IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

SYLVIA PERKINS, as Personal Representative of the Estate of BOBBY MOORE III — **PLAINTIFF**

v. — **CASE NO. 4:15-CV-00310 BSM**

JOSHUA HASTINGS and STUART THOMAS, in their individual and official capacities, and the CITY OF LITTLE ROCK, a municipality — **DEFENDANTS**

ORDER

The motion for summary judgment [Doc. No. 54] filed by Little Rock Police Chief Stuart Thomas, in his individual and official capacities, and by the city of Little Rock is granted in its entirety, and plaintiff Sylvia Perkins's claims for failure to train, supervise, and discipline; for maintaining a widespread custom of excessive force and untruthfulness; for single-act supervisory liability for the hiring of officer Josh Hastings; and for substantive due process violations are dismissed as to both Chief Thomas and the city of Little Rock.

I. BACKGROUND

In May of 2006, Josh Hastings applied to be a police officer with the Little Rock Police Department ("LRPD"). He submitted to a polygraph examination administered by officer Lisa Dawson, and during the examination, Hastings admitted he had once attended a Ku Klux Klan meeting as a junior in high school. He claimed his attendance was inadvertent, that he did not stay long, and that he never attended one again. Three out of four members on a hiring committee voted to hire Hastings, and the LRPD hired Hastings on March 26, 2007. Chief Stuart Thomas, who was the LRPD chief of police from 2005 to

2014, was one of the members of the hiring committee.

Hastings attended LRPD Recruit School #66 for 784 hours of police training. He then spent 320 more hours in LRPD field training. Each year thereafter, Hastings completed forty more hours of training on various topics.

At 5:27 a.m. on August 12, 2012, Hastings responded to a suspicious persons call at the Shadow Lake Apartments. He was alone when he arrived at the apartment complex where he came upon a vehicle occupied by three teenage boys. The details of what happened next are somewhat unclear, but it is uncontested that Hastings drew his gun and shot and killed fifteen-year-old Bobby Moore.

The LRPD internal affairs division conducted an investigation and found that Hastings provided untruthful testimony. It also found that Hastings's use of deadly force did not conform to LRPD training or policy. On September 7, 2012, in an effort to criminally prosecute Hastings, Sergeant James Lesher signed a probable cause affidavit stating that Hastings committed manslaughter when he killed Bobby Moore. Hastings was fired on October 18, 2012.

Plaintiff Sylvia Perkins brings this case as the personal representative of the estate of Bobby Moore against Hastings; Thomas, in his individual and official capacities; and the city of Little Rock. Perkins's claims against Hastings include a Fourth Amendment claim for excessive force, a claim for wrongful death, and a claim for survival. Her claims against Thomas and the city of Little Rock include claims for failure to train, supervise, and

discipline; for maintaining a widespread custom of excessive force and untruthfulness; for single-act supervisory liability for the hiring of Hastings; and for substantive due process claims. Thomas and the city of Little Rock move for summary judgment on all claims against them.

II. LEGAL STANDARD

Summary judgment is appropriate when there is no genuine dispute as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby Inc*., 477 U.S. 242, 249-50 (1986). Once the moving party demonstrates that there is no genuine dispute of material fact, the non-moving party may not rest upon the mere allegations or denials in his pleadings. *Holden v. Hirner*, 663 F.3d 336, 340 (8th Cir. 2011). Instead, the non-moving party must produce admissible evidence demonstrating a genuine factual dispute requiring trial. *Id.* Importantly, when considering a motion for summary judgment, all reasonable inferences must be drawn in a light most favorable to the non-moving party. *Holland v. Sam's Club*, 487 F.3d 641, 643 (8th Cir. 2007). Additionally, the evidence is not weighed, and no credibility determinations are made. *Jenkins v. Winter*, 540 F.3d 742, 750 (8th Cir. 2008).

III. DISCUSSION

Summary judgment is granted on all of Perkins's claims against Thomas and the city of Little Rock.

A. Failure to Train, Supervise, and Discipline

Summary judgment is granted because the undisputed facts do not demonstrate that either Thomas or the city of Little Rock was aware of and deliberately indifferent to a pattern of unconstitutional conduct by the LRPD that was similar to the shooting of Bobby Moore. Consequently, neither is liable for a failure to train, supervise, or discipline.

1. Liability as to Chief Thomas

It is axiomatic that a suit against a governmental employee in his official capacity is a suit against the government. *Brockinton v. City of Sherwood, Ark.*, 503 F.3d 667, 674 (8th Cir. 2007). Because Perkins also sued the city of Little Rock, liability as to Thomas need only be evaluated in his individual capacity, and the claims against Thomas in his official capacity are hereby dismissed.

Thomas is not liable for any excessive force Hastings may have used against Bobby Moore because there is no *respondeat superior* liability under 42 U.S.C. § 1983. *See Livers v. Schenck*, 700 F.3d 340, 355 (8th Cir. 2012); *Ware v. Jackson Cty., Mo.*, 150 F.3d 873, 885 (8th Cir. 1998). Liability cannot attach to a supervisor merely because his subordinate violated someone's constitutional rights. *See Nance v. Sammis*, No. 3:07CV00119 SCM, 2009 WL 308606, at *18 (E.D. Ark. Feb. 5, 2009), *aff'd*, 586 F.3d 604 (8th Cir. 2009).

Instead, a supervisor may be individually liable under section 1983 if he directly participated in a constitutional violation or if his failure to train, supervise, or discipline the offending subordinate directly caused the constitutional deprivation. *See Tilson v. Forrest City Police Dep't,* 28 F.3d 802, 806 (8th Cir.1994), *cert. denied,* 514 U.S. 1004 (1995);

Cooperwood v. City of Kensett, Arkansas, No. 4:05CV00902 JLH, 2006 WL 3735977, at *4 (E.D. Ark. Dec. 15, 2006); *Sammis*, 2009 WL 308606 at *18. For a supervisor to have violated a plaintiff's constitutional rights by failing to train, supervise, or discipline an officer, it must be shown that the supervisor 1) had notice of a pattern of unconstitutional acts committed by subordinates; 2) demonstrated deliberate indifference to, or tacit authorization of, the unconstitutional acts; 3) failed to take sufficient remedial action; and 4) the failure to act proximately caused the plaintiff's injury. *Livers*, 700 F.3d at 355; *Sammis*, 2009 WL 308606 at *18.

"A single incident, or a series of isolated incidents, usually provides an insufficient basis upon which to assign supervisory liability," but as the number of incidents grows, a finding of tacit authorization or deliberate indifference becomes more likely. *Howard v. Adkison*, 887 F.2d 134, 138 (8th Cir. 1989). In determining whether incidents create a pattern or are isolated, the amount of time between incidents is a relevant factor. *See Cooperwood*, 2006WL3735977 at *4 (noting that previous allegation of excessive force did not contribute to showing notice of a pattern, in part, because it occurred more than six years prior to the shooting at issue).

Although single or isolated incidents usually provide an insufficient basis upon which to impose supervisory liability, *Howard*, 887 F.2d at 138, this is not always the case. Because "police officers are armed by a municipality and are certain to be required to use force on occasion, 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." *Cooperwood*, 2006 WL 3735977 at *3 (internal punctuation omitted) (quoting *City of Canton, Ohio v. Harris*, 489 U.S. 378, 390 n.10 (1989)). Liability for failing to train officers may attach when training practices are so inadequate that their adoption shows deliberate indifference to the rights of others, and such inadequacy actually causes the plaintiff's injury. *Andrews v. Fowler*, 98 F.3d 1069, 1076 (8th Cir. 1996).

Perkins does not dispute that Hastings attended LRPD Recruit School #66 or that he had at least 1,304 hours of police training, which included training on the use of firearms and deadly force. *See* Pl.'s Resp. Def.'s Statement Undisputed Material Facts ¶¶ 9-13, Doc. No. 63; Helton Aff. ¶ 9, Doc. No. 66-6. This evidence precludes a finding that Hastings was so inadequately trained that supervisory liability may attach to a single act of excessive force. *See Sammis*, 2009 WL 308606 at *19 (finding 687 hours of training sufficient). To find otherwise would involve the federal courts in the endless and ill-suited task of second-guessing municipal training programs. *Harris*, 489 U.S. at 392. Thus, Perkins must show notice of a pattern of past unconstitutional acts.

"To impose supervisory liability, other misconduct must be very similar to the conduct giving rise to liability." *Livers*, 700 F.3d at 356; *Connick v. Thompson*, 563 U.S. 51, 62-63 (2011). If those previous instances of similar misconduct, standing alone, did not amount to violations of a third party's constitutional rights, the misconduct cannot demonstrate a

pattern or notice. *Sammis*, 2009 WL 308606 at *21 ("while the officer's use of warning shots was prohibited by the police department's policy, such action did not put the police chief on notice that the officer engaged in a pattern of unconstitutional acts because the action 'simply did not violate anyone's constitutional rights'") (quoting *Otey v. Marshall*, 121 F.3d 1150, 1156 (8th Cir. 1997)).

Even when similar unconstitutional misconduct is alleged, mere speculation that LRPD officers used excessive force in the past is not sufficient to avoid summary judgment. *See Livers*, 700 F.3d at 357; *Reed v. City of St. Charles, Mo.*, 561 F.3d 788, 791 (8th Cir. 2009). The issue of excessive force asks whether an officer's use of force was objectively reasonable under the circumstances, and when an officer is conducting a seizure, lethal force may not be used when the suspect poses no immediate threat to the officer or to others. *Craighead v. Lee*, 399 F.3d 954, 961 (8th Cir. 2005). This reasonableness standard must allow for the fact that "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 490 U.S. 386, 396-97 (U.S. 1989). It is important to remember that this standard is the metric by which to evaluate a constitutional violation, and a violation of a department policy does not necessarily equal a violation of constitutional rights.

Perkins's reliance on the police shootings of Jaime Alvarez and Landris Hawkins is insufficient to show a third party's constitutional rights were violated. The record indicates

that, in 2006, officers shot Alvarez while he was holding a knife or meat cleaver. It appears that the police surrounded Alvarez, and one officer attempted to tase him but missed. Alvarez retaliated by throwing his knife or cleaver at an officer, at which point the officers opened fire on Alvarez and killed him. Helton Dep. 358:10-22, Doc. No. 62-1. The record also indicates that, in 2009, officers shot Hawkins after his grandmother called the police and reported that he had a knife and was acting strangely. The grandmother also reported that she had a baby with her. When officers arrived, the police attempted to coax the grandmother to come outside and told Hawkins to put his knife down at least ten times. *Id.* 179:4-181:25, 346:14-25. When Hawkins failed to drop his knife, an officer shot him.

In both cases, the undisputed facts demonstrate that it was objectively reasonable for the officers to believe there was an immediate threat to human life. Even if the facts presented in the Alvarez and Hawkins cases violated the LRPD's general order 309, they do not appear to have violated a third party's constitutional rights.

Perkins also relies on a 2005 traffic stop involving officer Kelly Morris (then LePore). In that stop, Morris pointed her gun at Alexander Jones, a suspected drunk driver. Perkins asserts that Morris should not have pointed her gun at the suspect and that doing so violated her training. Even if true, such conduct does not necessarily amount to a constitutional violation. Morris testified that the suspect was driving erratically, that he ran a stop sign, and that he would not show her his hands when she told him to do so. Morris Dep. 153:12-17, 156:8, Doc. No. 62-1. She testified that she believed the suspect had zero regard for her life

or the lives of others. *Id.* 157:16-19. The suspect sped off and was eventually shot by another officer after a car chase.

The facts of Morris's traffic stop do not demonstrate a constitutional violation. *See, e.g.*, *Baird v. Renbarger*, 576 F.3d 340, 346 (7th Cir. 2009) ("courts do not find constitutional violations for gun pointing when there is a reasonable threat of danger or violence to police"); *Williams v. City of Champaign*, 524 F.3d 826, 828 (7th Cir. 2008).

In addition, when prior similar instances of alleged misconduct can be shown, deliberate indifference will not be found if the alleged misconduct was investigated and exonerated or if the officer was disciplined. *See Cooperwood*, 2006WL3735977 at *4 ("Investigation of a complaint is sufficient as a matter of law" to defeat a claim of deliberate indifference to prior misconduct.) (citing *Rogers v. City of Little Rock, Ark.*, 152 F.3d 790, 799 (8th Cir. 1998)). Consequently, the following instances of misconduct cannot be used to establish deliberate indifference.

Lieutenant Hudson's use of manual force against Chris Erwin at Ferneau Restaurant in October of 2011 does not show deliberate indifference, regardless of whether it violated Erwin's constitutional right to be free from excessive force, because Thomas suspended Hudson for 30 days. Thomas Dep. 321:16, Doc. No. 62-1. Hudson's use of force when he slapped a man in 1983 does not show deliberate indifference because he was suspended for ten days. Pl.'s Resp. Mot. Summ. J., Doc. No. 61 at 84. Officer David Green's use of excessive manual force in 2011 on a handcuffed man named Anthony Wheeler does not show

deliberate indifference because Thomas suspended Green for 30 days. Bewley Dep. 144:1, Doc. No. 62-2. Officer Eric Hollister's punching a suspect who was handcuffed in the backseat of a car does not show deliberate indifference because he was disciplined. Helton Dep. 452:13-15; Pl.'s Resp. Mot. Summ. J., Doc. No. 61 at 95. The sustained allegation of battery committed by Tom Bartsch and other LRPD officers in 2004 on several teenagers at Riverfest does not show deliberate indifference because the matter was "extensively investigated," and Bartsch was disciplined. Thomas Dep. 83:19-20; Resp. Pl's Statement Undisputed Material Facts ¶ 60, Doc. No. 68. Finally, officer Arthur McDaniel's use of force in June of 2010 when a car chase resulted in his firing shots at a driver and at a suspect fleeing on foot does not show deliberate indifference because the shooting was investigated and exonerated, McDaniel received remedial training, and a case file was given to the prosecutor for potential criminal prosecution. Lesher Dep. 187:18-189:12, Doc. No. 62-3; Pl.'s Resp. Mot. Summ. J., Doc. No. 61 at 127.

Also, Hastings's use of force in 2010 against Cedric McSwain in which Hastings took McSwain to the ground during arrest cannot demonstrate deliberate indifference because Hastings underwent remedial training despite the fact that the LRPD investigated and exonerated him, *see* Pl.'s Resp. Def.'s Statement Undisputed Material Facts ¶ 34, Doc. No. 63, and the force was judged lawful in a civil case brought by McSwain. *See McSwain v. Hastings*, No. 4:13CV122 DPM, 2015 WL 731286, at *2 (E.D. Ark. Feb. 17, 2015).

As an additional consideration, an officer's use of nonlethal force, as in many of the

instances discussed above, is not similar enough to the lethal force at issue in this case to demonstrate similar misconduct. *Cooperwood*, 2006 WL 3735977 at *4 (noting that the incidents described do not contribute to a showing of a pattern of similar constitutional violations, in part, because the incidents described did not involve lethal force). Although they all constitute uses of force to some degree, neither tackling, pepper spraying, fighting, punching, kicking, nor slapping someone is sufficiently similar to shooting someone to put anyone on notice of a similar pattern of misconduct.

To take this logic one step further, evidence of police misconduct such as dishonesty, theft of property, profane verbal assaults on citizens, sleeping on duty, skipping court dates in which officer testimony is needed to convict criminals, threatening to use a taser on a handcuffed suspect, drinking while on duty, drunk driving, sexual harassment, and domestic abuse are irrelevant because they do not involve an officer's use of force. Accordingly, the details of such clearly dissimilar misconduct will not be discussed.

Perkins has alleged instances of past officer misconduct that are more similar to Hastings's use of force on Bobby Moore in that they involve shootings by officers. These instances of misconduct, however, are also insufficient to provide notice of a pattern of unconstitutional conduct because Perkins's accounts of these events are largely speculative, and even when "viewing the facts in the light most favorable to the non-moving party, [a court] is not required to accept unreasonable inferences or sheer speculation as fact." *Reed*, 561 F.3d at 79 (internal punctuation omitted). Using past complaints or lawsuits to show a

pattern of constitutional violations requires evidence that the complaints or lawsuits had merit. *See Rogers*, 152 F.3d at 799; *Cooperwood*, 2006 WL 3735977 at *4.

For this reason, the use of force that resulted in the shooting of Eugene Ellison by Donna Lesher does not contribute to the pattern Perkins attempts to establish. This is true because Perkins speculates that Ellison could not have posed an objectively reasonable threat to officer safety because the bullet's trajectory through Ellison's body proves that Ellison was not standing up when he was shot. Defendants respond, however, that the trajectory could be explained by Ellison's swinging his cane downward from above his head. Reply Br. Supp. Mot. Summ. J., Doc. No. 67 at 10-11. A lawsuit was filed against Lesher in which she was denied qualified immunity because there were factual disputes as to whether her actions were reasonable. *See Ellison v. Lesher et al.*, No. 4:11CV00752 BSM (E.D. Ark. Oct. 25, 2013), ECF No. 170. That lawsuit, however, was settled and therefore no factual findings were ever made. Consequently, it would be speculation to accept Perkins's version of the facts.

Similarly, Perkins speculates that the 2008 shooting of Collin Spradling violated his constitutional rights. The involved officers claim they went to question him about the theft of a gun, and when they tried to arrest him, Spradling resisted and was shot when he reached for a gun. Robertson Dep. 40:8-43:21, Doc. No. 62-1; LRPD Memo., Doc. No. 62-4 at 140-43. Spradling's father filed a lawsuit against the officers and city alleging, among other things, fraudulent concealment of evidence, and Perkins states, "The Spradling court at least

agreed that Plaintiff made the requisite showing of fraudulent concealment." Pl.'s Resp. Mot. Summ. J., Doc. No. 61 at 133. The order Perkins cites to prove this proposition, however, merely states that Spradling's father sufficiently pled his claim. *See Spradling v. Hastings et al.*, No. 4:12CV00693 JM (E.D. Ark. Apr. 11, 2013), ECF No. 14. Surviving a motion to dismiss in the context of fraudulent concealment is not evidence of excessive force. Spradling's father ultimately dismissed the case, *see id.*, ECF No. 63, and accepting Perkins's version of the facts as accurate would be speculation.

The remaining instances cited by Perkins to demonstrate a "pattern of shooting at moving cars that do not pose an objectively reasonable fear of imminent death or great bodily harm" are similar to Hastings's use of force against Bobby Moore. While they all involve officers shooting at vehicles, they are insufficient because they too are speculative.

Perkins speculates in several instances that particular officers violated LRPD general order 303 by firing at moving vehicles and that such uses of force were unconstitutional. In 1992, Hudson shot at a suspected car thief. In 2005, officers fired 43 shots on driver Daniel Baker. In 2006, detective Mark Knowles shot at driver Jackie Grider, who was fleeing from arrest. In 2007, officer Paige Cline shot at Terry Mudge, a suspected car thief. Also in 2007, officers shot at driver Lance Stucker, who was fleeing from arrest. In 2010, officer Arthur McDaniel shot at Millis Farnam, who was fleeing from arrest. In all of these instances (except for the 2005 Baker shooting, of which there is little to no information relating to why officers were shooting at Baker), depositions show that officers shot at the suspects because

the suspects were using their vehicles as deadly weapons. Perkins tries to recreate the scene of each shooting to demonstrate that the officers acted imprudently because they could have stayed inside their vehicles, waited for backup, or gotten out of the way instead of shooting at the vehicles. Even if Perkins is correct, the evidence falls short of showing constitutional violations.

The only vehicular shooting that may demonstrate a constitutional violation is the 2010 Farnam shooting in which officer McDaniel shot at a suspect who exited his vehicle and fled on foot, but as previously discussed, the incident was investigated and exonerated, and the case file was turned over to the prosecutor. Consequently, even if a constitutional violation occurred, the Farnam shooting does not show deliberate indifference.

2. Municipal Liability

As with supervisory liability, municipal liability may attach under 42 U.S.C. § 1983 when there has been "a prior pattern of unconstitutional conduct . . . so 'persistent and widespread' as to have the effect and force of law," and the pattern caused the alleged injury. *Rogers*, 152 F.3d at 799 (quoting *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 691 (1978) ("a municipality cannot be held liable under § 1983 on a *respondeat superior* theory"). Because the undisputed facts demonstrate no pattern of excessive force and because a pattern of untruthfulness, even if proven, is not similar enough to be the proximate cause of an officer's use of excessive force, the city of Little Rock is not liable for failure to train, supervise, or discipline.

B. Single-Act Supervisory Liability for Hiring Hastings

Summary judgment is granted because the single act of hiring Hastings did not proximately cause a violation of Bobby Moore's constitutional rights. Thus, neither Thomas nor the city of Little Rock is liable for the hiring of Hastings.

"Cases involving constitutional injuries allegedly traceable to an ill-considered hiring decision pose the greatest risk that a municipality will be held liable for an injury that it did not cause." *Bd. of Cty. Comm'rs of Bryan Cty., Okl. v. Brown*, 520 U.S. 397, 415 (1997). "Predicting the consequence of a single hiring decision . . . is far more difficult than predicting what might flow from the failure to train [or supervise or discipline] a single law enforcement officer," and if rigorous standards of culpability and causation are not used, individual and municipal liability collapse into *respondeat superior*. *Id.* at 410, 415.

Deliberate indifference in this context will only be found if review of the applicant's background would lead a reasonable decision-maker to conclude that the "plainly obvious" consequence of the decision to hire the applicant would be the deprivation of a third party's constitutional rights. *Id.* at 411; *Morris v. Crawford Cty.*, 299 F.3d 919, 922 (8th Cir. 2002). Hence, the narrow issue is whether Thomas should have concluded from reviewing Hastings's application and record that Hastings's ultimate use of excessive force would be a plainly obvious consequence of hiring him. *Brown*, 520 U.S. at 413; *Morris*, 299 F.3d at 922. A record demonstrating that Hastings was a poor candidate for the position is not sufficient. *Morris*, 299 F.3d at 925-26. Instead, the prior misconduct in the applicant's

background must be "nearly identical" to the misconduct that ultimately caused the constitutional deprivation. *Id.* at 923, 924.

Perkins's asserts that Hastings's admission of having once attended a Ku Klux Klan meeting when he was in high school was sufficient to put Thomas on notice that Hastings would eventually use excessive force against Bobby Moore. Although the Ku Klux Klan is associated with violence towards black people, nothing in Hastings's background indicated that he was a violent person or that he was a Klan member. Because attending a Klan meeting is not similar, much less "nearly identical," to shooting someone, Perkins has failed to demonstrate a causal connection between the mere hiring of Hastings and the shooting of Bobby Moore.

Accordingly, the mere fact that Hastings was hired is not sufficient to impose liability on either Thomas or the city for excessive force. Municipal liability under 42 U.S.C. § 1983 cannot attach simply because the city made a bad hiring decision; an unconstitutional decision is required.

C. Substantive Due Process Violations

Summary judgment is granted on plaintiff's substantive due process claims for two key reasons. First, the proper cause of action against Thomas and the city is for excessive force, not for a substantive due process violation. "[I]f a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of

substantive due process." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998) (quoting *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997). Second, even if substantive due process was the appropriate standard, causation must still be shown. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816-817 (1985) (explaining that once a constitutional violation is established, plaintiff still must establish that the city caused the violation). As previously established, neither Thomas nor the city caused Hastings to shoot Bobby Moore.

IV. CONCLUSION

For the reasons set forth above, the motion for summary judgment [Doc. No. 54] is granted in its entirety, and Thomas and the city of Little Rock are dismissed with prejudice.

IT IS SO ORDERED this 27th day of January 2017.

UNITED STATES DISTRICT JUDGE