IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

FRANCIS DEWES,

Plaintiff,

No. 4:02-cv-40057

ORDER

VS.

CITY OF BLOOMFIELD,

Defendant.

This matter is before the Court on Defendant's Motion for Summary Judgment. Defendant moved for summary judgment on Plaintiff's claims on September 10, 2003. Hearing was held on the motion on February 24, 2004. Attorney Tim McKay appeared for Defendant, and attorney Eric Parrish appeared for Plaintiff. The matter is now fully submitted for review. For the reasons discussed below, Defendant's Motion for Summary Judgment is **granted**.

FACTS

On January 28, 2000, Sergeant Tom Jones was dispatched to investigate a report that two youths were smoking and drinking outside of the home of Jason and Vanessa Davidson in Bloomfield, Iowa. Sergeant Jones arrived at the reported location in his marked patrol car and utilized his spotlight in an attempt to observe the two subjects.

The two young males, Adam Scott and Shane Strachan,¹ later determined to be Plaintiff's grandchildren, attempted to evade detection by Sergeant Jones by circling around a tree as the patrol car drove by. Having observed the two youths, Sergeant Jones exited his patrol car to investigate. As Sergeant Jones, in full police uniform, was walking toward the youths, the two fled. Sergeant Jones yelled for the subjects to stop, stating "Stop, Police!"; however, the youths continued to run from the officer. Sergeant Jones gave chase on foot; Strachan fell down, but Scott continued to flee. The sergeant continued his foot pursuit of Scott.

During the foot chase, Scott ran through a nearby carport and entered the adjacent residence through an exterior screen door and wooden inner door. Sergeant Jones had no information regarding the identity of Scott, nor was he aware whose residence Scott had just entered. Still in pursuit of Scott, and based upon concern for the safety of the occupants of the residence, Sergeant Jones followed Scott into the home. Neither party disputes that Sergeant Jones did not knock on the door or otherwise announce his presence prior to entering the home. It is also undisputed that the officer did not possess a warrant permitting entry.

¹ Shane Strachan is also referred to as "Sean Strachan" in the deposition testimony. It was clarified in the record by Plaintiff's wife that this grandson's name is in fact "Shane Strachan".

Sergeant Jones entered the residence approximately 10 to 15 seconds after Scott entered the home.² Once Sergeant Jones entered the home, he observed Scott in the living room talking with the occupants of the home. Jones drew his firearm, pointed it at Scott and yelled, "Do you want shot?", shoving Scott across the room. Although the firearm was drawn, it was uncocked with the hammer at rest. Sergeant Jones then placed Scott into custody. Strachan, the second fleeing suspect, subsequently entered the room and was taken into custody as well. Both subjects were taken to the police station where they were ultimately charged with possession of alcohol by a person under the legal age and interference with official acts.⁴

On January 28, 2002, Plaintiff Francis Dewes, the owner of the residence at which the January 28, 2000, incident occurred, filed a civil complaint against Sergeant Jones and the City of Bloomfield. In his Complaint, Plaintiff claims that Sergeant Jones deprived Plaintiff of his right to be free from excessive and unreasonable force and that Sergeant

² There is a factual dispute concerning the time lapse between Scott's entry to the residence and Sergeant Jones' entrance, but the Court assumes the longer time lapse both to view the facts in the light most favorable to the non-movant and because the difference in the time estimates appear to generate no dispute of material fact.

³ Although worded as such in Defendant's brief, he possibly meant "Do you want to get shot?"

⁴ Scott was found guilty of both offenses on December 11, 2002.

Jones' actions were excessive and unreasonable. Plaintiff further alleges that Defendants have established, maintained, and enforced official municipal policies, patterns, practices, and/or customs of using unreasonable or excessive force. Plaintiff argues that the City of Bloomfield failed to train its police officers in fundamental police procedures, failed to properly supervise its officers, and failed to initiate policies and ensure excessive force is not unnecessarily used by its officers against citizens. Plaintiff claims that Defendants' conduct intruded upon his rights to bodily integrity and personal security, shocks the conscience, and that as a proximate result of Defendants' acts and omissions, Plaintiff has in the past and will in the future suffer damages including mental anguish and suffering, past, present, and future medical expenses, emotional distress, humiliation, fear, loss of freedom, deprivation of constitutional rights, lost earning capacity, loss of enjoyment of life, loss of bodily functions, and other related expenses and damages.

On September 10, 2003, Defendant moved for summary judgment on Plaintiff's federal constitutional claim alleged under 42 U.S.C. § 1983 contained in Count I of the Complaint. Defendant further asks the Court to decline to exercise jurisdiction over Plaintiff's supplemental claims which arise under Iowa law, contained in Counts II through V, pursuant to 28 U.S.C. § 1367(c)(3). Defendant claims that there is no genuine issue of material fact that the conduct of Sergeant Jones was not excessive or unreasonable, that Defendant did not establish, maintain, or enforce official municipal

policies, patterns, practices and/or customs of using unreasonable or excessive conduct, and that there is no genuine issue of material fact that Defendant did not fail to initiate policies to ensure excessive force is not used by its police officers against citizens. Defendant states that upon dismissal of the § 1983 claim contained in Count I, the Court should decline to exercise its supplemental jurisdiction over the four remaining state law claims alleged in Counts II through V of the Complaint.

On April 1, 2003, the City of Bloomfield moved to dismiss the Complaint as to Defendant Tom Jones, asserting that Sergeant Jones was not served with notice of the action. On June 2, 2003, this Court accepted Magistrate Judge Celeste Bremer's Report and Recommendation, and Defendant Tom Jones was dismissed from this matter with prejudice.

APPLICABLE LAW AND DISCUSSION

A. Standard of Review

"[C]laims lacking merit may be dealt with through summary judgment under Rule 56." Swierkiewicz v. Soreman, 122 S. Ct. 992, 998-999 (2002). Summary judgment is a drastic remedy, and the Eighth Circuit has recognized that it "must be exercised with extreme care to prevent taking genuine issues of fact away from juries." Wabun-Inini v. Sessions, 900 F.2d 1234, 1238 (8th Cir. 1990). "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show 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). See also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Herring v. Canada Life Ins. Co., 207 F.3d 1026, 1029 (8th Cir. 2000).

The party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion and identifying those portions of the record which show a lack of a genuine issue." Hartnagel v. Norman, 953 F.2d 394, 395 (8th Cir. 1992) (citing Celotex, 477 U.S. at 323); see also Shelter Ins. Co. v. Hildreth, 255 F.3d 921, 924 (8th Cir. 2001); McGee v. Broz, 251 F.3d 750, 752 (8th Cir. 2001). Once the moving party has carried its burden, the opponent must show that a genuine issue of material facts exists. Nat'l Bank of Commerce of El Dorado, Ark. v. Dow Chem. Co., 165 F.3d 602, 607 (8th Cir. 1999). The Court gives the nonmoving party the benefit of all reasonable inferences and views the facts in the light most favorable to that party. de Llano v. Berglund, 282 F.3d 1031, 1034 (8th Cir. 2002); Pace v. City of Des Moines, 201 F.3d 1050, 1052 (8th Cir. 2000); Prudential Ins. Co. v. Hinkel, 121 F.3d 364, 366 (8th Cir. 1997).

"Summary judgment is proper if the evidence, viewed in the light most favorable to the nonmoving party, demonstrates that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." Shelton v. ContiGroup

Companies, Inc., 285 F.3d 640, 642 (8th Cir. 2002) (citing Henerey v. City of St. Charles, 200 F.3d 1128, 1131 (8th Cir. 1999)). Summary judgment should not be granted if the court can conclude that a reasonable trier of fact could return a verdict for the non-moving party. Andersen v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Burk v. Beene, 948 F.2d 489, 492 (8th Cir. 1991).

B. 42 U.S.C. § 1983

"In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force." Graham v. Connor, 490 U.S. 386, 394 (1989). Plaintiff states that his core complaint rests on his assertion that Sergeant Jones used excessive force against him while in the process of subduing his grandson, Adam Scott, claiming that Sergeant Jones

⁵ The Court notes at the outset that Plaintiff has failed to comply with the requirements of Local Rule 56.1. Specifically, Plaintiff has failed file a response to Defendant's Statement of Material Facts expressly admitting, denying, or qualifying each of Defendant's numbered statements of fact. "The failure to respond, with appropriate citations to the appendix, to an individual statement of material fact constitutes an admission of that fact." L. R. 56.1(b). Plaintiff also failed to limit the deposition materials as required by L. R. 56.1(e), thus leaving to the Court the task of reading through materials unnecessary to the determination of the motion in search of material information. Plaintiff's failure to comply with the mandates of L. R. 56.1 gives the Court authority to find the facts established as set forth in Defendant's Statement of Material Facts. Because it is readily apparent from the record in this case what the facts are, the Court declines to exercise its authority under L. R. 56.1, as urged by counsel for the Defendant, to sanction counsel, and thereby the Plaintiff, in this fashion. The Court does note that failure to comply with these rules is a serious matter that will not routinely be tolerated.

deprived him of his right to be free from excessive and unreasonable force and intruded upon his rights to bodily integrity and personal security.

During his deposition, Plaintiff stated that Sergeant Jones never said anything to Plaintiff, never pointed his firearm at Plaintiff, and never pointed his firearm at anyone else present at Plaintiff's residence other than Adam Scott. Plaintiff further stated that Sergeant Jones never verbally or physically threatened him in any way. Even viewing the facts in the light most favorable to Plaintiff, there is no evidence in the record which would support a finding that Sergeant Jones used *any* force, much less excessive force, toward Plaintiff's person while placing Adam Scott into custody.⁶ Plaintiff's claim therefore can only arise from Sergeant Jones' unannounced entry into his residence, an action that would allegedly infringe on Plaintiff's Fourth Amendment right to be secure in his home against unreasonable searches and seizures.

⁶ At hearing, Plaintiff's counsel pointed to Plaintiff's own sworn affidavit as evidence that Sergeant Jones used excessive force against him. Plaintiff's affidavit, dated September 29, 2003, was created over two months after Plaintiff's deposition testimony was given and was filed together with Plaintiff's brief resisting Defendant's Motion for Summary Judgment. "[A] party may not create a question of material fact, and thus forestall summary judgment, by submitting an affidavit contradicting his own sworn statements in a deposition." Dotson v. Delta Consol. Industries, Inc., 251 F.3d 780, 781 (8th Cir. 2001). Plaintiff's affidavit is an apparent attempt to qualify his deposition testimony with the sole purpose of generating a fact issue in an attempt to defeat Defendant's Motion for Summary Judgment. Even taken in the light most favorable to Plaintiff, the statements contained in the affidavit do not generate a genuine issue of material fact.

"The validity of the [excessive force] claim must then be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized 'excessive force' standard." Id.

The fourth amendment guarantee of the 'right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures' is 'preserved by a requirement that searches be conducted pursuant to a warrant issued by an independent judicial officer.' California v. Carney, 471 U.S. 386, 390, 105 S. Ct. 2066, 2068-69, 85 L. Ed. 2d 406 (1985). In certain circumstances, however, a search may comport with the fourth amendment reasonableness standard even though not conducted pursuant to a warrant.

<u>United States v. Caves</u>, 890 F.2d 87, 89 (1989).

Although the warrant procedure is the preferred method by which law enforcement agents conduct searches and seizures, courts have recognized that the overriding principle of the Fourth Amendment is one of reasonableness. Thus, exceptions to the warrant requirement have been carved out in a logical and flexible manner. E.g., <u>United States v. Ross</u>, 456 U.S. 798 (1982), <u>Chambers v. Maroney</u>, 399 U.S. 42 (1970) (automobile exception); <u>California v. Carney</u>, 471 U.S. 386 (1985) (automobile exception applied to mobile homes); <u>New York v. Belton</u>, 453 U.S. 454 (1981), <u>United States v. Robinson</u>, 414 U.S. 218 (1973) (search of person and immediate vicinity pursuant to lawful arrest); <u>Schneckloth v. Bustamonte</u>, 412 U.S. 218 (1973) (consent); <u>Warden v. Hayden</u>, 387 U.S. 294 (1967) (hot pursuit); <u>United States v. Jeffers</u>, 342 U.S. 48 (1951) (exigent circumstances).

<u>United States v. Martin</u>, 806 F.2d 204, 206 (8th Cir. 1986).

Sergeant Jones arrived on the scene to investigate a report that two young men were drinking and smoking outside the Davidson residence. The Supreme Court held in

<u>Terry</u> that, consistent with the Fourth Amendment, an officer may conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot. <u>Terry v. Ohio</u>, 392 U.S. 1, 30 (1968). Based on the information Sergeant Jones received from dispatch, the sergeant believed the two youths he spotted at the location were drinking in a public place, which is a violation of Iowa Code § 123.46(d)(2). Sergeant Jones was therefore justified in attempting to conduct a <u>Terry</u> stop of the two young men.

Upon exiting his vehicle and walking in the direction of the two youths in order to conduct the investigatory stop, the two young men fled. "Headlong flight – wherever it occurs – is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." Illinois v. Wardlow, 528 U.S. 119, 124 (2000) (concluding officer was justified in suspecting that individual was involved in criminal activity and investigating further given the suspect's presence in an area known for heavy narcotics trafficking and his unprovoked flight upon noticing the police). As the young men fled, Sergeant Jones directed them to stop. Plaintiff does not specifically allege the two young men did not hear Sergeant Jones direct them to stop; rather, Plaintiff argues it remains in dispute whether the two young men heard the sergeant's directives to stop. There is nothing in the record to suggest Scott and Strachan did not hear the sergeant yelling for them to stop. Further, "in opposing a motion for summary judgment, a

nonmoving party may not rely on mere denials or allegations in its pleadings, but must designate specific facts showing that there is a genuine issue for trial." Hernandez v. Jarman, 340 F.3d 617, 622 (8th Cir. 2003). Even assuming, in the light most favorable to Plaintiff, that the two youths *did not* hear Sergeant Jones' instructions to stop, there is no evidence Sergeant Jones would have been unaware of such. The sergeant, therefore, would still have been under the impression the boys were ignoring his directives because they continued to flee despite his instructions to stop. The officer could reasonably conclude this resistance to his directions constituted a separate crime of interfering with official acts. See Iowa Code § 719.1.

Probable cause to conduct a warrantless arrest exists when, at the time of arrest, law enforcement possessed information sufficient to lead a reasonable person to believe that a crime was being committed or had been committed by the person being arrested. United States v. Adams, 346 F.3d 1165, 1169 (8th Cir. 2003). Given Scott's and Strachan's flight and refusal to stop despite Officer Jones' command to do so, the officer had probable cause to arrest both men for committing the crime of interfering with official acts. "Where the facts are in dispute or where they are subject to different inferences the question of probable cause is for the jury; however, where the facts are not disputed or are susceptible to only one reasonable inference, the question is one of law for the court." Linn v. Garcia, 531 F.2d 855, 861 (8th 1976); see also Fleming v. Harris, 39 F.3d 905,

907 (8th Cir. 1994) ("when the issue of probable cause arises in a damage suit and the facts are not disputed or are susceptible to only one reasonable inference, the question is one of law for the court").

During the foot pursuit, Scott entered a residence in an obvious attempt to avoid being apprehended by Sergeant Jones. Sergeant Jones, still in pursuit of Scott, followed Scott into the residence, shoved him across the living room of the residence, and pointed his firearm at Scott yelling, "Do you want shot?" Scott was immediately taken into custody; Strachan, who had subsequently entered the residence, was also placed into custody. The facts of the present case are susceptible to no other inference.

Defendant asserts that exigent circumstances justified Sergeant Jones' warrantless entry into Plaintiff's residence to search for and arrest Scott. "Exigent circumstances exist where law enforcement officers have a legitimate concern for the safety of themselves or others." <u>United States v. Kuenstler</u>, 325 F.3d 1015, 1021 (8th Cir. 2003) (quotations omitted) (quoting <u>United States v. Vance</u>, 53 F.3d 220, 222 (8th Cir. 1995)). Whether exigent circumstances existed is determined focusing on what a reasonable, experienced law enforcement officer would believe. <u>Id</u>.

Plaintiff argues that a genuine issue of material fact exists as to whether a reasonable officer could have believed Sergeant Jones' actions were lawful, asserting that Sergeant Jones did not have probable cause to believe either suspect had committed a

crime involving the infliction or threatened infliction of serious physical harm. Whether a suspect committed a crime involving the infliction or threatened infliction of serious physical harm is an inquiry relevant in deadly forces cases. See Tennessee v. Garner, 471 U.S. 1, 11 (1985) (if suspect threatens an officer with a weapon or there is probable cause to believe that the suspect has committed a crime involving the infliction of serious physical harm, deadly force may be used if necessary to prevent escape); Wilson v. City of Des Moines, Iowa, 293 F.3d 447, 451 (8th Cir. 2002) (same). The record demonstrates that Sergeant Jones drew his firearm and pointed it at Adam Scott and no one else. Deadly force is defined as

[f]orce which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm . . . A threat to cause death or serious bodily harm, by the production of a weapon

or otherwise, so long as the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary, does not constitute

deadly force.

<u>Black's Law Dictionary</u> 645 (6th ed. 1990). Sergeant Jones displayed his firearm and pointed it at Scott; the firearm was in double action status with the hammer pressed and was never fired. Deadly force was not used and is not relevant in the present case.⁷

⁷ Even if the Court were to find that Sergeant Jones' purpose in producing his firearm was not limited to creating an apprehension that he would use deadly force, the record clearly shows, by Plaintiff's own deposition, that such force was never used against Plaintiff.

Plaintiff also relies on Welsh v. Wisconsin to support his argument that his Fourth Amendment right to be free from government intrusions into his home was violated. In Welsh v. Wisconsin, the Supreme Court concluded that the gravity of the underlying offense is a factor to be evaluated in determining whether any exigency exists. Welsh v. Wisconsin, 466 U.S. 740, 753 (1984). "[A]pplication of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense, such as [a non-criminal traffic offense], has been committed." <u>Id.</u> In <u>Welsh</u>, a motorist saw a vehicle driving erratically and believed the driver to be intoxicated. <u>Id.</u> at 742. The driver eventually stopped his car in a field, causing no damage to person or property. <u>Id.</u> The concerned motorist encouraged the driver, later determined to be Welsh, to wait for assistance to arrive; however, Welsh refused and walked to his nearby home. Id. Law enforcement, advised of the situation by the concerned motorist, entered Welsh's residence without a warrant and arrested him for driving while intoxicated. <u>Id.</u> In holding that no exigency existed to justify the warrantless home entry and arrest of Welsh, the Supreme Court noted,

the claim of hot pursuit is unconvincing because there was no immediate or continuous pursuit of the petitioner from the scene of a crime. Moreover, because the petitioner had already arrived home, and had abandoned his car at the scene of the accident, there was little remaining threat to the public safety. Hence, the only potential emergency claimed by the State was the need to ascertain the petitioner's blood-alcohol level.

<u>Id.</u> at 753. Unlike <u>Welsh</u>, in the present case there was both a perceived threat to public safety and an immediate and continuous pursuit of Adam Scott.

There is no evidence in the record which in any way establishes that Sergeant Jones knew that Adam Scott was entering the residence of someone known to him. Given Scott's flight from the officer, it was reasonable for the sergeant to believe Scott had entered the residence of someone unknown to him in order to escape apprehension. Scott's escape into an unknown residence created what Sergeant Jones perceived as a threat to public safety because the sergeant was not aware Scott was the grandson of the owner of the residence; Sergeant Jones believed Scott was breaking into the residence of an unknown third party. Legitimate concern for the safety of others may constitute exigent circumstances justifying warrantless entries and searches. United States v. Antwine, 873 F.2d 1144, 1147 (8th Cir. 1989).

Even assuming the sergeant had reason to believe Scott had retreated into his own residence, the warrantless entry would still be justified. "[A] warrantless entry of a home would be justified if the police were in 'hot pursuit' of a fugitive." Steagald v. United States, 451 U.S. 204, 221 (1981) (citing United States v. Santana, 427 U.S. 38, 43 (1976) (a suspect may not defeat an arrest which has been set in motion in a public place by the cunning of escaping to a private place)). There is no question that Sergeant Jones was in hot pursuit of Scott when he entered Plaintiff's residence, especially where

Plaintiff has stated the sergeant entered the residence only ten to fifteen seconds after Scott had entered the residence.

Moreover, <u>Welsh</u> stands only for the principle that the gravity of the offense is an important *factor* to be considered in ascertaining exigency; it does not hold that the gravity of the underlying offense is *the* determinative factor. Because the warrantless entry was supported by both probable cause to arrest and exigent circumstances, Plaintiff's Fourth Amendment right to be secure in his home was not violated.

C. Liability of the City of Bloomfield

The analysis of a § 1983 claim against a municipality requires the Court to address two different issues. First, the Court must determine whether Plaintiff's harm was caused by a constitutional violation. The analysis above reveals Plaintiff has failed to generate a genuine issue of material fact with regard to whether a constitutional violation occurred. However, assuming *arguendo* that Plaintiff could generate a genuine issue of material fact with regard to whether Sergeant Jones violated his constitutional rights, the Court will address the second issue relevant to the § 1983 analysis, that is, whether the City is responsible for the alleged constitutional violation.

A governmental entity is liable under 42 U.S.C. § 1983 only when the 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". Monell

v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 694 (1978) (finding that the depravation complained of, compelling pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons, arose out of official policy); see also Bd. Of County Comm'rs of Byran County v. Brown, 520 U.S. 397, 403 (1997) (reasoning that when the plaintiff seeks to hold a municipality liable for the acts of an employee tortfeasor, it is the plaintiff's burden to "to identify a municipal 'policy' or 'custom' that caused the plaintiff's injury") (citing Monell).

The first inquiry in any case alleging municipal liability under § 1983 "is the question whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." City of Canton, Ohio v. Harris, 489 U.S. 378, 385 (1989). In addressing the liability of Defendant, Plaintiff states that his core complaint is that Sergeant Jones deprived him of his constitutional right to be free from excessive force. The record clearly shows that no violation of Plaintiff's right to be free from excessive force occurred.

Assuming Plaintiff could establish that a constitutional deprivation occurred, the Court would need to determine whether there is a direct causal link between a municipal policy or custom and the alleged violation of Plaintiff's right to be free from excessive force. The terms "policy" and "custom" are not used interchangeably when conducting a Monell analysis. Mettler v. Whitledge, 165 F.3d 1197, 1204 (8th Cir. 1999). "[A]

"policy" is an official policy, a deliberate choice of a guiding principle or procedure made by the municipal official who has final authority regarding such matters." <u>Id.</u> (noting that the plaintiff had not identified any official policy that arguably cause her alleged injury).

Plaintiff states that it remains disputed whether Defendant had a use of force policy or even felt the need to regulate the conduct of its police officers with regard to their use of force, claiming the discovery record is replete with examples demonstrating Defendant's lack of any clear or definitive policy regarding the use of unnecessary force; however, Plaintiff fails to point to any specific instance in the record. Plaintiff ultimately asserts that the City of Bloomfield did not have a policy regarding the use of unnecessary force.

Although Plaintiff claims that the Chief of Police at the time, Bernard Gutz, did not write a use of force policy, the record clearly demonstrates that when Gutz became the Chief of Police of the Bloomfield Police Department in 1988, he wrote a standard operational procedure manual for the police department that was to be used by the officers. Gutz worked with other police departments, researching their standard operating procedures, in developing the manual. The manual states the following with regard to the use of force:

Levels of Force

When the use of force is necessary and appropriate, officers shall, to the extent possible, utilize an escalating scale of options and will not employ a

more forceful measure unless it is determined that a lower level of force would not be adequate, or such a level of force is attempted and actually found to be inadequate. The scale of options, in order of increasing severity, is set forth below:

- * Physical Presence;
- * Oral Persuasion:
- * Physical Strength and Skill;
- * Approved Chemical Agent;
- * Police Baton;
- * Knife: and
- * Firearm.

It is not the intent of this order to direct officers to use each of the options before escalating to the next. Clearly good judgment in each situation will dictate at which level an officer will start. Officers using any type of force are accountable for its use.

Plaintiff claims it remains in dispute whether, at the time of the incident, the manual addressed use of force; however, other than Plaintiff's mere allegations, there is no evidence in the record to support this assertion. Although Gutz stated the department's standard operational procedures manual was constantly updated and revised, he also indicated several times that the policy regarding the use of firearms had been included in the manual since 1988 and there is no indication in the record that the policy regarding use of force was not in place on the night the incident occurred. While the record demonstrates that Defendant clearly had an official policy regarding the use of force at the time of the incident, there is nothing in the record to support the claim that Defendant maintained an official policy regarding the use of excessive force.

"Where official policy is lacking, municipal liability may be established under 42 U.S.C. § 1983 through proof that the alleged misconduct was so pervasive among the non-policy making employees of the municipality as to constitute a custom or usage with the force of law." Radloff v. City of Oelwein, 284 F. Supp. 2d 1145, 1154 (N.D. Iowa 2003) (quotations omitted) (quoting McGautha v. Jackson County, Mo., Collections Dept., 36 F.3d 53, 56 (8th Cir. 1994)); see also Andrews v. Fowler, 98 F.3d 1069, 1075 (8th Cir. 1996) (citing Monell, 436 U.S. at 691). As the record does not support a finding that Defendant maintained an official policy of using excessive force, the Court must examine whether a genuine issue of fact remains regarding whether Defendant maintained a *custom* of using such force. In order to demonstrate that a municipal custom exists, Plaintiff must satisfy three requirements:

- (1) The existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees;
- (2) Deliberate indifference to or tacit authorization of such conduct by the governmental entity's policymaking officials after notice to the officials of that misconduct; and
- (3) Th[e] plaintiff['s] injur[y] by acts pursuant to the governmental entity's custom, i.e., [proof] that the custom was the moving force behind the constitutional violation.

Mettler, 165 F.3d at 1204 (citing Ware v. Jackson Co., 150 F.3d 873, 880 (8th Cir. 1998)).

Plaintiff has provided no evidence of a continuing, widespread persistent pattern of unconstitutional misconduct by Defendant's employees. At most, Plaintiff stated that he had heard from a woman, whose name he could not remember, that Sergeant Jones had used excessive force against the woman's daughter. Even assuming that Plaintiff could establish this alleged incident involving Sergeant Jones occurred, "[g]enerally, an isolated incident of police misconduct by subordinate officers is insufficient to establish municipal policy or custom." Wedemeier v. City of Ballwin, Mo., 931 F.2d 24, 26 (8th Cir. 1991); see also Ward v. City of Des Moines, 184 F. Supp. 2d 892, 897 (S.D. Iowa 2002) (evidence of only a single alleged excessive-force incident normally does not suffice to prove the existence of a municipal custom); Mettler, 165 F.3d at 1204 (no genuine issue of material fact regarding the existence of municipal custom where plaintiff only offered evidence of prior citizen complaints of excessive force and problems with the post-incident investigation).

Plaintiff contends that because the appropriate amount of force an officer should use in a given situation is left up to the discretion of the individual police officer, this is sufficient evidence of local Bloomfield police custom. Plaintiff confuses a policy of officer discretion with a custom of using unreasonable or excessive conduct.

"[P]olice 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, 490 U.S. at 397. Due to the nature of police work, it would be impossible to prepare a manual that would address every situation in which force was necessary and what type of force should be utilized; therefore, police officers are routinely required to use their discretion in handling the various incidents they must face every day. The mere exercise of discretion by an employee does not give rise to a constitutional violation. See generally City of St. Louis v. Praprotnik, 485 U.S. 112, 126 (1988) (stating that "[i]f the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from respondeat superior liability."); see also Jeffes v. Barnes, 208 F.3d 49, 57 (2nd Cir.), cert. denied, 531 U.S. 813 (2000) ("It does not suffice for [§ 1983] purposes that the official has been granted discretion in the performance of his duties."); Ward, 184 F. Supp. 2d at 897 (stating plaintiff failed to identify any official policy that arguably played a role in an officer's alleged use of excessive force where police department's official policy included rules governing officers' interaction with the public and the department's use-of-force policy stated that an officer shall use only that force that is necessary to make an arrest and maintain control of the arrestee); Outb v. Ramsey, 285 F. Supp. 2d 33, 44 (D.D.C. 2003) ("because individual officers lack 'final policymaking authority,' their mere exercise of discretion, not in service of any municipally-established policy, is insufficient to render the city liable").

Assuming the record would support a finding that a persistent pattern of unconstitutional misconduct existed, Plaintiff would then need to establish a deliberate indifference to or tacit authorization of such conduct by Defendant's policymaking officials after notice to the officials of the misconduct. Plaintiff claims that the City of Bloomfield demonstrated its deliberate indifference by failing to train its police officers in fundamental police procedures and failing to properly supervise Sergeant Jones. "Deliberate indifference may be shown by a failure to train, or by conducting a training program in a grossly negligent manner so that police misconduct inevitably occurs." Patzner v. Burkett, 779 F.2d 1363, 1367 (8th Cir. 1985) (quotations omitted). Defendant may be liable for deficient hiring and training policies regarding law enforcement officers where

- (1) the city's hiring and training practices are inadequate;
- the city was deliberately indifferent to the rights of others in adopting them, such that the "failure to train reflects a deliberate or conscious choice by a municipality," <u>City of Canton v. Harris</u>, 489 U.S. 378, 389, 109 S. Ct. 1197, 1205, 103 L. Ed. 2d 412 (1989); and
- (3) an alleged deficiency in the city's hiring or training procedures actually caused the plaintiff's injury.

Andrews, 98 F.3d at 1076.

"It is necessary to show 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 policymakers of the city can reasonably be said to have been deliberately indifferent to the need." Andrews, 98 F.3d at 1076 (quotations omitted). There is nothing in the record to suggest a genuine issue exists regarding whether the city's hiring and training practices were inadequate. Although Sergeant Jones indicated that he would have liked to receive continual training, in a field such as law enforcement where the law is ever changing, the desire to receive training on a continual basis is not out of the ordinary. Further, Bernie Gutz, who was employed by the City of Bloomfield as the Chief of Police in January of 2000, stated that the policy manual was distributed to each officer. Although Sergeant Jones indicated he did not read the Bloomfield Police Department manual prior to the January 29, 2000, incident, "[t]hat a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program." City of Canton, Ohio v. Harris, 489 U.S. 378, 390-91. Even assuming, in the light most favorable to the Plaintiff, that Sergeant Jones' training was inadequate, there is nothing in the record which demonstrates a genuine issue of material facts exists as to whether any alleged inadequate training actually caused Plaintiff's alleged injury. The record does not support a finding of deliberate indifference on behalf of Defendant.

"A plaintiff must show that city officials had knowledge of prior incidents of police misconduct and deliberately failed to take remedial action." Rogers v. City of Little Rock, Ark., 152 F.3d 790, 799 (8th Cir. 1998) (quotations omitted) (quoting Andrews, 98 F.3d at 1075). There is no evidence in the record which shows city officials had knowledge of prior incidents involving alleged excessive force by the city's police officers, much less that they deliberately failed to take remedial action.

Other than mere allegations, Plaintiff has provided no evidence in the record to support the contention that the City of Bloomfield established, maintained, or enforced official municipal policies, patterns, practices, and/or customs of using unreasonable or excessive conduct. "Mere arguments or allegations are insufficient to defeat a properly supported motion for summary judgment; a non-movant must present more than a scintilla of evidence and must advance specific facts to create a genuine issue of material fact for trial." F.D.I.C. v. Bell, 106 F.3d 258, 263 (8th Cir. 1997) (internal quotation marks omitted) (citing Rolscreen Co. v. Pella Prods. of St. Louis, Inc., 64 F.3d 1202, 1211 (8th Cir. 1995)). The Bloomfield Police Operational Manual was approved and adopted by the Bloomfield City Council and was in effect on the night of January 28, 2000. The manual expressly details the Department's policy on the use of force and the use of a service firearm. Although Plaintiff argues Defendant failed to initiate policies to ensure excessive force was not unnecessarily used by its officers against citizens, at most

the record tends to show that, due to the nature of police work, the amount of force to be used in a given situation is left to the officer's discretion, and each officer is to exercise their discretion within the confines of the police department's manual. Further, Plaintiff testified he was not aware of any evidence that would demonstrate Bloomfield Police Department officers used excessive force against citizens in making arrests on other occasions. Plaintiff testified he heard Sergeant Jones used excessive force on another citizen, but he was unable to point to any other specific incidents involving Sergeant Jones or any other officers which would tend to show a custom, pattern, or practice of using excessive force endorsed by the City of Bloomfield.

Plaintiff has failed to generate a genuine issue of material fact regarding whether the City of Bloomfield maintained an official policy or custom that caused Plaintiff's alleged injury; therefore, no liability can attach to the Defendant.

CONCLUSION

Plaintiff has not made a showing sufficient to raise a material question of fact concerning the elements essential to his § 1983 claim. Defendant's Motion for Summary Judgment on Count I of Plaintiff's Complaint is **granted**. The Court may decline to exercise supplemental jurisdiction over Plaintiff's state law claims if the Court has dismissed all claims over which it has original jurisdiction. 28 U.S.C. § 1367(c)(3). In the present case, the Court finds no reason to exercise supplemental jurisdiction over

Plaintiff's remaining claims which arise solely under state law. Accordingly, Plaintiff's Complaint is **dismissed**.

UNITED STATES DISTRICT COURT

IT IS SO ORDERED.

Dated this 4th day of March, 2004.

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