UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. NO. 02-CV-12447 RGS

TORI A. BEAL,

Plaintiff

v.

DAVID W. BLACHE, MARTHA BLACHE, and THE CITY OF METHUEN,

Defendants

Memorandum of Law
in Support of the
Defendant City of Methuen's
Motion for Summary Judgment

Statement of the Case

Beal brings this action against David Blache on a claimed rape of her while he was on duty as a Methuen Police Officer on August 18, 2000. The City of Methuen is named in count II of the complaint for violation of 42 U.S.C. 1983. The claim against the City is based upon the allegation of "deliberate indifference" or tacit authorization to his prior wrongful conduct. As a subset to this claim it is alleged that the city's failure to supervise, consciously and deliberately fail to improve training and a custom or policy of discouraging personnel from properly addressing allegations of abuse caused the deprivation of the plaintiffs rights, privileges and immunities secured by the constitution and the laws of the United States.

Summary of Defendant City of Methuen's Position

It is the defendants, City of Methuen's contention that the plaintiff has failed to make a showing of "deliberate indifference" by a final policy maker of the city so as to sustain these allegations. It is further the City's position that the plaintiff he failed to demonstrate

that an action or inaction of a final policy maker of the city was a "causative factor" to this deprivation. It is thus the defendant, City of Methuen's, argument that summary judgment should be

granted in its favor and against the plaintiff as to count II (violation of 42 U.S.C. 1983).

Facts

The defendant, City of Methuen, refers and incorporates as is fully set forth herein defendant City of Methuen's Local Rule 56.1 Statement

Argument

The plaintiff has failed to demonstrate "deliberate indifference" by a final decision maker of the City of Methuen that functioned as the causation of the sexual assault by David Blache on the plaintiff Tori Beal and therefore summary judgment is appropriate as to count 2 of the complaint made against the City of Methuen.

Standard for Grant of Summary Judgment

In the case presently before the court the plaintiff has conducted extensive discovery including deposing the City of Methuen and the defendant David Blache. The plaintiff also sought and obtained interrogatories and requests for production from the city. The question then becomes whether on all the evidence gathered to date the plaintiff has made a case that can withstand summary judgment.

The 1st circuit has been clear on the function of summary judgment.

The role of summary judgment is "to pierce the pleadings and to access the proof in order to see whether there is a genuine need for trial". Mesnick vs General Elec. Co., 950 F.2d 816,822 (1st Cir 1991). The burden is on the moving party to show, based upon the pleadings, discovery on file and affidavits, "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c) "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." Matsushita Electric Indus. Co. v. Zenith Radio Corp. 475 U.S. 574,586-87, 106 S. Ct. 1348, 1356.(1986)

Summary judgment under Rule 56 of the Federal Rules of Civil Procedure is appropriate, "after adequate time for discovery and upon motion, against a party who fails

to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). To survive the motion, the nonmoving party need only present evidence from which a jury might return a verdict in its favor. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986). Where, as here, the moving party does not have the burden of proof at trial, that party nevertheless must make a showing, by "pointing out to the district court," that the evidence is insufficient to support the nonmoving party's case. *Celotex,* 477 U.S. at 325, 106 S.Ct. at 2554. Once this showing has been made, it is up to the nonmoving party to proffer sufficient competent evidence to establish the existence of a genuine issue of material fact. *United States v. One Parcel of Real Property,* 960 F.2d 200, 204 (1st Cir.1992). "Genuine" means that "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," and a "material fact" is one that "might affect the outcome of the suit under governing law." *Anderson,* 477 U.S. at 248, 106 S.Ct. at 2510. On issues where the nonmovant bears the burden of proof, he or she must present definite, competent evidence to rebut the motion. *Id.* at 256-57, 106 S.Ct. at 2514- 15.

Here the facts in this case when analyzed as to the law of when a city may be held liable establishes clearly that summary judgment should be granted in the defendant, City of Methuen's favor.

Municipal Liability under Section 1983

The language of the statute itself outlines the nature of liability existing and necessary to be shown in order for municipal liability to apply.

Title 42 U.S.C. § 1983 provides in relevant part:

"Every person who, **under color of** any statute, ordinance, regulation, **custom, or usage,** of any State or Territory or the District of Columbia**, subjects, or causes to be subjected, any citizen** of the United States or other person within the jurisdiction **thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law,** suit in equity, or other proper proceeding for redress."

The Supreme Court held in Monell v. New York City Dept. of Social Servs., 436

U.S.,658, 689, 98 S.Ct.,2018, 2035, that municipalities and other local governmental bodies are "persons" within the meaning of § 1983. However the Monell Court was equally clear that the liability was limited in nature.

A municipality cannot be held liable for a purported constitutional civil rights violation under ordinarily applicable principles of either vicarious liability or respondeat superior. *City of Canton, Ohio v. Harris,* 489 U.S. 378, 385, 109 S.Ct. 1197, 1202, 103 L.Ed.2d 412 (1989); *Monell v. Department of Social Services of City of N.Y.,* 436 U.S. 658, 691, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978).

Municipalities may be sued for their own unconstitutional or illegal policies, but not for the acts of their employees. Monell at 691.

"-------it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under section 1983". *Monell at 436 U.S. 691, 98 S. Ct. at 2036,2037.*

A municipal liability claim under section 1983 requires proof that the municipality maintained a policy or custom, which caused, or was the moving force behind, a deprivation of constitutional rights. See Oklahoma City vs. Tuttle, 471 U.S. 808, 819, 105 S. Ct. 2427, 85 L.Ed.2d 791 (1985); *see Monell* at 694, 98 S.Ct. 2018.

Monell and subsequent cases illustrated that the Supreme Court required a plaintiff seeking to impose liability on a municipality under § 1983 to identify a municipal "policy" or "custom" that caused the plaintiff's injury. See *Monell, supra,* at 694, 98 S.Ct., at 2027; *Pembaur, supra,* at 480- 481, 106 S.Ct., at 1298-1299; *Canton, supra,* at 389, 109 S.Ct., at 1205.

"Locating a "policy" ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality". *Monell, supra,* at 694, 98 S.Ct., at 2027." Bryan County vs Brown, 520 U.S. 397, 117 S.Ct. 1382, 1388. "Similarly, an act performed pursuant to a "custom" that has not been formally approved by an appropriate decision-maker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law. 436 U.S., at 690-691, 98 S.Ct., at 2035-2036 (citing *Adickes v. S.H. Kress & Co.,* 398 U.S.

144, 167-168, 90 S.Ct. 1598, 1613-1614, 26 L.Ed.2d 142 (1970)). Bryan County id. at 1388.

As noted by the Supreme Court only those municipal officials who have "final policymaking authority" may by their actions subject the municipality to § 1983 liability. *Pembaur v. City of Cincinnati,* 475 U.S. 469, 483, 106 S.Ct. 1292, 1300, 89 L.Ed.2d 452 (1986)

Existence of a municipal policy is shown by; a deliberate choice to follow a course of action---- made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question. It must be "so well settled and widespread that the policymaking officials of the municipality can be said to have either actual or constructive knowledge of it yet did nothing to end the practice." *Miller v. Kennebec County,* 219 F.3d 8 (1st Cir.2000). Bordanaro vs McLeod 871 F.2d 1151,1156 (1989), quoting Spell v. McDaniel, 824 F.2d 1380,1386-88 (4th cir.)(1988).

The First Circuit has recognized these two requirements for establishing municipal liability:

First, the custom or practice must be attributable to the municipality. In other words, it must be so well settled and widespread that the policymaking officials of the municipality can be said to have either actual or constructive knowledge of it yet did nothing to end the practice.

Second, the custom must have been the cause of and the moving force behind the deprivation of constitutional rights. *Bordanaro v. McLeod,* 871 F.2d 1151, 1156 (1st Cir.1989)

There must also be shown an "affirmative link" between the municipal custom and the constitutional deprivation. See Tuttle, 471 U.S. at 824-25 105 S. Ct. 2436-37; Kibbe 777 F2d at 808, Voutour 761 F.2d at 819-20. **"This connection needs to rise above a mere but/for coupling between cause and effect,** see City of Canton, at 109 S.Ct. 1205-05; Tuttle 471 U.S. 823, 105 S.Ct. at 2436 (opinion of Rehnquist, J.); for "[i]n every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city 'could have done' to prevent the

unfortunate incident. *See Oklahoma City v. Tuttle, supra,* 471 U.S. at 823, 105 S.Ct. at 2436 (opinion of Rehnquist, J.)." *City of Canton,* 489 U.S. at ----, 109 S.Ct. at 1205. Further the plaintiff cannot rest comfortably on a theory that in some fashion the action of a governmental employee is attributable to the city.

As our § 1983 municipal liability jurisprudence illustrates, however, it is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was 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 the deprivation of federal rights. Bryan County, 520 U.S. at 397, 117 S.Ct. at 1385

"To the extent that we have recognized a cause of action under § 1983 based on a single decision attributable to a municipality, we have done so only where the evidence that the municipality had acted and that the plaintiff had suffered a deprivation of federal rights also proved fault and causation." See *Owen v. Independence, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), and Newport v. Fact Concerts, Inc., 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981), Bryan County id. 520 U.S.405, 117 S.Ct. 1389.*

Claims not involving an allegation that the municipal action itself violated federal law, or directed or authorized the deprivation of federal rights, present much more difficult problems of proof. That a plaintiff has suffered a deprivation of federal rights at the hands of a municipal employee will not alone permit an inference of municipal culpability and causation; the plaintiff will simply have shown that the *employee* acted culpably. The Supreme Court recognized these difficulties in cases such Canton and Bryan County confirmed that 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. *City of Canton Id., at 388, 109 S.Ct., at 1204. A showing of simple or even heightened negligence will not suffice.*

As the decision in *Canton* makes clear, "deliberate indifference" is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.

Liability for Failure to Supervise

No basis exists in this case upon which the City is or could be found liable based upon a policy of inadequate training and supervision. Quite the contrary a review of very similar cases supports the fact that summary judgment is appropriate here.

The 4th Circuit decision in Jones vs. Wellham Case

The present action follows to a large degree the factual pattern in a 4th circuit decision known as Jones vs. Wellham 104 F.3rd 620 (1997). However as the facts demonstrate the Methuen Police Chief in the current case took far a more extensive and pro-active role in the discipline and control of the officer. As noted above the Blache discipline involved a one-year suspension, a mandate for counseling and successful completion of medical and psychological testing prior to re-instatement.

In the Jones case an Officer named Zeigler stopped a pickup truck driven by Ms. Jones on the suspicion of intoxication. Zeigler then informed her he would drive her home. Zeigler while Jones was in custody forcibly raped her. (Zeigler claimed the sexual act was consensual). The original charge of second-degree rape ultimately resulted in a plea to a lesser charge of misconduct in office.

This was not the first time that Zeigler had been involved in a sex related misconduct with a citizen while on duty. In 1979 Zeigler was accused of using his badge to enter the apartment of a woman and forcibly raping her. The woman a Ms. Forsythe went the next day to the station and filed a complaint. Chief Maxwell Frye then ordered a criminal investigation, which included a police lineup in which she identified Zeigler, and her taking and successfully passing a polygraph test regarding the alleged rape. Zeigler when questioned asserted his Fifth Amendment rights and never gave a statement. Zeigler was suspended pending the results of the investigation. The police met with the states attorney and presented the evidence of the rape charges.[1] The state attorney in Jones, much like the Essex County District Attorneys' office in the present case, as to the charge of rape against Zeigler "concluded that because he was not confident that the available evidence respecting the nonconsensual nature of the incident would suffice to convict" declined to

[1] Note should be had that in the Jones case the investigation was made internally while in the present case the Methuen Police Chief had turned the investigation over to the state police and the district attorneys office.

prosecute Zeigler for any criminal violation. The states attorney advised the chief of his decision. Jones at 623.

On the complaint of the Forsythe rape the Chief was then given the criminal investigative file. The Chief Frye met with Zeigler to conclude the departments' internal affairs investigation of the incident. Chief Frye made no further inquiry and Zeigler received and accepted a discipline of one month's suspension, transfer to desk duty, loss of the personal patrol vehicle and a requirement that he consult with the police chaplain. The chief put Zeigler a short time later back on street duty. When the police chief put Zeigler back on street duty on street duty Forsythe called him to express her concern. Police Chief Frye told her not to talk about the incident and that if she called him again he would sue her. Jones at 623.

In 1990 Zeigler while on duty raped Jones. She then brought the suit against the county. The charges of Jones were that it (the county) was liable under section 1983 in that the rape was directly caused by the county's condonation, with deliberate indifference to its consequences, of a known "custom or usage" of its police chief in failing to impose adequate discipline for sexually-related conduct such as Zeigler's, that Jones' rape in 1990 by Zeigler was directly caused by the deliberately indifferent decisions of Chief Frye in 1979 and 1980, first to retain Zeigler in service, then to return him to street duty, despite knowledge of his propensity for sexual misconduct while on duty, which decisions are attributable to the county as ad hoc policy choices of Frye as authorized final policy maker in police personnel matters. Jones at 623-624.

The district court in the Jones case rejected the "custom and usage" theory of liability on the basis that the undisputed facts of record failed, as a matter of law, to show the "persistent and widespread" practice required to invoke that theory under the holding of Spell vs McDaniel 824 F.2d 1380,1386 (4th cir. 1987). In the Jones case the court noted that Jones acquiesced in the ruling as to "custom or usage". Jones therefore relied solely on her appeal on her claim of error by the district court in rejecting her alternative theory of liability by virtue of Chief Frye's decisions, as final policy maker for the county, in failing to discharge or at least to keep Zeigler off street duty back in 1979 and 1980 following the Forsythe incident.

Jones in the argument relied on the theory of liability recognized under Pembaur vs. Cincinnati 475 U.S. 469 (1986). Under that theory " municipal liability may be imposed for a single decision by municipal policy makers under appropriate circumstances" id. at 480. The court then analyzed the case under the standard established in the case of City of Oklahoma vs Tuttle, 471 U.S. 808,822 (1985) this standard being a showing of "deliberate indifference" of the decision maker to the possible consequences of his decision, hence a "conscious choice" of the course of action taken, see City of Canton vs. Harris 489 U.S. 378,389 (1989) and a close causal connection between the decision and the ultimate constitutional injury inflicted. See id. 391 (policy choice must have "actually caused" the constitutional violation) Tuttle, 471 U.S. at 823. ("affirmative link"); Spell 824 F.2d at 1391 ("almost bound to happen, sooner or later, rather than merely "likely to happen in the long run.").

As the court noted Jones "Pembaur" claim was that Chief Frye's November 1979 decision not to discharge Zeigler, followed by his June 1980 decision to return him to street duty, constituted ad hoc policy decisions by an official having final policy making authority with respect to such personnel matters; that they were made with deliberate indifference to the risks they entailed for local citizens; and that as a proximate result of these decisions Zeigler was put in a position to and did rape Jones as a result of this. *Jones at 626*

The Appeals Court in the Jones case focused on the finding by the District Court that there was not a showing of "deliberate indifference". The Appeals Court concurred on the facts that the District Court was correct in concluding that there did not exist "deliberate indifference" as necessitated to find governmental liability. The court referencing the City of Canton finding 489 U.S. 389 reiterated that "Only where a [municipality's] conduct evidences a deliberate indifference to the rights of [municipal] inhabitants can such a shortcoming be properly thought of as a city "policy or custom" that is actionable under section 1983."

The appeals court in Jones at 626 stated "--- we agree with the district court's conclusion that on the summary judgment record, Frye's decisions respecting Ziegler's retention and duty status following the Forsythe incident back in 1979 and 1980 could not be found to reflect deliberate indifference." The appeals court in agreeing with the district

courts decision examined the material facts including the internal investigation by two officers of the Forsythe complaint, their report, the filing of the report with the state district attorney's office for consideration of rape charges against Zeigler and the district attorney declining to prosecute for the reason as reported to the then Chief that insufficient evidence existed to prosecute. The Appeals Court in Jones further examined the then Chief Frye's decision to discipline but not discharge Zeigler and after a six-month interval to return him to street duty.

The Jones court at 627 then stated, "We agree with the district court that on those undisputed facts, Frye's decisions could not be found to be the result of "**deliberate indifference**." "With the benefit of hindsight, they were clearly unfortunate, might perhaps be thought imprudent, or even be found legally negligent, but that does not suffice; only decisions taken with **deliberate indifference** to the potential consequences of known risks suffices to impose municipal liability on the basis that such decisions constituted official county policy". [2]

This line of reasoning was also found correct in the Farmer case of the Supreme Court. Indeed, a supervisory official who responds reasonably to a known risk is not deliberately indifferent even if the harm is not averted. *See Farmer,* 511 U.S. at 844, 114 S.Ct. 1970; *Doe v. Dallas Ind. Sch. Dist.,* 153 F.3d 211, 219 (5th Cir.1998) (concluding that school official who investigated complaint of sexual abuse was not deliberately indifferent even though official erroneously concluded that complaint was baseless).

The Jones court further went on to uphold the courts alternative ground of decision that Frye's 1979 and 1980 decisions respecting Zeigler's retention and duties could not, as a matter of law, be found the sufficiently direct cause of Ms. Jones rape. "The causation requirement of imposing municipal liability for policy maker decisions not themselves unconstitutional is a stringent one deriving from the necessity to avoid the effective, but forbidden, imposition of vicarious liability on municipalities." Jones cited Monell 436 U.S. 692-694 for the proposition that municipal liability is imposed only when "execution of---policy---inflicts the injury. "the policy must be the "moving force" behind the

[2] To the extent the plaintiff Beal might in this case argue that the ten year span between the original rape and the second rape by Zeigler was the persuasive factor in the Jones decision this is incorrect and in fact was found not the reason for the decision in an interpretation of that by the United States District Court E.D. Virginia 112 F. Supp.2d 524 (2000). In that case the court stated in contravention to such argument. "We disagree with Malone's reading of Jones." The court recited the various steps taken by the chief at that time as the grounds for the Jones holding.

ultimate violation, Polk County vs Dodson 454 U.S. 312,326(1981); there must be an "affirmative link" between the policy and the violation; mere but-for-causation will not suffice, Tuttle 471 U.S. at 823. "as we have put it: the challenged policy decision must be one that made the ultimate violation "almost bound to happen, sooner or later", rather than merely 'likely to happen in the long run" Spell at 824 F.2d at1391. *Jones id. at 627*

The Jones court concluded that the causal link between Frye's decision not to discharge Ziegler outright and Jones rape were simply to attenuated to satisfy that stringent causation requirement. "----mere cause-in-fact does not suffice to establish the required affirmative link." "If that were the test, every depredation of this sort would give rise to municipal liability, for every section 1983 claimant harmed by such employee conduct could 'point to something the [municipality] could have done' to prevent the unfortunate incident" City of Canton 489 U.S. at 392. *Jones id. at 627*

The Jones court thus upheld the District Courts decision to grant summary judgment to the county.

The 8th Circuit Decision in the Rogers case

The 8th circuit had the occasion to review the causation component of a rape allegation in the Rogers case.

The 8th circuit examined the policy issue on the question of causation in the case of Rogers vs. Little Rock 152 F.3rd 790 (8th Cir.)(1988). In this case a Little Rock Police Officer named Morgan had forcible sex with a female named Rogers. The plaintiff sued the city. The District Court granted summary judgment in favor of the City of Little Rock and Rogers appealed.

Rogers in the appeal claimed that there were genuine issues of fact about whether the city had a policy of not sustaining complaints of physical abuse by police officers and whether such policy caused the violation of her constitutional rights. The appeals court in Rogers at 798 noted that in order to subject the city to § 1983 liability Rogers must show that the city had a "policy or custom' of failing to act upon prior similar complaints of unconstitutional conduct, which caused the constitutional injury at issue." Andrews v. Fowler, 98 F.3d 1069, 1075 (8th Cir. 1996) (quoting Monell v. Dep't of Soc. Servs. of the City of New York, 436 U.S. 658, 694 (1978)).

In support of her claim Rogers offered the deposition testimony of officer John Hall of the LRPD Internal Affairs Division who stated that a complaint would not be sustained without physical evidence or other witnesses to support the accusations. She also pointed to two LRPD documents, which indicated that the department would accept an officer's statement as true unless the complaint was corroborated. She argued that this created an environment in which officers believed that they could violate citizens' constitutional rights with impunity, even by an act of rape. *Rogers at 799.*

The court for the purpose of summary judgment determined that the city had a policy of ruling complaints "not sustained" when there was no supporting evidence besides the complaintant's account.[3] The Appeals Court nevertheless found Rogers had failed to establish a case for section 1983 liability since such policy was not shown to have caused the constitutional violation. "A § 1983 plaintiff must prove that the alleged policy "was the moving force behind the constitutional violation." The court therein cited Jane Doe A. v. Special School Dist., 901 F.2d 642, 646 (8th Cir. 1990)." "Rogers has not made an adequate showing that a policy of believing the officer's word over the complainant's in the absence of other evidence led officers to believe that they could violate citizens' constitutional rights without fear of punishment. The uncontested evidence shows that all allegations of police misconduct were investigated by the LRPD, and there was no pattern of acquiescence in the face of constitutional violations." Rogers id 799.

This necessity for a causation link to the injury is reiterated in Bryan County vs Brown 517 U.S. 1154, 116 S.Ct. 1540 (1996). There the court reviewed its earlier rulings in cases such as City of Canton. *Rogers id 799.*

"Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee. See *Canton, supra,* 489 U.S., at 391-392, 109 S.Ct., at 1206-1207; *Tuttle, supra,* at 824, 105 S.Ct., at 2436 (plurality opinion). See also *Springfield v. Kibbe,* 480 U.S. 257, 270-271, 107 S.Ct. 1114, 1121-1122, 94 L.Ed.2d 293 (1987) (*per curiam*) (dissent from dismissal of writ as improvidently granted)."

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[3] It should be noted that no such showing exists in the Beal case.

The court in Rogers on the issue of custom or policy reviewed the plaintiffs claimed evidence of the city's inadequate reaction to an earlier incident where Morgan engaged in sexual intercourse with a fellow cadet while on duty and an unsustained claim by another cadet of sexual harassment. The Rogers court at 799 stated "The undisputed evidence showed that the department investigated both incidents and suspended Morgan as a result of his engaging in intercourse with a fellow cadet while on duty." "This response was sufficient as a matter of law to defeat a claim that the city responded inadequately to information about Morgan's prior misconduct."

Failure to Train

Failure to train cases normally relates to excessive force or deadly force cases. For example, in *Canton,* the Court noted that because police officers are armed by a municipality and the officers are certain to be required on occasion to use force in apprehending felons, "the need to train officers in the constitutional limitations on the use of deadly force can be said to be 'so obvious,' that failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights." *Id.* at 390, n. 10, 109 S.Ct. at 1205, n. 10 (citation omitted).

The evidence in this case does not compare favorably with the example recited in *Canton.* Even if it were assumed that some need for training regarding sexual abuse or fraternization would have been obvious to ordinarily police officials. Plaintiff has not proffered any evidence to support a finding that any purported failure to train police officers regarding sexual abuse or fraternization was a cause of injury to Tori Beal. A plaintiff must show that there is a causal link between the municipality's policy and the alleged violation. *Bowen,* 966 F.2d at 18.

To the extent that plaintiff claims "deliberate indifference is shown by the failure to train Blache regarding his conduct another 8th Circuit case is instructive. In Andrews vs Fowler 98 F.3rd 1069 (8th Cir. 1996) the plaintiff appealed the district courts decision to grant summary judgment in favor of the city of North Sioux City. The plaintiff claimed the deficient training led to her rape by the police officer. The Andrews court at 1077 stated "in light of the regular law enforcement duties of a police officer, we cannot conclude that there was a patently obvious need for the city to specifically train officers not to rape young women." The court went thereon to state "Moreover, even if the

training was in some manner deficient, 'the identified deficiency in the city's training program must be closely related to the ultimate injury' such that 'the deficiency in training actually caused the police officers offending conduct." *Andrews at 1077* citing City of Canton 489 U.S. at 391.

Liability for Failure to Discipline

In addition to the above-cited cases the 1st Circuit Court of Appeals decision on this issue is instructive. In the case of *Santiago v. Fenton* 891 F.2d 373 (1989) the Appeals court reviewed a claim by a Hector Santiago that the City of Springfield, Massachusetts, its police chief and three police officers violated his constitutional rights by forcibly arresting and repeatedly striking him after he threw a snowball that hit a police officer's unmarked car. Santiago asserted that the city's tacit approval of widespread violations of constitutional rights, evidenced by a failure to discipline officers who commit violations, establishes a policy of encouraging unconstitutional conduct. The court stated at 382 "Appellant claims that the city's failure to discipline Officer Mackler for both an earlier incident and the one underlying this action is sufficient evidence to defeat summary judgment on this issue." "We disagree." "The city and the department undisputedly had a policy of investigating complaints that expressly included the disciplining of officers in appropriate circumstances." "In both of these instances the department conducted an investigation and hearing but decided that discipline was not appropriate." "As we have indicated before, we cannot hold that the failure of a police department to discipline in a specific instance is an adequate basis for municipal liability under *Monell. Kibbe,* 777 F.2d at 809 n. 7; *Landrigan v. City of Warwick,* 628 F.2d 736 (1st Cir.1980)." " Appellant has not offered evidence of a failure to discipline sufficiently widespread to reflect a municipal policy." With this statement we hold that summary judgment appropriately was granted to Fenton and the City of Springfield. *Santiago at 382*

The custom or policy discouraging personnel from properly
Addressing allegations of abuse

The plaintiff has offered no evidence whatsoever to support this theory. In fact the evidence to date has shown much discussion whereby the personnel of the department would have observed that complaints are subject to investigation. MacDougall in his affidavit at para. 67 states there is no such policy.

Conclusion

The facts of this case showed that the chief of police took all reasonable actions in the original rape claim of **S.T.**

These actions included referring the matter to the state police investigative unit for an independent investigation, following the course of the investigation with the state police and the district attorney's office, commencing his own internal disciplinary investigation, imposing with approval of the mayor a one-year unpaid suspension, requiring counseling and a psychological evaluation prior to allowing Blache's return to duty. To hold the city responsible would effectively negate the required showing of "deliberate indifference" by way of a custom or policy and the requirement to demonstrate the "causal connection" or "moving force" behind the rape.

One could argue that the actions taken did not prevent the rape. However as noted by our courts a mere/but for coupling between cause and effect is inadequate. Further the fact that the disciplinary action was unsuccessful does not meet the requisite standard necessary to find municipal liability. To allow this case to proceed with the lack of evidence subjects the city more to a respondeat superior theory not recognized under section 1983.

As the Supreme Court stated in City of Oklahoma City v. Tuttle, 471 U.S. at 821, 105 S.Ct. at 2435 (1985) "To impose liability under those circumstances would be to impose it simply because the municipality hired 'one bad apple'."

For these reasons the defendant, City of Methuen requests this court to grant its motion for summary judgment on count II.

City of Methuen
By its solicitor

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