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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

KIRK C. FISHER,)	CIVIL NO. 11-00589 ACK-BMK
)	
Plaintiff,	)	Honolulu, Hawaii
	)	April 9, 2012
vs.	)	11:09 a.m.
)	
LOUIS KEALOHA, as an	)	1) Defendant City and County
individual and in his	)	of Honolulu's amended motion
official capacity as	)	for partial dismissal of
Honolulu Chief of Police;	)	complaint
PAUL PUTZULU, as an)	
individual and in his	)	2) Defendant Louis Kealoha's
official capacity as former	)	motion to dismiss partial of
Honolulu Acting Chief of	)	complaint filed
Police; CINTY AND COUNTY OF	)	September 28, 2011
HONOLULU; HONOLULU POLICE)	
DEPARTMENT and DOE)	
DEFENDANTS 1-50,)	
)	
Defendant.)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE ALAN C. KAY,
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff:	TE-HINA ICKES 841 Bishop Street, Suite 2201 Honolulu, Hawaii 96813
For the Defendants:	D. SCOTT DODD Deputy Corporation Counsel City and County of Honolulu 530 S. King Street, Rm. 110 Honolulu, Hawaii 96813
Official Court Reporter:	GLORIA T. BEDIAMOL, RPR, RMR United States District Court P.O. Box 50131 Honolulu, Hawaii 96850

1 Proceedings recorded by machine shorthand, transcript produced
2 with computer-aided transcription (CAT).
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1 Monday, April 9, 2012 11:09 a.m.

2 THE CLERK: Calling the case of Civil 11-00589
3 ACK-BMK, Kirk C. Fisher versus Louis Kealoha, et al. This
4 hearing has been called for Defendant City and County of
5 Honolulu's amended motion for partial dismissal of complaint
6 and Defendant Louis Kealoha's motion to dismiss partial of
7 complaint filed September 28, 2011.

8 Counsel, your appearances for the record, please.

9 MS. ICKES: Good morning, Your Honor. Te-Hina Ickes
10 on behalf of Plaintiff Kirk Fisher.

11 THE COURT: Good morning.

12 MR. DODD: Good morning, Your Honor. Scott Dodd on
13 behalf of Defendants City and County of Honolulu and Louis
14 Kealoha.

15 THE COURT: What about Mr. Putzulu?

16 MR. DODD: Mr. Putzulu was not served with a copy of
17 the complaint, so we do not have the authority to represent him
18 here today, Your Honor.

19 THE COURT: Are the plaintiffs going to be pursuing
20 Mr. Putzulu?

21 MS. ICKES: Yes, Judge. We have had many difficulties
22 getting him served. We have attempted through HPD, through the
23 City. Because he no longer is employed by HPD or the City,
24 they are not accepting service for him, which is
25 understandable. We have tried with two separate process

1 servers to try track him down at his home, and it just seems,
2 Judge, that he is evading service as his home is fenced in.

3 We would like to pursue our claims against
4 Mr. Putzulu. It may come to an issue and may have to publish.
5 As I understand it, there have been many, many efforts to
6 obtain personal service on him, and it just has not been done.

7 THE COURT: Okay. Well, Mr. Dodd, it's your motion.
8 Please come up to the podium.

9 MR. DODD: Yes, Your Honor.

10 THE COURT: These are not really partial motions to
11 dismiss; is that right?

12 MR. DODD: They are entitled motions for partial
13 dismissal of the complaint. They're aimed at specific claims
14 that were --

15 THE COURT: They're aimed at all the claims for two
16 specific defendants, aren't they?

17 MR. DODD: Your Honor, that may have happened that
18 when the motions were first formulated -- and I also apologize
19 the motions are both inadequately captioned. The civil number
20 does not include Your Honor's initials, so we apologize about
21 that. I think when they were initially framed, the idea was to
22 move for partial dismissal. And then when they were ultimately
23 filed, it did appear that they were moving to dismiss all
24 claims pled against the defendants.

25 THE COURT: Okay.

1 MR. DODD: I apologize for that.

2 THE COURT: Are both parties in agreement that the HPD
3 ought to be dismissed?

4 MS. ICKES: Yes, Judge.

5 THE COURT: I see HPD is not a separate legal entity
6 for sui juris purposes, so HPD is dismissed.

7 Please proceed, Mr. Dodd.

8 MR. DODD: Okay, Your Honor. I was hoping we might
9 see the written order on the court's other case involving
10 firearms, but I will proceed with our arguments in this motion.

11 THE COURT: You are talking about Baker?

12 MR. DODD: Baker. Correct.

13 THE COURT: This is a very separate situation.

14 MR. DODD: I understand, Your Honor. Understood.

15 In this case, first I would like to discuss the City's
16 motion. And the basic argument under that is that it fails to
17 state a Monell type claim for municipal liability under Section
18 1983.

19 To make a municipal liability claim under that
20 section, the plaintiff must show that the municipal action was
21 taken with the requisite degree of culpability and must
22 demonstrate a direct causal link between the municipal action
23 and the deprivation of the federal rights.

24 If plaintiff were proceeding under a ratification
25 theory to establish municipal liability, the plaintiff would

1 have to show that the authorized policymaker or policymakers
2 approved the subordinate's decision and the basis for it and
3 thus requires knowledge of the alleged constitutional
4 violation.

5 Your Honor, we believe that plaintiff has not properly
6 pled a municipal liability claim under Monell because plaintiff
7 has not pled that the municipal action was taken with the
8 requisite degree of culpability and the causal link.
9 Plaintiff has alleged what appears to be a, for lack of a
10 better term, respondeat superior claim against the City and is
11 alleging a municipal liability claim under Section 1983. And
12 the law is clear that that is not permitted.

13 Municipal liability claim under Monell is an entirely
14 different animal with different requirements. We believe that
15 the complaint fails to state such a claim.

16 And the other -- under the Surplus Store and Exchange
17 case, 928 F.2d at 793, that's a Seventh Circuit case just for
18 persuasive authority, says the mere enforcement of state law on
19 the part of the local government in the absence of expressed
20 incorporation or adoption of state law into local regulations
21 has been found insufficient to sustain a federal action under
22 Section 1983.

23 So our argument, Your Honor, is that in this case,
24 since plaintiff does not allege any deliberate conduct on the
25 part of the City, nor any specific policy or custom that was

1 applied to plaintiff that was the cause of the alleged injury,
2 the claim is insufficient. Plaintiff merely cites the action
3 of Acting Chief Putzulu and Chief Kealoha in enforcing state
4 and federal law. We posit that this is insufficient to make
5 that a claim of municipal liability under Section 1983.

6 THE COURT: Why?

7 MR. DODD: Because it appears to be no more than a
8 respondeat superior claim. The allegation --

9 THE COURT: The chief of police doesn't have the
10 authority to make final policies?

11 MR. DODD: It could, Your Honor, if that were under a
12 ratification theory. Yes, the chief would be the final
13 decisionmaker. But we believe that if you go under the chief's
14 motion to dismiss, we believe that that -- the claim against
15 the chief is also insufficient. So a ratification theory would
16 not work against the City in this case either.

17 May I proceed to Kealoha's motion?

18 THE COURT: Please.

19 MR. DODD: Your Honor, we found in that case -- excuse
20 me a second. I apologize, Your Honor. We found the case most
21 closely related was the U.S. versus Hayes case, and that is 129
22 Supreme Court 1079. In that case, the court noted that 18 USC
23 Section 922(g)(9) makes it unlawful for any person who has been
24 convicted in any court of a misdemeanor crime of domestic
25 violence to possess in or affecting commerce any firearm or

1 ammunition. And that Section 921(a)(33) capital A, defines a
2 misdemeanor crime of domestic violence as having an element,
3 the use or attempted use of physical force or the threatened
4 use of a deadly weapon committed by a person in a domestic
5 relationship with the victim.

6 The Hayes case is analogous -- not exactly the same,
7 but it's analogous to the present case in that the court in
8 that case Hayes was convicted of a misdemeanor crime of
9 domestic violence. He was then charged under 922(g)(9) and 924
10 (a)(2) of possessing firearms after having been convicted of
11 the misdemeanor domestic violence crime.

12 He moved --

13 THE COURT: Well, the plaintiff contends that under
14 the harassment statute you could simply have slight touching,
15 and there was no use of force.

16 MR. DODD: I understand the plaintiff's argument. It
17 is our position that the domestic -- that the harassment -- the
18 crime of harassment under which plaintiff was convicted of the
19 two counts is a domestic violence crime. And therefore that
20 his convictions for harassment meet the federal definition of a
21 crime of violence in that it involved the use or attempted use
22 of force.

23 The defendants maintain that if the statute itself,
24 HRS 134-7 did not bar plaintiff from owning or possessing
25 firearms, that the Lautenberg Amendment would bar him from

1 doing so.

2 THE COURT: Let's stay first with the misdemeanor
3 definition of violence and force. Again, it's the plaintiff's
4 position that harassment could include only slight touching.

5 MR. DODD: I agree that is plaintiff's argument.

6 THE COURT: So how do you get around that?

7 MR. DODD: But I don't know if we can absolutely get
8 around it, but in Hayes, why I brought Hayes up, is that the
9 reason that Hayes rejected -- I'm sorry, the reason that the
10 Supreme Court rejected Hayes's arguments in that case is that
11 it said in that construing Section 922(g)(9) to exclude the
12 domestic abuser convicted under a generic use of force
13 statute -- and that's one that does not designate domestic
14 relationship as an element of the offense -- would frustrate
15 congress's manifest purpose.

16 Although the statute in the present case for
17 harassment -- I mean, it can be argued that it's only a slight
18 touch, it is our position that in this case it's clear that it
19 is a domestic violence crime. That what plaintiff here was
20 convicted of was a domestic violence crime.

21 THE COURT: But it would only be violence if there was
22 more than slight touching.

23 MR. DODD: Yes. And we're talking about the elements
24 of the offense, but we understand what actually happened was
25 that he -- what he was charged with --

1 THE COURT: We don't have much of a record of what
2 actually happened.

3 MR. DODD: Your Honor, at this point, you are correct.
4 We do not have that much of a record. It's merely a motion to
5 dismiss. It's not a motion for summary judgment. But it was
6 our position that even without that portion of the record that
7 harassment is a domestic violence crime and thus he could be --

8 THE COURT: Do you have any evidence? I understand
9 this is a motion to dismiss, but do you have any evidence that
10 would show that there was force or violence in the underlying
11 crime committed by Mr. Fisher?

12 MR. DODD: Well, Your Honor, as it is a motion to
13 dismiss, I don't have evidence. But it is my understanding
14 that it was a crime -- or it was a -- what occurred did involve
15 violence and that what he pled to was harassment, which does
16 not exactly -- I mean, it is not a requirement that violence be
17 used to be convicted of harassment. I do concede that.

18 THE COURT: Where does that leave the City?

19 MR. DODD: Well, the City -- as I argued before, I
20 don't think plaintiff has properly pled a Monell claim, so I
21 don't think that --

22 THE COURT: Well, just as far as the violation of the
23 statute.

24 MR. DODD: Well, if it's -- what we would argue is
25 that if that were insufficient, if the crime for which he was

1 convicted, harassment, is insufficient, we would argue that
2 Kealoha -- I'm not going to argue for Putzulu -- would be it
3 was a reasonable stake -- excuse me, a reasonable mistake under
4 which he would be entitled to qualified immunity.

5 From our point of view, Your Honor, it's something of
6 splitting hairs. Yes, the crime itself does not have an
7 element of a necessity of the use of force, but there's
8 definitely -- the use of force is one possible way to be
9 convicted of harassment.

10 THE COURT: We have a 1983 claim with federal
11 constitution claims, and we also have an alleged violation of
12 state statutes. So which immunity would apply? Would it be
13 federal immunity or state immunity?

14 MR. DODD: Qualified immunity would only apply to the
15 federal 1983 claim. Under state law, Chief Kealoha would be
16 entitled to the conditional privilege under Hawaii state law.

17 THE COURT: Please proceed.

18 MR. DODD: Your Honor, that's basically what I wanted
19 to argue. If the court has any questions, I will do my best to
20 address those.

21 THE COURT: You haven't discussed the injunction issue
22 at all.

23 MR. DODD: Well, Your Honor, plaintiff has filed a
24 motion at the same time that he filed his opposition to these
25 motions. He filed a motion for preliminary injunction. We

1 believe that that --

2 THE COURT: Well, it's asked for in the complaint too.

3 MR. DODD: Correct, Your Honor, and we did not
4 separately move to dismiss that. But we will make those
5 arguments in opposition to the plaintiff's motion for the
6 injunction. We will argue at the time -- I won't get into that
7 now, but we will argue that the injunction should not issue.

8 THE COURT: But you do argue that both the City and
9 Kealoha should be dismissed? If they are dismissed, who is
10 going to carry out any injunction?

11 MR. DODD: I think that's the confusion on our end,
12 Your Honor, which was -- led the motion, at least for Kealoha,
13 to be dismissed as a motion for partial dismissal.

14 We believe that the -- I can understand from
15 plaintiff's position we're arguing out of both sides, but
16 because typically we argue that official capacity claims are
17 only claims against the municipal entity and should be
18 dismissed as against the City.

19 But since the City is arguing there's no Monell claim,
20 I can understand that the plaintiffs say, Well, which one is
21 it? Someone has to be responsible for the request for
22 injunctive relief, but we'll be moving to oppose that motion.
23 We believe that that motion will fail.

24 THE COURT: Are you saying at this time you're not
25 seeking to move for a dismissal of either the City or Kealoha

1 with respect to the injunctive claim?

2 MR. DODD: Your Honor, we would; but since we have not
3 properly briefed it, I don't think we could honestly ask the
4 court to dismiss it. We haven't fully briefed the issue in our
5 papers.

6 THE COURT: Thank you.

7 MR. DODD: Thank you, Your Honor.

8 THE COURT: Is it Te-Hina Ickes?

9 MS. ICKES: Yes, Judge.

10 THE COURT: I should call you Ms. Ickes or Ms.
11 Te-Hina?

12 MS. ICKES: Ms. Ickes is fine. Thank you, Judge. May
13 I?

14 THE COURT: Please.

15 MS. ICKES: With respect to the City's motion to
16 dismiss for failure to state a claim under 42 U.S. 1983, the
17 plaintiff's position -- or the plaintiff agrees that there's no
18 municipal liability under respondeat theory or -- theory. That
19 in order to establish municipal liability, a plaintiff must
20 allege some sort of policy or custom that the municipality has.

21 We have alleged policy or custom on the part of the
22 HPD, which is not a separate entity as was the first thing that
23 was discussed, it's not a separate entity from the City. The
24 municipality that's being sued here.

25 That policy or custom, Judge, is identified -- excuse

1 me -- in paragraph 25 and again referred to in paragraphs 50
2 and 57 of plaintiff's complaint.

3 THE COURT: Only with respect to Mr. Fisher, right?

4 MS. ICKES: I'm sorry, could you -- the policy with
5 respect to Mr. Fisher?

6 THE COURT: What paragraphs of the complaint are you
7 referring to again?

8 MS. ICKES: I see what your question is, Judge. I'm
9 referring to paragraph 25 of the complaint wherein Mr. Fisher
10 was informed by HPD of what their custom, practice and policy
11 was with regards to issuing or denying permits to acquire.

12 You're right, Mr. Fisher is the only person referenced
13 in that paragraph. In paragraphs 50 and 57, we just reallege
14 that --

15 THE COURT: That's 5-0 and 5-7?

16 MS. ICKES: Correct. Five zero and five seven -- that
17 by maintaining these customs, practices and policies, and its
18 kind of the standard language in the causes of action section,
19 Judge. It's kind of a lengthy paragraph. I can read it into
20 the record, but pages 50 and 57 just reestablish what
21 plaintiff's claims are.

22 And it is policy or custom that led to the deprivation
23 of Mr. Fisher's constitutional rights specifically. Because
24 HPD's policy is to review police reports, police reports have
25 nothing to do with whether or not a person has been convicted

1 of any crime. I have a lengthy discussion in my memo in opp to
2 Chief Kealoha's motion to dismiss that discuss harassment and
3 whether it's a crime of violence.

4 Now HPD has specifically related that they review
5 police reports and that's just -- that has nothing to do with
6 the statute. The statute 134-7, as well as the Lautenberg Act
7 talk about whether an applicant is convicted of a crime of
8 violence. So that policy, Judge, is what we're alleging is
9 that policy or custom that HPD and, as an extension, the City
10 engages in. And that is the basis for our claims against the
11 municipality under 1983.

12 THE COURT: But, again, you're only referring to
13 Mr. Fisher?

14 MS. ICKES: Yes.

15 THE COURT: That doesn't sound like a policy or a
16 custom.

17 MS. ICKES: Well, Judge, the way this complaint is
18 drafted, it's drafted on Mr. Fisher's behalf, and it was
19 Mr. Fisher who was informed of what HPD's policy, customs
20 practices are with regards to determining whether or not an
21 applicant is qualified or disqualified from firearms ownership.

22 Now, while we're filing this suit on behalf of
23 Mr. Fisher, there's no reason for us to know or not know
24 whether or not HPD engages in these types of customs or
25 policies with respect to any other applicant. If HPD is

1 relating to Mr. Fisher that this is what they do, when they
2 look at whether or not someone is statutorily qualified or
3 disqualified, they're looking at the police reports.

4 The police reports are completely irrelevant to
5 whether or not someone was ever convicted of a crime of
6 violence under Chapter 134 Hawaii Revised Statutes or the
7 Lautenberg Act under federal law.

8 So, Judge, I believe, to answer your question,
9 although we're filing on behalf of Mr. Fisher, there's no
10 reason to believe that the HPD is not doing this for every
11 other citizen who would normally be statutorily qualified. But
12 because HPD is exceeding the scope of what the statute
13 requires, a conviction, again it could be applied to any other
14 Hawaii citizen applying for a permit to acquire pursuant to
15 Chapter 134 Hawaii Revised Statutes. So that being said,
16 Judge, it was that policy or custom which we're alleging led to
17 the deprivation of Mr. Fisher's rights.

18 Now, the City, and I mentioned this was -- this was
19 mentioned in the City's moving papers and my memorandum in
20 opposition on behalf of Mr. Mr. Fisher that -- the ratification
21 issue.

22 Now, an official with final decision-making authority,
23 in this case plaintiff submits that both Kealoha and Acting
24 Chief Putzulu did have final decision-making authority pursuant
25 to Hawaii Revised Statutes 134-2. In fact, the statute, and

1 this is the Hawaii Revised Statutes Chapter 134, did establish
2 that it is the chiefs of police who may issue customs to -- or
3 permits to acquire.

4 So absolutely the plaintiff is arguing --

5 THE COURT: They --

6 MS. ICKES: I'm sorry, Judge.

7 THE COURT: You're talking about who makes the
8 determination whether a permit will be granted?

9 MS. ICKES: Correct.

10 THE COURT: That's not saying who will be making some
11 city policy. He's just carrying out the statute.

12 MS. ICKES: I understand. Judge, I can discuss that
13 part now about enforcing the statute, if you have questions
14 about that. I was going to be getting to it, but I can move
15 there now.

16 THE COURT: However you want to proceed.

17 MS. ICKES: Okay. So with regard to enforcing a
18 statute, Judge, the City submits that Chief Kealoha is
19 merely -- could be reasonably -- I don't want to misquote their
20 argument in their memo, but essentially that he reasonably
21 relied on the statute -- excuse me, Judge -- and therefore
22 should be excused. And I believe this comes under their
23 qualified immunity argument that a reasonable official in
24 Kealoha's position would not understand that his common sense
25 interpretation of the law violates a convicted criminal's

1 constitutional rights.

2 Well, Judge, there is case law that discusses whether
3 or not an official's conduct violated plaintiff's
4 constitutional rights. Case law in the Ninth Circuit does
5 discuss that a reasonably competent public official should know
6 what the law is regarding his conduct.

7 Furthermore, unlawful enforcement --

8 THE COURT: Well, this statute is not that clear,
9 right?

10 MS. ICKES: Well, Judge, I would -- plaintiff's
11 position is that a facial reading of the statute that it is
12 clear. If a person is statutorily qualified meets the
13 objective requirements of Chapter 134 Hawaii Revised Statutes,
14 the permit should issue.

15 The statute --

16 THE COURT: You don't have any case law defining these
17 statutes.

18 MS. ICKES: Defining the Hawaii Revised Statutes,
19 Judge?

20 THE COURT: Correct.

21 MS. ICKES: Okay.

22 THE COURT: Whether it's a slight touch, whether force
23 is required?

24 MS. ICKES: The plain reading of the harassment
25 statute. Is that the statute that you are asking about, Judge?

1 I thought we were still talking about 134.

2 THE COURT: About the force --

3 MS. ICKES: 711-1106, that's the harassment statute,
4 the harassment statute is a person commits the offense of
5 harassment with the intent to harass, annoy or alarm that other
6 person; that person strikes, shoves, kicks or otherwise touches
7 another person in an offensive manner, or subjects the person
8 to offensive physical contact.

9 So correct, Judge, the statute does encompass conduct
10 that could be, I guess, considered violent. But as the court
11 was -- had stated before, the statute also contemplates a
12 slight touching.

13 THE COURT: So what's the police chief meant to do
14 with that kind of language?

15 MS. ICKES: My argument, Judge, is that the police
16 chief is considered a reasonably competent official and could
17 make the decision that because an applicant's constitutional
18 rights are involved, that the statute could contemplate
19 behavior or conduct that is not violent in nature. And,
20 therefore, would pass the Hawaii Revised Statutes 134 --
21 Chapter 134 requirement --

22 THE COURT: When the police chief was, particularly
23 Mr. Putzulu, he had the record before him of what actually had
24 happened? What happened?

25 MS. ICKES: Judge, I don't know that --

1 THE COURT: Did your client simply touch his wife, or
2 did he slap her?

3 MS. ICKES: Well, Judge, I don't have that
4 information. What I can -- I can tell you, and it's alleged in
5 our complaint, that Nicole Fisher was his wife, and she was the
6 complaining witness in that matter. Contrary to what is --

7 THE COURT: Their child is a complaining witness too.

8 MS. ICKES: I'm not sure if I said Collette or Nicole.

9 THE COURT: I think your paragraph 16 in their
10 complaint does.

11 MS. ICKES: I may have misspoken with the name
12 Collette and Nicole. Contrary to what's argued in the City's
13 motion, Mr. Fisher was not arrested for abuse but was arrested
14 for harassment. Now, it's my understanding that apparently at
15 least until 2009, when Acting Chief Putzulu denied the
16 application, Mr. Fisher's application, they had the police
17 reports. What's contained in the police reports, Judge, I
18 don't know. I've never seen the police reports nor has
19 Mr. Wilkerson, my co-counsel. Mr. Fisher was represented by
20 other attorneys.

21 THE COURT: So we're all ignorant as to what really
22 happened.

23 MS. ICKES: Our office has attempted to request the
24 transcripts from those matters from his guilty plea. We do
25 have some very limited documents from that original case. And

1 this was over ten years ago. The judiciary retention statutes
2 for the state is ten years. So by the time Mr. Fisher retained
3 us, that retention period had long since passed by at least a
4 year.

5 And the reason I know that, Judge, is because that was
6 the response we got from the court when we tried to request
7 those transcripts or the audio recordings of the transcripts.
8 So if the court needs me to, I can submit that correspondence.
9 I have not attached it to any motion.

10 THE COURT: So what if the record says that your
11 client slapped his wife and daughter?

12 MS. ICKES: Well, that would be part of the record
13 because generally in state court there's a factual basis.
14 Mr. Fisher pled guilty and generally there's a factual basis
15 established by the prosecutor who reads the facts into the
16 record, or defense counsel, or they stipulate to it, but it's
17 made part of the record. And we don't have that record.

18 So whether or not the record would indicate whatever
19 Mr. Fisher -- the factual basis of his guilty plea, Judge, I
20 would argue that whatever is contained in the police report is
21 irrelevant. If that was not made a part of the record in his
22 guilty plea and/or conviction, then I would submit that it does
23 not constitute a crime of violence because he was never
24 convicted under those facts.

25 So because those -- whether or not Mr. Fisher --

1 Judge, I think at this point I'm confusing myself. So if Your
2 Honor has any specific questions or am I going on too long or
3 being unclear --

4 THE COURT: I'm waiting to hear more from you.

5 MS. ICKES: Okay. With regards to --

6 THE COURT: What if your client did slap his wife?

7 MS. ICKES: Well, if he slapped -- if a person slapped
8 his wife and was charged with harassment and was later
9 convicted, either by way of trial or a guilty plea or a no
10 contest plea, Judge, I would submit that whatever the factual
11 basis of that conviction was -- now if a person did that and
12 the factual basis was, I punched my wife, Judge, that I believe
13 could be considered under the Hawaii statutes as a crime of
14 violence.

15 But just because someone is arrested for that and then
16 later pleads guilty, if that factual record is not clear, then
17 I don't think we can say whether or not it was a slight
18 touching.

19 THE COURT: Doesn't your client have a copy of his
20 plea agreement?

21 MS. ICKES: Judge -- yes, we do have copies of the
22 judgment. And, you know, this is in district court, and I have
23 seen it. It does not contain whatever the factual basis was of
24 the guilty plea. And those forms are prepared by -- they're
25 form documents, Judge, that are filled in as you go through the

1 change of plea. So it's a change of plea form that you fill
2 in. Now this was not a felony court thing, so those plea forms
3 are more detailed.

4 The district court forms, Judge, and I can provide
5 these for the court's review, back in 1998 or 1999, whenever
6 Mr. Fisher's guilty plea occurred, are much different, and they
7 do not contain space for the factual basis of the guilty plea.

8 THE COURT: Your client at one point got an order
9 requiring the police department to return the firearms, right?

10 MS. ICKES: Correct, Judge. Back in --

11 THE COURT: And they did?

12 MS. ICKES: Yes. He did get an order permitting the
13 return. More than ten years later -- and HPD did return his
14 firearms and ammunition. When he reapplied for some sort of
15 other firearm, HPD went back and checked and said, Hey, wait a
16 minute, 10-year-old conviction, you've got to turn in all of
17 your guns -- or you have to turn in all of your firearms and
18 ammunition, and he complied.

19 THE COURT: And then he filed a motion with the family
20 court?

21 MS. ICKES: Correct. Under that old family court
22 number. Now that judge -- there were no findings --

23 THE COURT: They denied that, right?

24 MS. ICKES: Yes. The motion was ultimately denied.

25 THE COURT: Did he appeal the order?

1 MS. ICKES: I'm sorry, Judge?

2 THE COURT: Did he appeal the order?

3 MS. ICKES: The order was not appealed.

4 THE COURT: Why not?

5 MS. ICKES: We filed here for damages and injunctive
6 relief based on the constitutional violation.

7 THE COURT: That order of denial was some time ago,
8 wasn't it?

9 MS. ICKES: Yes, Judge, it is -- well, the dates are
10 laid out in the complaint. And I believe it was sometime --
11 the order was issued in 2008. Now the --

12 THE COURT: So he never bothered to appeal it?

13 MS. ICKES: Well, the order -- he never had any
14 problems with the order back in 1998. The motion was for --

15 THE COURT: This was -- I'm talking about an order
16 that denied his motion.

17 MS. ICKES: Correct.

18 THE COURT: So he would have had a problem with it.

19 MS. ICKES: In 2010, that was not appealed.

20 THE COURT: Why not?

21 MS. ICKES: I don't have the answer to that, Judge. I
22 believe that -- just based on the information we have and the
23 further investigation we did, we believe we had a
24 constitutional violation and this would be the appropriate
25 forum to pursue those claims.

1 Judge, with regards to this statute, we discussed how
2 the harassment statute can contemplate touching, rough
3 touching, violent touching, but it also encompasses slight
4 touching. And what I had been leading up to, before I started
5 discussing that, was with regards to qualified immunity, that
6 plaintiff -- we would be submitting that the individual
7 defendants in this case are not entitled to qualified immunity
8 because plaintiff had a clearly established constitutional
9 right, and our submission is that the defendants' conduct --

10 THE COURT: What constitutional rights has he clearly
11 established?

12 MS. ICKES: The constitutional rights that we have
13 alleged are Second Amendment, Fifth Amendment and Fourteenth
14 Amendment. We have not addressed the Fifth Amendment claim,
15 and I did not discuss that in my memo because, as I understand
16 it, the Fifth Amendment applies to federal defendants.

17 THE COURT: And your view is that the Fifth should be
18 dismissed too?

19 MS. ICKES: Yeah. I would just be submitting on that
20 issue. I did not brief that at all.

21 With regards to the Second and Fourteenth Amendment,
22 those are the constitutional claims that the plaintiff has
23 alleged and believes have been violated.

24 So with regards to -- well, Defendant Kealoha is the
25 only defendant on this motion before the court. And plaintiff

1 would just submit that, based on his experience, based on what
2 a reasonably competent public official should be aware of, that
3 the --

4 THE COURT: You and I have trouble determining what
5 the statute means and what it doesn't mean, so why should the
6 police chief?

7 MS. ICKES: Yes, Judge. I would submit that the
8 reason we have trouble is because we don't know what the record
9 says. We don't know what the factual basis of Mr. Fisher's
10 guilty plea was.

11 Now, what Police Chief Kealoha -- and it's my
12 understanding that he didn't -- or Acting Chief Putzulu did not
13 personally go down there and go through the records, but
14 someone under their employment did, and they ratified it by
15 signing off on that decision.

16 Now, that ratification or that custom of doing that is
17 our argument that that exceeds the scope of what the statute --
18 the firearm statutes. This is what Chapter 134 Hawaii Revised
19 Statutes contemplates.

20 Now --

21 THE COURT: Now, what did he do wrong on 134?

22 MS. ICKES: Well, 134-7 discusses, if anybody has been
23 convicted of a crime of violence, a permit shall not issue.
24 And they're looking at HPD, and the defendants are looking at
25 that -- that wording and saying because harassment could

1 contemplate a crime of violence, he is statutorily
2 disqualified.

3 Now, we're not disputing the validity of the statute.
4 We're disputing the enforcement of this valid statute that the
5 City, HPD, and the individual defendants have exceeded what the
6 statute mandates by looking at these police reports, looking at
7 all these different things, and not looking at what the
8 conviction was based on. And if they did -- well, Judge, the
9 record doesn't exist anymore because the case is so old. But
10 the --

11 THE COURT: Do you think his wife filed a complaint
12 with the police department because her husband slightly touched
13 her?

14 MS. ICKES: Well, there are all different types of
15 things that could constitute a slight touching, Judge, which
16 could be offensive. And I believe in my memo I discussed
17 spitting on a person, tapping somebody's shoulder.
18 Realistically, Judge, the question you're asking me, I can't
19 answer it. Do I really think -- I can't answer that without
20 having a knowledge of what Mr. Fisher was convicted of -- the
21 factual basis of what he was convicted of.

22 And, like I said, Judge, this is a really old case.
23 For the past ten years, Mr. Fisher, around there for
24 approximately the last ten years, Mr. Fisher had his firearms
25 and ammunition returned to him. So he had moved on --

1 THE COURT: He had them what?

2 MS. ICKES: He had had them returned. So when -- it
3 was only when he attempted to reapply for some sort of
4 additional permit for a different type of firearm is when,
5 after ten years, the City, HPD, Defendant Kealoha said, Wait a
6 minute, you have this 10-year-old conviction for harassment.
7 You've got to turn in -- you've got to surrender your firearms
8 or properly dispose of them. That's all laid out in the
9 complaint, Judge.

10 THE COURT: He simply put them in his wife's name?

11 MS. ICKES: Correct. Right now he is prohibited from
12 having these firearms as -- he is prohibited from having the
13 firearms and ammunition.

14 THE COURT: What about the federal statute?

15 MS. ICKES: The federal statute, Judge, has to do with
16 whether or not a person was also again convicted of a
17 misdemeanor crime of domestic violence. Now, there's no --
18 there's some case law, and the City attorney discussed it
19 briefly, about whether or not there's a relationship -- whether
20 or not a spouse -- there were spouses married, that's not an
21 issue in contention here. He was married to his wife at that
22 time, and that was his natural child at that time. So that's
23 not an issue here.

24 The issue is, what is a misdemeanor crime of domestic
25 violence?

1 Now, it discusses use of force and threatened use of
2 force. And that I believe is in Section 921. There are many
3 subsections there, Judge, and it's defined as -- I'm sorry, I
4 don't have that specific subsection, but it is set forth in my
5 memorandum in opposition. It discusses the use of force or the
6 threatened use of force. And, just like my argument on how HRS
7 711-1106, the harassment statute, does not contemplate -- or
8 can include slight touching. The harassment statute does not
9 require use of force or threatened use of force. It's not an
10 element of the offense.

11 So a similar analysis, which I set forth in my memo,
12 discusses why the Lautenberg Act, that's U.S.C. 922, is also
13 inapplicable here. Furthermore, it's never been established
14 that -- or Mr. Fisher was never convicted of a crime that
15 included the use of force or the threatened use of force. And
16 that under 711-1106 --

17 THE COURT: As far as you know.

18 MS. ICKES: Excuse me?

19 THE COURT: I said as far as you know.

20 MS. ICKES: As far as the record shows, Judge.

21 THE COURT: Now, we don't have the record.

22 MS. ICKES: We don't have the record. Judge, I've
23 skipped all over my notes here, and I believe I've covered all
24 the points I was hoping to in response to the City's motion.
25 If the court does not have any questions for me, my argument is

1 complete.

2 THE COURT: Okay. Thank you.

3 MS. ICKES: Thank you. Oh, Judge, if I may one more
4 brief thing. Also included in my memorandum in opposition, the
5 plaintiff submits that we have established the claim under 1983
6 as set forth. Our arguments are set forth in the memo there.
7 But the caveat at the end, Judge, was motion for leave to amend
8 the complaint.

9 If the court finds any merit in the City's arguments
10 that -- we submit that the motion to dismiss should be denied.
11 But if the judge believes we can clear anything up by amending
12 the complaint, we would request leave to do so.

13 THE COURT: Thank you. One area that I'm concerned
14 about is qualified immunity.

15 MS. ICKES: Okay. Judge, I think I've covered all my
16 points in my case law -- well, I haven't cited anything for you
17 on the record here, but it's all laid out in the memorandum in
18 opposition. And I don't have anything further on qualified
19 immunity.

20 THE COURT: Okay. Thank you.

21 MS. ICKES: Thank you.

22 THE COURT: Mr. Dodd.

23 MR. DODD: Just briefly, Your Honor. I think the
24 court made it clear what our problem is. The problem is that
25 the statute includes a harassment -- it could be a crime of

1 violence; but if it's simply an offensive touching, maybe it's
2 not. But we don't have enough record to know what happened in
3 this case. Did he simply slightly touch her and the daughter?
4 Or, was it actually something which would be clearly a crime of
5 violence -- a crime of domestic violence?

6 So I think it would be incumbent on the plaintiff to
7 provide the record so that we could see what he actually was
8 convicted of, then the issue would become clear.

9 I think that the complaint should have that as part of
10 it. It should be included in the complaint as to what exactly
11 what he pled to so we would understand.

12 THE COURT: I think the plaintiff makes the argument
13 that you just go by categories, not by the underlying facts.

14 MR. DODD: I mean, I understand the argument, but I
15 think in this one, as the court noted, if he beat up his wife
16 pretty good, and he says, Well, the statute is insufficient, I
17 still get my guns, I think that would frustrate congress's
18 purpose in passing the Lautenberg Amendment.

19 Because in the U.S. versus Hayes case, a similar type
20 of argument was rejected because simply the domestic
21 relationship was not a predicate element of the offense to say,
22 Well, he still can possess the firearms would frustrate
23 congress's purpose. I think, in this case, it similarly would
24 be a frustration of congress's purpose if the crime he was
25 convicted of and what he pled to was a crime of violence, but

1 yet we don't have the record, so we can't make that decision.

2 THE COURT: Well, the complaint alleges that the
3 plaintiff was told that the police chief simply looked at the
4 police report rather than the actual court order of conviction.

5 MR. DODD: I agree, Your Honor, that is what the
6 complaint alleges. We don't have evidence, but we have what
7 the complaint alleges.

8 THE COURT: What's your rebuttal to that?

9 MR. DODD: Your Honor, I think the confusion is, as
10 the court noted, it's confusing as to whether harassment
11 necessarily is it a crime of violence or is it not? Due to
12 that confusion, if the claim is against the chief of police, he
13 made a reasonable mistake in doing what he did, then we would
14 be entitled to qualified immunity.

15 THE COURT: Is that it?

16 MR. DODD: That's it, Your Honor.

17 THE COURT: Thank you. Anything more, Ms. Ickes?

18 MS. ICKES: Just one point, Judge. We all acknowledge
19 the problem, the record being unclear. Now Mr. Fisher pled
20 guilty in 1997 -- on December 3, 1997, on November 4, 1998,
21 less than a year later, the Honorable Dan Kochi, a state court
22 judge, issued the order permitting the return of the firearms.
23 And HPD returned Mr. Fisher's firearms at that time.

24 So even back then when the record was available, HPD
25 acknowledged that he was entitled to his guns back then. Ten

1 years later, the statutes are all the same, and that's alleged
2 in our complaint also, that the statutes Hawaii Revised
3 Statutes 134, Chapter 134, and the harassment statute 711-1106
4 was the same back then as it was now.

5 So back then, '97, '98, at the time of Mr. Fisher's
6 guilty plea and the time of the order permitting return of
7 firearms, and HPD's prompt return of Mr. Fisher's firearms
8 indicates that, at that time when the record was available,
9 they believed that Mr. Fisher was statutorily qualified under
10 134-2. Because the conduct back then of HPD just goes to show
11 that they didn't believe back then that he was -- had been in
12 fact convicted of a crime of violence.

13 Other than that, Judge, I have nothing more to add.

14 THE COURT: Maybe the judge made a wrong ruling.

15 MS. ICKES: Perhaps the judge made a wrong ruling, but
16 I don't know Judge Kochi. And all I know is that the issue was
17 ordered and HPD did return the firearms.

18 THE COURT: This is family court judge?

19 MS. ICKES: Yes, family court judge. I'm not
20 particularly -- I'm not familiar with this particular judge,
21 Judge Kochi, but I noticed the case number is FCCR and that
22 indicates family court criminal.

23 THE COURT: Oh, criminal.

24 MS. ICKES: FCCR stands for family court criminal.

25 THE COURT: Thank you.

1 MS. ICKES: Thank you, Judge.

2 THE COURT: Mr. Dodd, what do you have to say about
3 that?

4 MR. DODD: Your Honor, I don't believe we can take
5 what HPD, the City, with the municipal entity did back then as
6 an indication that they were doing anything other than
7 following a court order, rather than that they were evaluating
8 the harassment statute as to whether that permitted Mr. Fisher
9 to possess firearms. I think the court order came out, I don't
10 think we can assume anything more than just that, they followed
11 a court order. I don't think we can extend that to say they
12 acknowledged that he had a right to the firearms.

13 THE COURT: The court even referred to Chapter 134 and
14 said that this order is provided there's no violation of
15 Chapter 134.

16 MR. DODD: Your Honor, it does say that, and I
17 acknowledge that, but I think we can just -- all we can assume
18 is that what HPD did at that time was to follow the court
19 order. I think that's -- anything more than that would be
20 making an assumption that we just don't know.

21 THE COURT: Well, they followed the court order,
22 returned the guns at that point in time, but then ten years or
23 so later, when he applied for a permit to buy a new gun, he was
24 told that he was disqualified under his prior conviction and
25 that he had to return all of his guns.

1 MR. DODD: It is an odd result, Your Honor. I fully
2 agree with that. Perhaps, I know it was looked in a later
3 time, it was determined that he wasn't statutorily qualified.
4 I don't want to make assumptions and guesses, Your Honor. It
5 is odd that the guns were returned and then later he was told
6 to turn in the firearms as he was not qualified.

7 But looking at what happened in the later time period,
8 I think that the action was reasonable based upon the
9 information provided and that the statute -- the statute of
10 harassment, even if it didn't necessarily be a crime of
11 violence, it was possibly a crime of violence, and that it was
12 reasonable for the chief to act as he did.

13 THE COURT: I'm looking for my page that shows up in
14 my memo here. Maybe my law clerk can help me. What page in
15 the memo does that show up, that court order?

16 MS. ICKES: Judge, if I may. In the complaint, if the
17 court has the complaint, the exact text of the order is on
18 page -- bottom of page 6 top of page 7. And that's exactly the
19 language pulled from the order.

20 THE COURT: It is hereby ordered that the Honolulu
21 Police Department shall return to Mr. Fisher all firearms,
22 etcetera, which was surrendered to the above mentioned court
23 order, provided that the provisions of HRS Chapter 134 are
24 satisfied and that no outstanding state or federal restraining
25 orders, etcetera, Section 922(g)(8), 1347 prohibitions under so

1 and so.

2 I guess one way you can read that in this case is that
3 the court order said the police are directed to return the
4 firearms, provided that that is permissible under Chapter 134
5 and is permissible under 922. The police made a mistake in
6 returning the firearms at that time. That's another way of
7 looking at it, right?

8 MS. ICKES: That's possible, Judge.

9 THE COURT: Okay. Well, I want to look at these cases
10 again. I'm going to take this under advisement at this time.
11 Thank you both.

12 MR. DODD: Thank you, Your Honor.

13 MS. ICKES: Thank you, Your Honor.

14 (Recess at 12:07 p.m.)

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COURT REPORTER'S CERTIFICATE

I, Gloria T. Bediamol, Official Court Reporter, United States District Court, District of Hawaii, do hereby certify that the foregoing is a true, complete and correct transcript from the record of proceedings in the above-entitled matter.

DATED at Honolulu, Hawaii, October 19, 2012.

/s/ Gloria T. Bediamol
GLORIA T. BEDIAMOL.
RPR, RMR