COLOR OF LAW

WHEN IS A POLICE OFFICER "ON THE JOB?" UNDER § 1983



POINTS FOR DISCUSSION

-A recent scenario in Colorado

-Initial considerations in analysis

-Standard for “color of law” – 2 exclusions

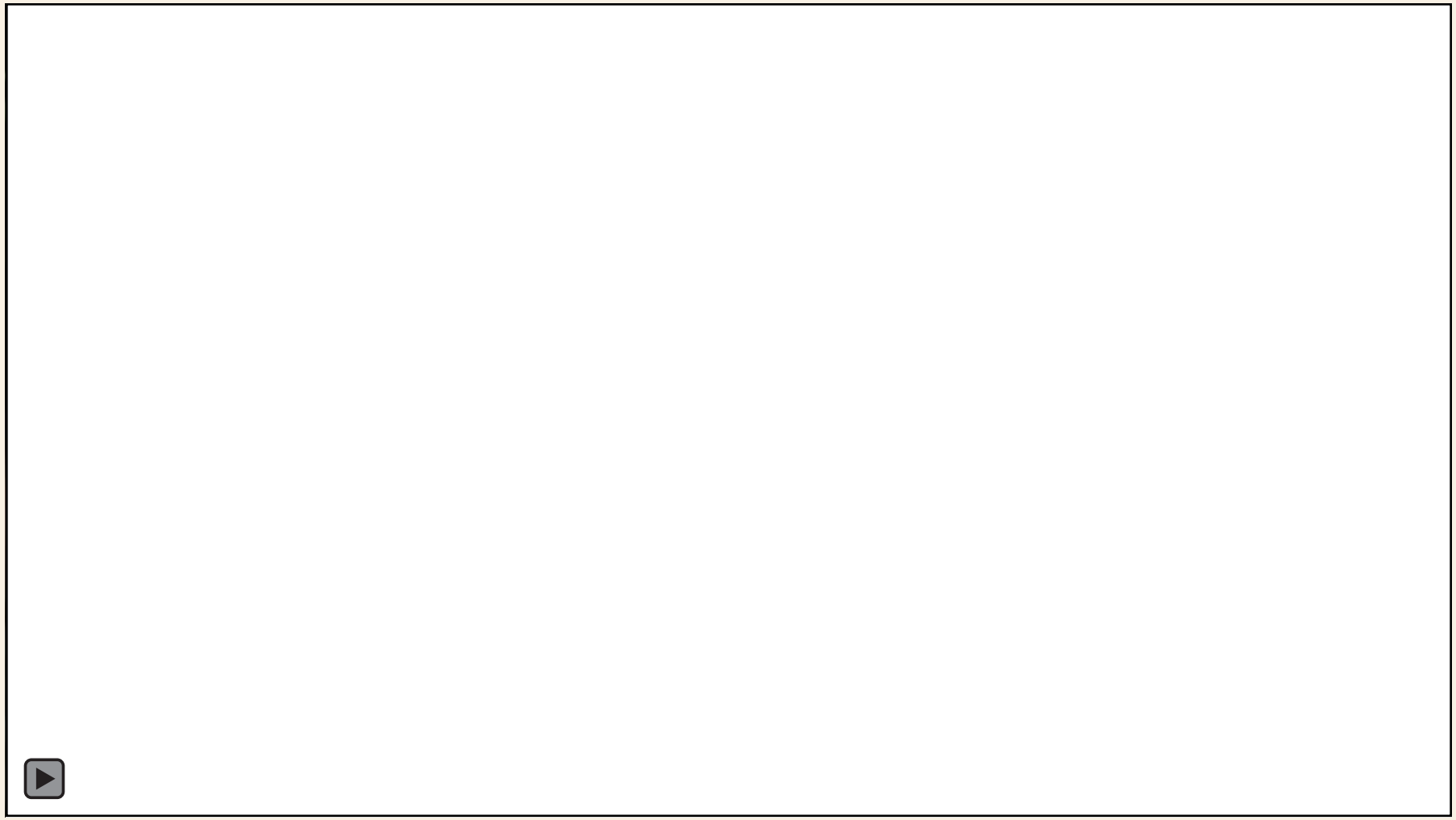
-Municipal liability arguments

-Motions to stay

-Duty to defend and indemnify?

MARTINEZ V. HARROUN, ET AL

23-CV-01241-CNS-SBP, D. COLO.



News Clip Source: https://www.9news.com/video/news/local/9news-mornings/off-duty-aurora-officer-accused-of-assault/73-0a1dc211-950b-4f9d-ac56-646b769a2d13

MARTINEZ V. HARROUN, ET AL

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6. At all times relevant to this action, Defendant Douglas Harroun was a citizen of the United States and a resident of the State of Colorado and was acting under color of state law in his capacity as a law enforcement officer with Aurora Police Department.

7. Aurora is a municipality in the State of Colorado, which operates under Article XX, Sections 10-13 of the Constitution of the State of Colorado. Aurora is a "person" subject to suit under 42 U.S.C. § 1983.

8. The Aurora Police Department is a department of Aurora. At all times relevant to this matter, officers and personnel of the Aurora Police Department ("APD") were acting as agents of Aurora under color of state law.

9. The Civil Service Commission is a department of Aurora. At all times relevant to this matter, personnel of the Civil Service Commission were acting as agents of Aurora under color of state law.

10. At all relevant times, Defendant Aurora was responsible for the oversight, supervision, discipline, and training of APD personnel, including Defendant Harroun.

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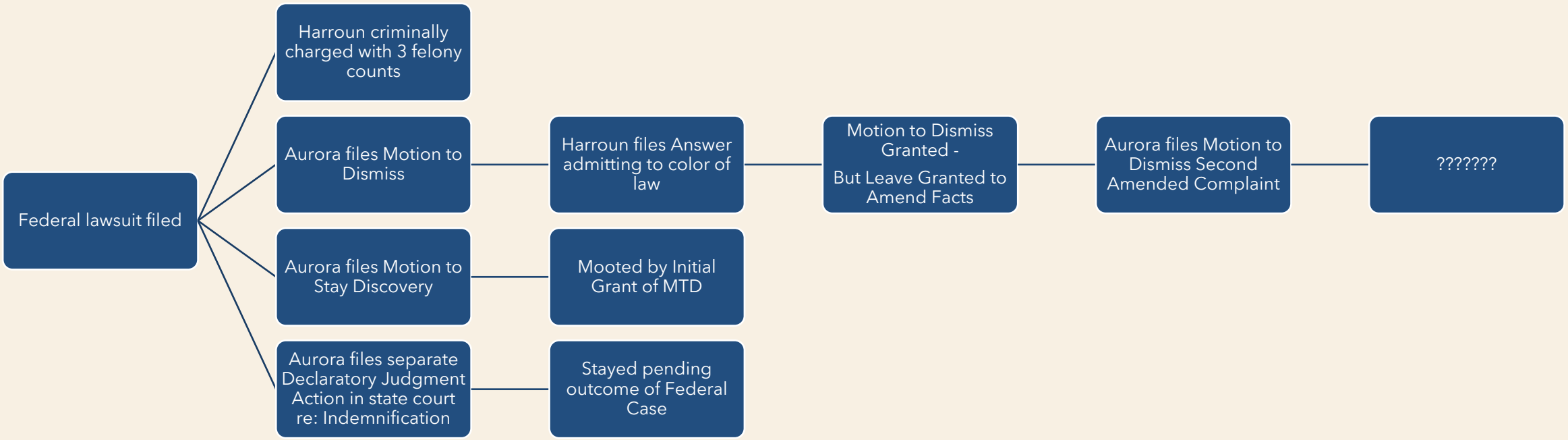

WHAT IS COLOR OF LAW?

The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."

United States v. Classic, 313 U.S. 299, 326 (1941).

WHAT IS COLOR OF LAW?

Color of law is considered a "jurisdictional prerequisite" to bring a 1983 action.

Simmons v. Ayers, 878 F.2d 386 (9th Cir. 1989);

Tinsley v. Greyhound Lines, 2022 WL 1421884 (D. NM 2022) *citing Polk v Dodson,* 454 U.S. 312, 315 (1985).

MOTION TO DISMISS- WHICH STANDARD?

-File under F.R.C.P. 12(b)(6) for failure to state a claim

-Why not 12(b)(1) for lack of SMJ?

- **1983 action provides federal question jurisdiction under 28 USC 1331; there is SMJ**

  - *Elliott v. Chrysler Financial*, 149 Fed. Appx. 766 (10th Cir. 2005)
    - Plaintiff must show the deprivation was committed by a person acting under color of state law."). Although § 1331 would provide subject matter jurisdiction, Plaintiff's complaint fails to state a claim upon which relief can be granted when it fails to establish state action.

  - *Boyle v. Governor's Veterans Outreach & Assistance Ctr.*, 925 F.2d 71, 74 (3d Cir. 1991)
    - Where the motion to dismiss is based on the lack of state action, dismissal is proper only pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim and not under Rule 12(b)(1) for lack of jurisdiction.



CAN A DEFENDANT ADMIT COLOR OF LAW?

"Color of law" is not a question of fact subject to a party's admission, it is a determination of law.

Blum v. Yaretsky, 457 U.S. 991, 997-98 (1982) (noting that the question of whether there was state action was an issue of law "to be decided by the District Court").



CAN AN OFFICER ADMIT COLOR OF LAW & BIND CITY?

An officer cannot "admit" or "consent" to acting under color of state law.

Sonia v. Town of Brookline, 914 F. Supp.2d 36, 42-43 (D. Mass 2012) (court held officer's admission was not binding on City).



CAN AN OFFICER ADMIT COLOR OF LAW FOR SELF?

But be wary of courts holding an officer to their own admissions.

See e.g. *Rossiter v. Robinson*, 716 F. Supp 2d 1018, 1021 (D. Colo 2010).

- **Defendant admitted to acting under color of law in his Answer. When it was raised on Summary Judgment, the court denied Motion due to the prior admission.**

MUNICIPAL LIABILITY ACTIONS

- **Plaintiff must establish:**

  (1) a constitutional right violation by a municipal employee acting under color of law;

  (2) a municipal policy or custom was the moving force behind the constitutional deprivation.

West v. Atkins, 487 U.S. 42, 48 (1988); *Cordova v. Aragon*, 569 F.3d 1183, 1193 (10th Cir. 2009)

ELEMENT 1: RIGHT VIOLATION BY EMPLOYEE ACTING UNDER COLOR OF LAW

Test does not depend on single, easily identifiable fact, such as the officer's attire, the location of the act, or whether the officer acts in accordance with his or her duty.

David v. City and Cty. of Denver, 101 F.3d 1344, 1352-53 (10th Cir. 1996), citing *Martinez v. Colon*, 54 F.3d 980, 986 (1st Cir. 1995)

COLOR OF LAW: 2 CATEGORIES OF EXCLUSION



Purely Personal Pursuit

- Think criminal acts



Lack of Authority to Act

- "Off-Duty"
- Administrative Leave

EXCLUSION: PURELY PERSONAL PURSUIT

"[A]cts of officers in the ambit of their personal pursuits are plainly excluded."

Screws v. United States, 325 U.S. 91, 111 (1945).

EXCLUSION: PURELY PERSONAL PURSUIT



Delcambre v. Delcambre, 635 F.2d 407, 408 (5th Cir. 1981) (per curiam)

- Holding that a police chief's assault on a private citizen due to a family squabble was not conduct under color of law even though it occurred at police headquarters while he was on duty



Haines v. Fisher, 82 F.3d 1503, 1508 (10th Cir. 1996)

- Police officers who staged a robbery of a convenience store as a practical joke on an acquaintance who worked there did not act under color of law because they did not use their state authority to carry out their plan



Hill v. Barbour, 787 F. Supp. 146 (N.D. Ill. 1992)

- Sheriff's deputy was not acting under color of law when he chased a suspect out of his garage and shot him with his personal rifle, yelling "Sheriff's Office" as he chased him

EXCLUSION: PURELY PERSONAL PURSUIT

In these cases, courts have not engaged in extended multi-factor analysis, likely because the Supreme Court has never held that an objective indicia of state authority, without more, can bring an officer's otherwise "purely personal pursuits" within the scope of § 1983.

***Dry v. City of Durant*, 242 F.3d 388, *4 (10th Cir. 2000) (unpublished).**

EXCLUSION: PURELY PERSONAL PURSUIT

Facts pled in Martinez v. Harroun

- He was at his home, on his apt complex property
- Not in uniform (prohibiting from wearing it)
- He drove up so close to her he almost hit her
- Exited vehicle and spit on her when he talked
- He incited the incident, did not intervene in something already happening
- She pulled mace on him before he assaulted her, which suggests she had no idea he was law enforcement
- Harroun then grabbed Martinez's wrist, punched her in the face with a closed fist, slammed her to the ground, then punched her four or five times in the face and throat while she was pinned to the ground.

- Most importantly, he was charged with THREE felony assault charges

EXCLUSION: LACK OF AUTHORITY TO ACT



Officer is off duty



Officer is on administrative leave and directed to take no police action

EXCLUSION: LACK OF AUTHORITY TO ACT– ON LEAVE



Gibson v. City of Chicago, 910 F.2d 1510 (7th Cir. 1990).

- Officer Novit involuntarily placed on leave after a department ordered psychological evaluation.
- He received full pay, he was under a written order to exercise no police power (which he never signed), was prohibited to carry his weapon (though he did not do so), and was ordered to turn in his identification (which he did).
  - Three months after being placed on leave, Novit encountered Mr. Gibson in his neighborhood, identified himself as an officer, drew his gun, told Mr. Gibson he was under arrest, then fatally shot him in the chest.
  - The Seventh Circuit held that Novit was not acting under color of law, given the Court found "no authority for expanding this concept of 'pretense' of law to encompass the actions of an official who possessed *absolutely no authority* to act but nonetheless assumed the position of an imposter in pretending that he did."

EXCLUSION: LACK OF AUTHORITY TO ACT– ON LEAVE

In Gibson, the court did not engage in extended multi factor analysis, presumably because "an official who was stripped completely of authority to act; such a situation does not constitute action under "pretense" of law."

***Gibson*, 910 F.2d at 1519.**

EXCLUSION: LACK OF AUTHORITY TO ACT– ON LEAVE

In Martinez v. Harroun, we argued:

- **Harroun was specifically directed not to take police action**
- **He was prohibited from wearing his uniform**
- **He acknowledged he was on administrative leave with his signature**

EXCLUSION: LACK OF AUTHORITY TO ACT



Officer is off duty



Officer is on administrative leave and directed to take no police action

EXCLUSION: LACK OF AUTHORITY TO ACT– OFF DUTY

Things to ask yourself outright:

Does the department have an "always on duty" clause in the policies or procedures?

Can the action also be classified as a purely personal pursuit, or was it in line with a traditional police duty?

EXCLUSION: LACK OF AUTHORITY TO ACT– OFF DUTY



Pickrel v. City of Springfield, 45 F.3d 1115, 1118–19 (7th Cir. 1995)

- Motion to dismiss color of law analysis denied, even though the officer was working secondary employment at a fast-food restaurant. The officer was outfitted in his full police uniform with weapon and police cruiser, though as a private security guard. The officer and Plaintiffs had a long running personal dispute, he threatened for them to leave and ultimately arrested them.



Pitchell v. Callan, 13 F.3d 545, 547–49 (2d Cir. 1994)

- off-duty police officer who used his own personal weapon to shoot victim did not act under color of state law. The officers were drinking at a bar after their shift, then relocating to Plaintiff's home to continue drinking. While there, they got into a dispute over politics and movies, and the off-duty officer shot Plaintiff, permanently injuring him.



Zambrana–Marrero v. Suarez–Cruz, 172 F.3d 122, 123-24 (1st Cir. 1999)

- reversal of a dismissal on color of law grounds where two off-duty police officers, still in uniform from their shift, intervened in a fight between the bar's owner and a patron. There, the court reasoned that the off-duty officers entered an already developed dispute between two private individuals, and their action in helping to pull them apart was consistent with the responsibility of police officers to defuse violent situations

EXCLUSION: LACK OF AUTHORITY TO ACT– OFF DUTY

These cases suggest looking to the following factors:

(1) objective indicia of authority;

(2) the victim's perception of the encounter;

(3) the defendant's belief as to whether he was acting under color of law.

EXCLUSION: LACK OF AUTHORITY TO ACT– OFF DUTY

The factors that look to perceptions and impressions appear to come into play where purely personal pursuits and authority is not at issue.

> ***See Gibson v. City of Chicago*, 910 F.2d 1510, 1518 (7th Cir. 1990), where the court distinguished cases that involved off duty officers where provisions existed that they were "always to be on duty" given Officer "expressly had been ordered not to perform any police duties."**
>
> **See *Pitchell v. Callan,* 13 F.3d 545, 546–49 (2d Cir. 1994), no color of law found where off duty officers were engaged in purely personal pursuit**

EXCLUSION: LACK OF AUTHORITY TO ACT– OFF DUTY

That said, the Court in Martinez v. Harroun nonetheless analyzed the factors in the Court's Order, given the lack of authority, analyzing in that case:

- **He was at his personal home**
- **He was not in uniform**
- **Plaintiff pulled mace on him and threatened to call police, suggesting she did not view him as law enforcement**
- **He did not identify himself until after he assaulted Plaintiff**
- **Harroun was specifically directed not to take police action by the department**
- **Harroun signed the Administrative Leave notice, so knew he was not authorized to take police action**

EXCLUSION: LACK OF AUTHORITY TO ACT– OFF DUTY

On the Motion to Dismiss the Second Amended Complaint, the Court in *Martinez v. Harroun* is considering whether one additional fact matters:

- **Whether Harroun's announcing himself as an officer before he used force makes a difference in the analysis**

MUNICIPAL LIABILITY ACTIONS

- **Plaintiff must establish:**

  (1) her constitutional rights were violated by a municipal employee acting under color of law;

  (2) a municipal policy or custom was the moving force behind the constitutional deprivation.

West v. Atkins, 487 U.S. 42, 48 (1988);
Cordova v. Aragon, 569 F.3d 1183, 1193 (10th Cir. 2009)



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ELEMENT 2: POLICY OR CUSTOM WAS MOVING FORCE

- Plaintiff must allege an
  - (1) official policy or custom,
  - (2) causation, and
  - (3) state of mind

- *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 769 (10th Cir. 2013)



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ELEMENT 2: POLICY OR CUSTOM WAS MOVING FORCE

- **When Challenging Color of Law, consider challenge to both causation and deliberate indifference.**

- **Causation:** A Plaintiff must show a "direct causal link between the municipal action and the deprivation of federal rights," *Brown*, 520 U.S. at 404, and that the municipality's conduct is "closely related to the ultimate injury." *City of Canton v. Harris,* 489 U.S. 378, 391 (1989).

- **Deliberate Indifference:** "The deliberate indifference standard may be satisfied when 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." *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1998).



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ELEMENT 2: POLICY OR CUSTOM WAS MOVING FORCE

- **Facts argued in Harroun:**
- **Causation:**
  - It is factually and legally impossible for City policy to have caused this incident given he was specifically directed to not take any police action;
  - Negligent hiring claim fails as soon as he was placed on admin leave and directed to not take police action
  - Essentially, any City related claims fail the minute he was placed on leave
- **Deliberate Indifference:**
  - Similar arguments as above, given that Harroun was on leave at the time of this incident, and the City had taken action to respond to the prior concerning incident, it cannot be said the City was deliberately indifferent at this time.



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ELEMENT 2: POLICY OR CUSTOM WAS MOVING FORCE

- ***Gibson v. City of Chicago***, 910 F.2d 1510, 1521-22 (7th Cir. 1990)

  - Mr. Gibson alleged a municipal "policy" of inadequate procedures regarding the recovery of a deadly weapon and ammunition from officers placed on medical leave as mentally unfit for duty. He also has alleged that the City's failure to promulgate adequate procedures to recover weapons and ammunition from officers it knew were mentally unfit for duty constituted "deliberate indifference" to the rights of the decedent and was the cause of the decedent's death in deprivation of his constitutional rights.
  - These inadequacies may be said to constitute a "policy" for which the City is responsible if "the need for more or different [procedures] is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need."
  - Mr. Gibson has pleaded sufficient facts to survive the defendants' motion to dismiss. We, however, offer no opinion on the underlying merits of Mr. Gibson's municipal liability claim.

MOTION TO STAY DISCOVERY

- **A stay is particularly warranted when a dispositive motion is pending and is particularly appropriate where jurisdictional issues have been raised.**
  - *See Vivid Techs., Inc. v. American Science & Engineering, Inc.*, 200 F.3d 795, 804 (Fed. Cir. 1999) ("When a particular issue may be dispositive, the court may stay discovery concerning other issues until the critical issue is resolved.")
  - *PopSockets LLC v. Online King LLC*, No. 19-cv-01277-CMA-NYW, 2019 WL 5101399, at *3 (D. Colo. October 11, 2019) (citing collective of stayed cases where jurisdiction or immunity are challenged)

<u>Takeaway</u>: Even though you might not have a qualified immunity challenge in your Motion to Dismiss, the Court should apply the same heightened scrutiny for this jurisdictional challenge.

-This does not eliminate the need to analyze the String Cheese factors.

MOTION TO STAY DISCOVERY

- **Your position is bolstered if the Motion to Dismiss will dispose of all issues before the Court. *See Vivid Techs., Inc. v. American Science & Engineering, Inc.*, 200 F.3d 795, 804 (Fed. Cir. 1999) ("When a particular issue may be dispositive, the court may stay discovery concerning other issues until the critical issue is resolved.").**

  - **Even if the officer has admitted color of law, that admission is not binding on the City.**
    - **Recall, color of law is a determination of law for the district court to decide (*supra*).**
  - **A determination that the officer did not act under color of law creates the law of the case, and the judge can dismiss all federal claims brought under 1983 and *Monell*.**

IS A DECLARATORY JUDGMENT ACTION UNDER STATE LAW WARRANTED?

Defense and indemnification of peace officers is governed by state statute in Colorado.

- Liability of Peace Officers Act, C.R.S. § 29-5-111, et seq. (Calls for Defense and indemnification for peace officers acting in the scope of their employment).
- Colorado Government Immunity Act, C.R.S. § 24-10-110, et seq. (Calls for Defense and indemnification for public employees acting in the scope of their employment).
- Law Enforcement Integrity Act, C.R.S § 13-21-131, et. seq. (Creates a cause of action similar to 1983 under the Colo. Constitution against law enforcement officers, and has unique provisions for defense and indemnification).

IS A DECLARATORY JUDGMENT ACTION UNDER STATE LAW WARRANTED?

Is color of law synonymous with scope of employment? No.

Brown v. Gray, 227 F.3d 1278, 1290 (10th Cir. 2000) ("[T]he fact that the jury found Officer Gray was not acting in the scope of his employment is of no consequence to Mr. Brown's section 1983 action. The scope of employment inquiry was related to the district court's interpretation of the Colorado statutes, and this standard is not a part of the section).

Coles v. City of Chicago, 361 F. Supp. 2d 740, 746 (N.D. Ill. 2005) (explaining that the under-color-of-law and scope-of-employment inquiries "should not be confused").

Chavez v. Guerrero, 465 F. Supp. 2d 864, 869 (N.D. Ill. 2006) ("Contrary to [the defendant's] argument, whether he was acting within the 'scope of employment' is not a factor to be considered in the context of the § 1983 claim raised against him.").

Menghi v. Hart, 745 F. Supp. 2d 89, 101 (E.D.N.Y. 2010), *aff'd*, 478 F. App'x 716 (2d Cir. 2012) ("Whether actions are performed 'in the scope of employment' is a different inquiry as to whether those acts were made 'under color of state law' for § 1983 purposes.").

Graham v. Sauk Prairie Police Com'n, 915 F.2d 1085, 1093 (7th Cir. 1990). (The "color of law" category is broader than the "scope of employment" category).

IS A DECLARATORY JUDGMENT ACTION UNDER STATE LAW WARRANTED?

Where is a declaratory judgment action particularly warranted?

-when officer has been sued and city has not been named—and the officer has admitted to color of law

-Example: Arend v. Paez, No. 12-cv-01270-WYD-CBS, USDC Colo. (Denver officer sexually assaults woman in police cruiser while on duty. He admits to acting under color of law.)

Denver v. Paez, 13-cv-0030, Denver Dist. Court. (Declaratory Judgment action seeking to declare officer was not acting under color of state law so the City had no duty to defend or indemnify.)

-when you suspect the injured Plaintiff has made an agreement with the officer to not execute against the officer's personal assets in exchange for cooperation in the suit



QUESTIONS?

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