330; Davidson v. Cannon, 474 U.S. 344, 347 (1986)).

To succeed on its supervisory liability claims against Defendants, Plaintiffs must prove that Mayor Chavez, Bakas, Chief Gallegos, and then DCOP Schultz either personally directed or had personal knowledge of and acquiesced in the alleged deprivation of Plaintiffs’ constitutional rights. Woodward, 977 F.2d at 1400. There is no evidence which suggests that Mayor Chavez, Bakas, Chief

Gallegos, and then DCOP Schultz personally directed Defendant Officers' alleged violation of Plaintiffs' constitutional rights. There is also no evidence which shows that Defendants had actual knowledge of prior violations of protestors' civil rights by APD officers or Defendant Officers and failed to take corrective action. Prior to the protest involving Plaintiffs, neither the APD Internal Affairs Unit nor an APD supervisor had found that an APD officer's conduct at a demonstration violated APD's policies or procedures, including APD's use of force policy. No court, either federal or state, has found that any APD officer's conduct during a protest (including the conduct of Defendant Officers) constituted excessive force, battery, or any other violation of federal or state law. Therefore, the dismissal of Plaintiffs' Section 1983 supervisory liability claim is proper.

IV. THE DISMISSAL OF PLAINTIFFS' STATE LAW FAILURE TO TRAIN AND SUPERVISE CLAIMS IS PROPER BECAUSE THERE IS NO EVIDENCE WHICH SHOWS THAT DEFENDANTS' TRAINING OR SUPERVISION CAUSED DEFENDANT OFFICERS TO COMMIT AN ENUMERATED TORT.

While New Mexico recognizes a cause of action for negligent supervision and/or training against supervisory defendants under the New Mexico Tort Claims Act, the New Mexico Courts have held that there is no waiver of sovereign immunity for such a claim standing by itself. In Ortiz v. New Mexico State Police, 112 N.M. 249, 252, 814 P.2d 117, 120 (Ct. App. 1991), the New Mexico Court of Appeals held that when subordinate officers have committed one of certain specified torts, the New Mexico Tort Claims Act does not provide immunity to supervisory law enforcement officers whose negligent training or supervision of the subordinates was a proximate cause of the tort. In McDermitt v. Corrections Corporation of America, 112 N.M. 247, 248, 814 P.2d 115, 116 (Ct. App. 1991), the Court of Appeals held that "when personal injury results from

a violation by subordinate officers of rights secured by the constitution or laws of the United States or New Mexico, then the Act waives immunity for negligent supervision or training by superior law enforcement officers that proximately cause the violation.” In McDermitt, the Court of Appeals emphasized, however, “that immunity is not waived for negligent training and supervision standing alone; such negligence must cause a specified tort or violation of rights.” Id.

In this case, there is simply no evidence which suggests that Defendants’ training or supervision caused Defendant Officers to commit an enumerated tort. Instead, the undisputed facts show that Defendant Officers’ training and supervision required Defendant Officers to use only that force authorized by Graham and respect the First Amendment rights of the protestors. Therefore, the dismissal of Plaintiffs’ state law failure to train and supervise claims is proper.

V. PLAINTIFFS LACK STANDING TO SEEK PROSPECTIVE INJUNCTIVE RELIEF AGAINST THE CITY BECAUSE THERE IS NO EVIDENCE WHICH SHOWS A REAL OR IMMEDIATE THREAT OF FUTURE HARM BY THE CITY AGAINST PLAINTIFFS.

Article III of the United States Constitution limits the federal courts to adjudicating actual cases and controversies. See Allen v. Wright, 468 U.S. 737, 750 (1984). This provision requires that Plaintiffs have “standing” in order to invoke the power of a federal court. Id. The essence of the standing doctrine is that Plaintiffs must allege a personal injury fairly traceable to Defendants’ allegedly unlawful conduct and likely to be redressed by the requested relief. See id. at 751. In order to satisfy the jurisdictional prerequisite of standing, Plaintiffs must do more than allege abstract injury, they must show that they “‘ha[ve] sustained or [are] immediately in danger of sustaining some direct injury’ as the result of the challenged official conduct and the injury or threat of injury must

be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983) (citing Golden v. Zwickler, 394 U.S. 103, 109-110 (1969)).

In Lyons, the Supreme Court made clear that plaintiffs may lack standing to seek prospective relief when the challenged conduct is no longer continuing. The plaintiff in Lyons sued the City of Los Angeles and several police officers, alleging that the officers had stopped him for a routine traffic violation and applied a "choke-hold" without provocation. 461 U.S. at 97. Among other things, the plaintiff requested an injunction against the future use of choke-holds by the Los Angeles Police Department unless the suspect threatened to use deadly force. Id. at 98. The Court held that Lyons lacked standing to seek prospective injunctive relief because he could not show a real or immediate threat of future harm. Id. at 105.

In reaching this conclusion, the Court in Lyons relied on its earlier decision in O'Shea v. Littleton, 414 U.S. 488 (1974), wherein it stated that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." Lyons, 461 U.S. at 102 (quoting O'Shea, 414 U.S. at 495-96). To obtain equitable relief for past wrongs, the Court held that "Lyons would have had not only to allege that he would have another encounter with the police, but also to make the incredible assertion either, (1) that all police officers in Los Angeles always choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation or for questioning or, (2) that the City ordered or authorized police officers to act in such manner." Id. at 105-06.

Even when the evidence is viewed in the light most favorable to them, Plaintiffs lack standing to seek prospective injunctive relief against the City because there is no admissible evidence

which shows a real or immediate threat of future harm by City against Plaintiffs. There is no admissible evidence which suggests that the City will violate Plaintiffs' constitutional rights if they participate in another protest. There is also no admissible evidence which suggests that the City will order or authorize officers to violate Plaintiffs' constitutional rights if they participate in another protest. Therefore, Plaintiffs lack standing to seek prospective injunctive relief against City. See Lyons, 461 U.S. at 105.

V. UNABLE TO ESTABLISH LIABILITY ON THE UNDERLYING CLAIMS, PLAINTIFFS CANNOT PURSUE THEIR TORT CLAIMS AGAINST THE CITY UNDER A *RESPONDEAT SUPERIOR* THEORY.

Plaintiffs asserted various state law tort claims against the individual Defendant Officers and the City for false imprisonment, battery, and malicious abuse of process. See Complaint, Counts I, II, III. Plaintiffs claim that the City is responsible under the theory of *respondeat superior* for torts allegedly committed by the individual Defendant Officers. See id., ¶¶ 135, 152, & 165. With the exception of their battery claim against Officer Fisher, Plaintiffs do not, however, have evidence to establish that the individual Defendant Officers caused any tort as Plaintiffs cannot identify who caused the alleged harm. Unable to establish the alleged torts against the named Defendant Officers (except for Officer Fisher), Plaintiffs' cannot pursue such claims against the City under a *respondeat superior* theory.

Under the NMTCA, the doctrine of *respondeat superior* applies. NMSA 1978, § 41-4-4.

As the New Mexico Supreme Court has stated:

A governmental entity is not immune from liability for any tort of its employee acting within the scope of duties for which immunity is waived. When the act of the employee is the act of the public entity, let the master answer.

Silva v. State, 106 N.M. 472, 745 P.2d, 380, 385 (1987). However, where the liability of the employer is derivative, dismissal of the underlying claim against the employee also releases the employer. See Brown v. City of Belen, No. Civ. 96-0533 BB/RLP, slip op. (D.N.M. filed April 4, 2004) [Doc. No. 24]; Sisneros v. City of Albuquerque, No. Civ. 02-1035 JB/KBM, slip op. at 20-23 (D.N.M. filed November 7, 2003) [Doc. No. 35] (granting the City of Albuquerque summary judgment on plaintiff's *respondeat superior* claim, in part, because he did not present any evidence identifying which police officer allegedly grabbed him and used excessive force against him.); Lovelace v. City of Albuquerque, No. Civ. 01-690 MCA/RLP, slip op. at 21 (D.N.M. filed February 5, 2003) [Doc. No. 67] (stating "[a]s Plaintiffs have failed to come forward with evidence showing that any individual Defendant acted wrongly in arresting and detaining them, it follows that there is no basis for holding Defendant City of Albuquerque or its supervisory personnel liable for such action under a theory of vicarious liability . . ."); Sickles v. City of Albuquerque, No. Civ. 01-1287 JP/DJS Slip op. at 11 (D.N.M. filed October 21, 2002) [Doc. No. 37] (rejecting plaintiff's theory that liability can lie directly with the city under the NMTCA for the acts of its officers because a governmental entity is not a law enforcement officer within the meaning of the Act.).

As fully discussed in Defendants' Motion for Partial Summary Judgment No. II, Plaintiffs have no evidence that the named Defendant Officers committed any of the harm of which they complain in Counts I, II and III of the Complaint. Unable to establish liability on the underlying claims, Plaintiffs cannot pursue their tort claims against the City under a *respondeat superior* theory. Except for a battery claim against Officer Fisher, Plaintiffs' Tort claims (Counts I, II and III) must therefore be dismissed with prejudice against the City.


WHEREFORE, Defendants respectfully request that this Court grant the following relief:

- A. Grant Defendants' Motion for Partial Summary Judgment No. III;
- B. Dismiss Plaintiffs' municipal liability (policies, customs, patterns, and practices) (Count IX) claims with prejudice;
- C. Dismiss Plaintiffs' failure to train (Count IX) claims with prejudice;
- D. Dismiss Plaintiffs' supervisory liability claims against Mayor Martin Chavez, Nick Bakas, Gilbert Gallegos and Ray Schultz (Count IX) with prejudice;
- E. Dismiss Plaintiffs' injunctive relief claims with prejudice; and
- F. Order all other relief this Court deems just and proper.

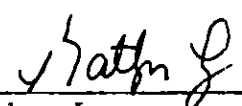
Respectfully Submitted,

CITY OF ALBUQUERQUE
Robert M. White
City Attorney

By:


Kathryn Levy
Deputy City Attorney
Attorney for Defendants City of Albuquerque,
Mayor Chavez, Bakas, Gallegos and Schultz
P.O. Box 2248
Albuquerque, New Mexico 87102
(505) 768-4500

I hereby certify that a true and correct copy of the foregoing was sent via U.S. Mail this 31st day of January, 2006 to all counsel of record.


Kathryn Levy

**THE EXHIBITS ATTACHED TO
THIS PLEADING ARE TOO
VOLUMINOUS TO SCAN. SAID
EXHIBITS ARE ATTACHED TO THE
ORIGINAL PLEADING IN THE CASE
FILE WHICH IS LOCATED IN THE
RECORDS DEPARTMENT, U.S.
DISTRICT COURT CLERK'S
OFFICE...**