IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-00901-WJM-NRN

MICHAELLA LYNN SURAT,

Plaintiff,

v.

RANDALL KLAMSER, in his individual capacity, and
CITY OF FORT COLLINS, a municipality,

Defendants.

RESPONSE TO DEFENDANTS' MOTION TO DISMISS [Doc. 23]

Plaintiff, through her undersigned counsel, submits the following Response to Defendants' Motion to Dismiss [Doc. 23], and states the following in support:

INTRODUCTION

This case involves a clear incident of excessive force. Defendant Randall Klamser, an officer of Fort Collins Police Services, grabbed Plaintiff Michaella Surat by the wrist and slammed her face-first into the ground, causing serious injuries. Plaintiff brings an excessive force claim pursuant to 42 U.S.C. § 1983 again Defendant Klamser, and seeks to impose *Monell* liability on the City of Fort Collins. Defendants filed their Motion to Dismiss [Doc. 23] [1] on June 7, 2019, seeking the dismissal of both of Plaintiff's claims. For the reasons below, the Motion is meritless and should be denied.

[1] Defendants filed two versions of their Motion to Dismiss [*see* Docs. 22, 23] that are almost identical. Plaintiff assumes that the Motion to Dismiss at Doc. 22 was a prior draft filed in error, and therefore responds here to the Motion to Dismiss at Doc. 23.

STANDARD OF REVIEW

The Federal Rules of Civil Procedure allow a defendant to file a motion to dismiss for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "There is a strong presumption *against* the dismissal of claims under this rule." *Blevins v. Reid*, 2008 U.S. Dist. LEXIS 46168, at *9 (D. Colo. June 12, 2008) (citing *Cottrell, Ltd. v. Biotrol Intern., Inc.*, 191 F.3d 1248, 1251 (10th Cir. 1999)) (emphasis added). When a defendant files a motion to dismiss pursuant to Rule 12(b)(6), a court must accept as true "all well-pleaded factual allegations in a complaint and view these allegations in the light most favorable to the plaintiff." *Kerber v. Qwest Group Life Ins. Plan*, 647 F.3d 950, 959 (10th Cir. 2011) (citation omitted). Under Fed. R. Civ. P. 8(a)(2), the complaint "must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Generally, in the post-*Twombly* and *Iqbal* era, a complaint will survive a Rule 12(b)(6) motion to dismiss if it contains "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Plausible" does not mean "likely to be true," but is, instead, a nudge beyond "conceivable." *See Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008). "The allegations must be enough that, if assumed to be true, the plaintiff plausibly (not just speculatively) has a claim for relief." *Id.*; *see also Johnson v. City of Shelby*, 135 S.Ct. 346, 346 (2014) ("Federal pleading rules call for 'a short and plain statement of the claim showing that the pleader is entitled to relief,' . . . they do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted.").[2]

[2] In *Johnson*, the United States Supreme Court summarily reversed a dismissal of a § 1983 action, emphasizing that lower courts are not to apply such a heightened standard of pleading.

ARGUMENT

I. Plaintiff's Excessive Force Claim is Not Barred by *Heck* Because She is Not Challenging Her Underlying Convictions.

Defendants' sole argument for dismissal of Plaintiff's excessive force claim is that it is barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). In *Heck*, the United States Supreme Court considered whether a prisoner could challenge the constitutionality of his criminal conviction in a § 1983 lawsuit for damages. The Supreme Court held that a claim for damages that would require a court to find that the underlying conviction or sentence was invalid is not a cognizable claim unless the plaintiff proves "that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 486-87. Consistent with *Heck*, the Tenth Circuit has clarified that an excessive force claim under § 1983 may proceed as long as the suit "does not challenge the *lawfulness* of [the plaintiff's] arrest and conviction[.]" *Martinez v. City of Albuquerque*, 184 F.3d 1123, 1125 (10th Cir. 1999) (emphasis in original) (holding that plaintiff could pursue an excessive force claim even though he was convicted of resisting arrest); *see also Fresquez v. Minks*, 567 F. App'x 662, 666 (10th Cir. 2014) (holding that the district court erred in dismissing excessive force claim pursuant to *Heck* because "[a] favorable finding for Plaintiff on his excessive force claim would not necessarily call into question his conviction for obstruction").

The *Heck* bar is inapplicable to Plaintiff's excessive force claim. In short, Plaintiff is not challenging the validity of her resisting arrest and obstruction convictions in this matter. She is not arguing that the arrest was unlawful. Rather, Plaintiff is alleging that her lawful arrest was conducted in an unlawful manner because the amount of force that Defendant Klamser used to

arrest her was unreasonable. *See Compl.* [Doc. 1] ¶¶ 61-63. Even where a person fails to follow an officer's orders, the officers are not entitled to employ anything more than reasonable force to make an arrest. *See Martinez*, 184 F.3d at 1127 ("[F]ailing to heed the arresting officers' instructions and closing his vehicle's window on the arm of one of the arresting officers . . . might justify the officers' use of reasonable force to effectuate Martinez' arrest, but would not authorize the officers to employ excessive or unreasonable force in violation of Martinez' Fourth Amendment rights."). Regardless of the fact that Plaintiff was convicted of resisting arrest and obstruction, Plaintiff sufficiently pled that Defendant Klamser's force – pulling her arm by the wrist and throwing her face-first onto the sidewalk hard enough to cause a concussion, chin contusion, cervical strain, and severe bruising – was excessive because it was greater force than necessary to effect the arrest. *Compl.* [Doc. 1] ¶¶ 63, 42-44; *see Fresquez*, 567 F. App'x at 666 ("[W]e reject Defendants' argument that slamming a prison inmate on the ground with enough force to break his teeth is necessarily a reasonable use of force so long as the inmate did something 'obstructive' first.") (citations omitted).

The Court should not consider Defendants' arguments that rely on the jury instructions in Plaintiff's criminal case, which constitutes information outside of the four corners of the Complaint and is therefore improperly referenced on a motion to dismiss filed pursuant to Fed. R. Civ. P. 12(b)(6). *See Macarthur v. San Juan Cty.*, 309 F.3d 1216, 1221 (10th Cir. 2002) (stating that a court typically should not look beyond the pleadings on a Rule 12(b)(6) motion). Nonetheless, Plaintiff recognizes that the Court has discretion to consider documents that are public record on such a motion without converting it to a motion for summary judgment. *See Shifrin v. Colorado*, No. 09-cv-03040-REB-MEH, 2010 U.S. Dist. LEXIS 86594, at *9 (D. Colo.

July 22, 2010) ("[T]he Court 'has discretion in deciding whether to convert a motion to dismiss into a motion for summary judgment by accepting or rejecting the attached documents.'") (citing *JP Morgan Trust Co. Nat. Ass'n v. Mid-America Pipeline Co.*, 413 F. Supp. 2d 1244, 1256-57 (D. Kan. 2006)). Thus, in an abundance of caution, Plaintiff addresses Defendants' arguments here.

Contrary to Defendants' assertion, the jury instructions from Plaintiff's criminal trial do not indicate that the jury considered whether Defendant Klamser *ever* used excessive force in the entirety of the incident. Rather, the jury instructions considered whether *Plaintiff's* own use of physical force constituted self-defense to the force first employed by Defendant Klamser. *See Respondent's Exh. 1* at 12 (instructing jury to consider whether Plaintiff "used that physical force in order to defend herself or a third person from what a reasonable person would believe to be the use or imminent use of unlawful physical force"; she used force that was reasonably necessary; and she was not the initial aggressor). Any force used by Plaintiff – which is the basis of her resisting arrest and obstructing a peace officer convictions – occurred before she was taken down to the ground. Thus, the jury never considered whether Defendant Klamser's act in slamming her to the ground was excessive force. To give an example of circumstances that do not exist here, if Plaintiff had punched Defendant Klamser in the face *after* being taken down to the ground, then she asserted a self-defense affirmative defense and was still convicted, the jury likely would have properly considered whether the take-down itself was excessive.

The Tenth Circuit has made clear that the timeline of the events is critical in weighing whether *Heck* bars excessive force claims. For this reason, Defendants' reliance on *Adams v. Dyer*, 223 F. App'x 757 (10th Cir. 2007), is inapposite. In that case, the plaintiff alleged that two

officers entered his bedroom, "tackled him and began assaulting him" without announcing that they were officers and without giving any orders, and "a struggle ensued." *Id.* at 761, 759. The two officers called for backup, and "[t]here is some question about when [the third officer] arrived, and what his involvement was in the altercation. Ultimately, the three officers were able to subdue [the plaintiff] long enough to handcuff him." *Id.* at 759. The Tenth Circuit affirmed summary judgment in favor of the first two officers based on the *Heck* bar because the plaintiff's allegations squarely attack the jury's finding that the plaintiff was not provoked by the officers' conduct *before* a struggle ensued. *Id.* at 761-62. However, the circuit court stated that the grant of summary judgment based on *Heck* with respect to the third officer was in error because he arrived after the struggle that the convictions were based on. *Id.* at 762.

Here, the Complaint alleges that Defendant Klamser used excessive force against Plaintiff *after* her attempts at defending herself. Thus, Defendant Klamser's excessive force is most analogous to the conduct of the later-arriving third officer in *Adams*, who still participated in the struggle with the plaintiff, but arrived after the plaintiff's acts that constituted resistance. *Adams*, 223 F. App'x at 762. To consider whether someone acted in self-defense, the jury must examine *that person's* use of physical force. As explained above, Plaintiff's use of any type of force ended prior to the take-down. Thus, the jury could not possibly have considered whether Plaintiff acted in self-defense in response to Defendant Klamser throwing her to the ground. *See id.* The timeline of events alleged in the Complaint is sequential and clear, contrary to Defendants' assertions.

For these reasons, the Court should find that, viewing the facts in the light most favorable to Plaintiff, she has plausibly pled an excessive force claim. *See Kerber*, 647 F.3d at 959.

II. Plaintiff's Claim Against the City of Fort Collins Should Not Be Dismissed.

A. Legal standards for entity liability.

Municipalities are considered "persons" subject to suit under 42 U.S.C. § 1983 for civil rights violations. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978). A municipality or other local government unit is liable for constitutional torts if the alleged unconstitutional acts implicate a policy, ordinance, or custom of the local government. *Id*. at 690-94; *Garcia v. Salt Lake Cnty.*, 768 F.2d 303, 308 n.4 (10th Cir. 1985). An institutional defendant is responsible under § 1983 when the execution of a policy or custom actually caused an injury of constitutional dimensions. *Monell*, 436 U.S. at 694; *D.T. v. Indep. Sch. Dist.*, 894 F.2d 1176, 1187 (10th Cir. 1990). To ultimately prevail on their claim against the City of Fort Collins, Plaintiff must establish "(1) that a municipal employee committed a constitutional violation, and (2) that a municipal policy or custom was the moving force behind the constitutional deprivation." *See Myers v. Okla. Cnty. Bd. of Cnty. Commr's*, 151 F.3d 1313, 1316 (10th Cir. 1998). A municipal policy or custom can be established in many ways, including the existence of:

> (1) a formal regulation or policy statement; (2) an informal custom amounting to a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law; (3) the decisions of employees with final policymaking authority; (4) the ratification by such final policymakers of the decisions – and the basis for them – of subordinates to whom authority was delegated subject to these policymakers' review and approval; or (5) the failure to adequately train or supervise employees, so long as that failure results from deliberate indifference to the injuries that may be caused.

Bryson v. Oklahoma City, 627 F.3d 784, 788 (10th Cir. 2010) (citation and quotations omitted).

Critically, courts have rejected a heightened pleading standard that goes beyond the "short and plain" statement normally required pursuant to Fed. R. Civ. P. 8(a) for claims of municipal liability. As Judge Ebel explained in *Walker v. Zepeda*:

> The reasons for not requiring heightened fact pleading in a § 1983 municipal liability complaint remain even in the wake of *Twombly* and *Iqbal*: a plaintiff, as an outsider to municipal government, is not expected to have information about a city's official policies, practices, or training programs at the pleading stage.

Walker v. Zepeda, 2012 U.S. Dist. LEXIS 74386, at *14 (D. Colo. May 29, 2012). Rather, a well-pleaded claim of municipal liability is one that simply "provide[s] fair notice to the defendant, [which] requires more than generically restating the elements of municipal liability." *Taylor v. RED Dev., LLC*, 2011 U.S. Dist. LEXIS 97985, at *9 (D. Kan. Aug. 31, 2011) (quoting *Thomas v. City of Galveston, Texas*, 800 F. Supp. 2d 826, 843 (S.D. Tex. 2011)). Thus, a complaint sufficiently alleges municipal liability where "it contain[s] not only 'a boilerplate recitation of the grounds for municipal liability,'" but also makes "*some additional allegation to put the municipality on fair notice* of the grounds for which it [is] being sued." *Walker*, 2012 U.S. Dist. LEXIS 74386, at *14 (quoting *Taylor*, 2011 U.S. Dist. LEXIS 97985, at *4) (emphasis in original). "To require more could foreclose legitimate § 1983 claims that, after appropriate discovery, turn out to have evidentiary support." *Id*. at *15-16 (citing *Wilson v. City of Chicago*, 2009 U.S. Dist. LEXIS 93912, at *3 (N.D. Ill. Oct. 7, 2009) ("[A] plaintiff should be given the opportunity to develop an evidentiary record to determine whether he can provide support for his claims.")). Put differently, "[w]here a plaintiff provides more than a boilerplate recitation of the grounds for municipal liability, and instead makes some additional allegation to put the municipality on fair notice of the grounds for which it is being sued, 'federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims

sooner rather than later.'" *Thomas*, 800 F. Supp. 2d at 844-45 (quoting *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168-69 (1993)).

B. The City of Fort Collins has illegal customs, policies, and practices, including inadequately training and supervising its law enforcement officers.

As an initial matter, Plaintiff has sufficiently alleged that Defendant Klamser violated her constitutional rights. *See Myers*, 151 F.3d at 1316. The allegations in the Complaint also meet the second prong for municipal/entity liability that a "policy or custom was the moving force behind the constitutional deprivation." *See id.*

Defendants' assertion that Plaintiff has not provided specific allegations entirely ignores paragraphs 46-58 of the Complaint [Doc. 1]. The Complaint explains that "Defendant Fort Collins has a policy, custom and practice of unlawful seizure and use of excessive force." The Complaint further alleges that Fort Collins Police Services instituted an internal affairs investigation and ultimately concluded that Defendant Klamser used "standard arrest control," which is a strong indication that the City has "a custom and practice of unconstitutional use of force" and deficient training, supervision, and discipline. *Compl.* ¶¶ 47, 48, 49. The Complaint further highlights five (5) other cases involving the use of excessive force by Fort Collins police officers. *Id.* ¶¶ 50-54. These allegations are more than sufficient to put Defendant Fort Collins on notice of the basis of the municipal liability claim. *See Walker*, 2012 U.S. Dist. LEXIS 74386, at *14 (stating that only "some additional allegation" is necessary to put municipality on notice of basis of claim). Furthermore, these facts are sufficient to allege that there was a custom and practice "so permanent and well settled as to constitute a custom or usage with the force of law. *See Bryson*, 627 F.3d at 788.

In *Lynch v. Barrett*, 2012 U.S. Dist. LEXIS 72250, at *18-21 (D. Colo. May 24, 2012) (Jackson, J.), *rev'd in part on other grounds*, 703 F.3d 1153, 1164 (10th Cir. 2013), the Court denied the defendant city's request for summary judgment (of course, Defendant Fort Collins faces a higher burden to prevail under the Rule 12(b)(6) standard) based primarily on *one* statement in *one* newspaper article about the general culture of the police department. The Court determined that the evidence submitted was sufficient to create a genuine issue of material fact regarding the existence of a custom or practice in the department. *Id.* at *21. The Complaint here provides significantly more allegations than were dispositive in *Lynch*, as it references 5 other recent incidents involving excessive force. *See Compl.* ¶¶ 50-54. Thus, the pleadings are sufficient to permit an inference that there is a widespread practice, policy, or custom of deliberate indifference.

Furthermore, even a single incident involving excessive force may evidence a failure to train where the unconstitutional consequences of failing to train are "patently obvious." *Connick v. Thompson*, 563 U.S. 51, 64 (2011); *see also Allen v. Muskogee*, 119 F.3d 837, 842 (10th Cir. 1997); *Estate of Walter v. Corr. Healthcare Cos.*, 232 F. Supp. 3d 1157, 1165 (D. Colo. 2017) (finding allegations of single incident sufficient to survive motion to dismiss because "jails and prisons routinely house mentally ill inmates" and failure to train on appropriate treatment was therefore likely to result in constitutional violations). When all plausible inferences are drawn in Plaintiff's favor, as they must be, the need to train law enforcement officers on reasonable use of excessive force was obvious. *See Twombly*, 550 U.S. at 570.

The Tenth Circuit has stated that "[a] subsequent cover-up might provide circumstantial evidence that the [entity] viewed [its official policy] as a policy in name only and routinely

encouraged contrary behavior." *Cordova v. Aragon*, 569 F.3d 1183, 1194 (10th Cir. 2009); *see also Grandstaff v. City of Borger*, 767 F.2d 161, 171 (5th Cir. 1985) ("The disposition of the policymaker may be inferred from his conduct after the events of that night."). The fact that a Fort Collins police spokesperson told the media that Defendant Klamser used "standard arrest control" during this incident shows that the department was publicly attempting to cover up his wrongdoing.[3] *Compl.* [Doc. 1] ¶ 48.

Finally, the Court should be leery of dismissing this claim against the City so early in the case; dismissal at this early stage unduly risks "foreclos[ing] legitimate § 1983 claims that, after appropriate discovery, turn out to have evidentiary support." *Walker*, 2012 U.S. Dist. LEXIS 74386, at *15-16 (citing *Wilson*, 2009 U.S. Dist. LEXIS 93912, at *3). Thus, the Court should deny Defendants' Motion to Dismiss with respect to the municipal liability claim against Defendant City of Fort Collins.

CONCLUSION

For the reasons above, Defendants' Motion to Dismiss must be denied in its entirety.

DATED this 3rd day of July 2019.

KILLMER, LANE & NEWMAN, LLP

s/ Tania Valdez
David A. Lane

[3] Alternatively, the fact that Defendant Klamser was absolved of any wrongdoing during the internal affairs investigation and was not disciplined shows that the City ratified his unconstitutional conduct. Ratification occurs where "a subordinate's position is subject to review by the municipality's authorized policymakers," and those policymakers "approve a subordinate's decision and the basis for it." *Moss v. Kopp*, 559 F.3d 1155, 1169 (10th Cir. 2009) (internal citation omitted); *Compl.* [Doc. 1] ¶¶ 47-48.

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CERTIFICATE OF SERVICE

I certify that on this 3rd day of July, 2019 I filed a true and correct copy of the foregoing via CM/ECF which will generate emailed notice to the following:

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