

1990

J.H., by and through his Guardian ad Litem, D.H. v.
West Valley City, West Valley City Police
Department, and Jene V. Lyday, individually : Brief
of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Allan L. Larson; Richard A. Van Wagoner; Snow, Christensen & Martineau; Attorneys for Defendant.

James M. Dunn; Michael N. Zundel; Laurie S. Hart; Jardine, Linebaugh, Brown & Dunn; Attorneys for Defendant.

Richard I. Ashton; Wayne H. Braunberger; David A. Wilde; Ashton, Braunberger, Poulsen and Boud; Attorneys for Plaintiff/Appellant.

Recommended Citation

Brief of Appellant, *J.H. v. West Valley City*, No. 900052.00 (Utah Supreme Court, 1990).
https://digitalcommons.law.byu.edu/byu_sc1/2855

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

900052

IN THE SUPREME COURT OF THE STATE OF UTAH

J. H., by and through
his Guardian ad Litem, D. H.

Plaintiff-Respondent,

vs.

WEST VALLEY CITY, WEST
VALLEY CITY POLICE DEPARTMENT,
and JENE V. LYDAY, individually

Defendants-Appellant.

Case No. 900052

BRIEF OF APPELLANT

On Appeal from the Third Judicial District
Court of Salt Lake County, State of Utah
The Honorable David S. Young, Judge.

RICHARD I. ASHTON
WAYNE H. BRAUNBERGER
DAVID A. WILDE
ASHTON, BRAUNBERGER, POULSEN & BOUD
302 West 5400 South
Suite 103
Murray, Utah 84107
Attorneys for Plaintiff/Appellant

ALLAN L. LARSON
RICHARD A. VAN WAGONER
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant
10 Exchange Place, Eleventh Floor
P.O.Box 45000
Salt Lake City, Utah 84145

JAMES M. DUNN
MICHAEL N. ZUNDEL
LAURIE S. HART
JARDINE, LINEBAUGH, BROWN AND DUNN
370 East South Temple, Suite 400
Salt Lake City, Utah 84111

FILED

ARGUMENT PRIORITY CLASSIFICATION: RULE 29(b)(16)

AUG 13 1990

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

J. H., by and through)	
his Guardian ad Litem, D. H.)	
)	
Plaintiff-Respondent,)	
)	
vs.)	
)	
WEST VALLEY CITY, WEST)	
VALLEY CITY POLICE DEPARTMENT,)	Case No. 900052
and JENE V. LYDAY, individually)	
)	
Defendants-Appellant.)	

BRIEF OF APPELLANT

On Appeal from the Third Judicial District
Court of Salt Lake County, State of Utah
The Honorable David S. Young, Judge.

RICHARD I. ASHTON
WAYNE H. BRAUNBERGER
DAVID A. WILDE
ASHTON, BRAUNBERGER, POULSEN & BOUD
302 West 5400 South
Suite 103
Murray, Utah 84107
Attorneys for Plaintiff/Appellant

ALLAN L. LARSON
RICHARD A. VAN WAGONER
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendant
10 Exchange Place, Eleventh Floor
P.O.Box 45000
Salt Lake City, Utah 84145

JAMES M. DUNN
MICHAEL N. ZUNDEL
LAURIE S. HART
JARDINE, LINEBAUGH, BROWN AND DUNN
370 East South Temple, Suite 400
Salt Lake City, Utah 84111

ARGUMENT PRIORITY CLASSIFICATION: RULE 29(b)(16)

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATUTORY AUTHORITY CONFERRING JURISDICTION	1
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW	1
DETERMINATIVE STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
Nature of the Case	3
Course of Proceeding	3
Facts	4
Summary of Arguments	7
ARGUMENT	8
STANDARDS FOR SUMMARY JUDGMENT	8
A MUNICIPALITY WHICH ACTS WITH "DELIBERATE INDIFFERENCE" FOR THE SAFETY OF ITS CITIZENS, IS SUBJECT TO SUIT UNDER SECTION 1983	9
PLAINTIFF'S CONSTITUTIONAL "RIGHT OF PRIVACY" WAS VIOLATED	15
THE MUNICIPALITY IS LIABLE FOR THE TORTIOUS ACTS OF A POLICE OFFICER WHO ACTS UNDER COLOR OF AUTHORITY	18
WEST VALLEY NEGLIGENTLY HIRED AND SUPERVISED ITS EMPLOYEE, AND PLACED LYDAY IN A POSITION TO DEFRAUD AND TAKE ADVANTAGE OF OTHERS	22
CONCLUSION	25
ADDENDUM	
1. Order and Judgment dated November 29, 1989	
2. Rule 54(b) Certification dated January 17, 1990	
3. Determinative Statutory Provisions	

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Pages</u>
<u>Adickes v. Kress & Co.</u> , 398 U.S. 144; 26 L.Ed. 2d 142; 9 S.Ct. 1598 (1970)	8
<u>Agarwal v. Johnson</u> , 603 P.2d 58, 160 Cal. Rptr. 141 (1979) .	23
<u>Applewhite v. City of Baton Rouge</u> , 380 So. 2d 119 (La. App. 1979)	20
<u>Birkner v. Salt Lake County</u> , 771 P.2d 1053 (Utah 1989) . . .	18
<u>City of Canton, Ohio v. Harris</u> , 489 U.S. _____; 103 L.Ed. 2d 412; 109 S. Ct. 1197 (1989)	9-11
<u>Cox Broadcasting Corp. v. Cohn</u> , 420 U.S. 469; 43 L.Ed. 2d 328; 95 S. Ct. 1029 (1975)	16
<u>Exnicous v. U.S.</u> , 563 F.2d 418 (10th Cir. 1977)	8
<u>Garcia v. Salt Lake County</u> , 768 F.2d 303 (10th Cir. 1985). .	10
<u>Griswold v. Connecticut</u> , 381 U.S. 47; 14 L.Ed. 2d 510; 85 S. Ct. 1678 (1965)	16
<u>Hild v. Bruner</u> , 496 F. Supp. 93 (D.N.J. 1980)	13-14
<u>Interstate Comm. Commission v. Brimson</u> , 154 U.S. 447; 38 L.Ed. 1047; 13 S. Ct. 1125 (1894)	16
<u>Katz v. U.S.</u> , 389 U.S. 347; 19 L.Ed. 2d 576; 88 S. Ct. 507 (1967)	16
<u>Lane v. Messer</u> , 731 P.2d 488 (Utah 1986)	18, 22-23, 24-25
<u>Madison v. Desert Livestock Co.</u> , 574 F.2d 1027 (10th Cir. 1978)	8
<u>Martin v. Covington, Ky.</u> 541 F. Supp. 803 (E.D. Ky. 1982)	17
<u>Phillips v. J.C.M. Development Corp.</u> , 666 P.2d 876 (Utah 1983)	18
<u>Redding v. Brady</u> , 606 P.2d 1193 (Utah 1980)	15
<u>Singleton v. Alexander</u> , 431 P.2d 126, 19 Utah 2d 292 (1967)	8

<u>Turner v. State</u> , 494 So. 2d 1292 (La. App. 1986)	20-21
<u>U.S. v. Diebold, Inc.</u> , 369 U.S. 654, 8 L.Ed. 2d 176; 82 S. Ct. 993 (1962).	8
<u>Wassum v. City of Bellaire, Texas</u> , 861 F.2d 453 (5th Cir. 1988)	13
<u>White v. County of Orange</u> , 166 Cal. App. 3rd 566, 212 Cal. Rptr. 493 (1985).	18-19

Statutes

Utah Code Annotated Section 67-15-6(7)	2, 14, Addendum
Utah Code Annotated Section 67-15-6.5	2, Addendum
Utah Code Annotated Section 67-15-9	2, Addendum
5 U.S.C.A. Section 552a.	17
42 U.S.C.A. Section 1983	2, 3, 9, 14, 17, Addendum

Rules

Utah Rule of Civil Procedure 56(b)	2, Addendum
Utah Rule of Civil Procedure 56(c)	2, Addendum

Other Authorities

16 Am. Jur 2d 536-544, Constitutional Law, Sections 601-603.	17
Restatement (Second) of Torts Section 315 (1965)	23

J. H., by and through
his Guardian ad Litem, D. H.

VS.

Case No. 900052

BRIEF OF APPELLANT

Jurisdiction of this appeal is proper in the Utah Supreme Court pursuant to Utah Code Annotated Section 78-2-2(3)(j) which states:

A review of Utah Code Annotated Section 78-2a-3, outlining the jurisdiction of the Utah Court of Appeals, indicates that the Court of Appeals does not have original jurisdiction to hear any appeal of a District Court Civil Dispute.

1. Was West Valley guilty of "deliberate indifference" to the rights of its citizens when it hired a police officer and

placed that officer in charge of young people without having conducted a complete and thorough investigation of the officer's background, including psychological testing?

2. Is there a constitutional "right of privacy" which would protect an individual from undesired sexual molestation and abuse at the hands of a police officer acting under "color of law"?

3. Is a police officer acting within the course and scope of his employment when he sexually assaults an individual in the context of activities authorized, directed and approved by the officer's employer?

4. Is a municipality liable for the acts of an employee who has been placed in a position of management and trust by the municipality, and that employee later takes advantage of the position in which he has been placed to sexually molest one who has been placed in his charge?

DETERMINATIVE STATUTORY PROVISIONS

1. 42 U.S.C. Section 1983 (See Addendum).
2. Utah Code Annotated Section 67-15-6(7) (See Addendum).
3. Utah Code Annotated Section 67-15-6.5 (See Addendum).
4. Utah Code Annotated Section 67-15-9 (See Addendum).
5. Utah Rule of Civil Procedure 56(b) (See Addendum).
6. Utah Rule of Civil Procedure 56(c) (See Addendum).

STATEMENT OF THE CASE

Nature of the Case

Plaintiff filed claims against West Valley City and the West Valley City Police Department (hereinafter "West Valley") alleging negligence in hiring, Respondeat Superior, and violations of 42 U.S.C.A. Section 1983. These claims arose from sexual abuse which was committed by the Defendant, Jene V. Lyday, on two or more occasions in April of 1986. This is an appeal from the trial court's order granting the summary judgment motion of West Valley.

Course of Proceedings

Plaintiff's claims against West Valley were filed on or about October 7, 1987. Plaintiff claimed that West Valley was negligent in failing to completely and thoroughly check the background of Lyday before hiring him as a police officer and later installing him as the advisor of a Law Enforcement Explorer Post organized by the City. Plaintiff further alleged that West Valley's failure to completely and thoroughly check Lyday's background before hiring him as a police officer constituted "deliberate indifference" toward the rights of the citizens of West Valley which would subject West Valley to liability under 42 U.S.C.A. Section 1983. Plaintiff also alleged that the abuse and assault committed by Lyday was, given the peculiar facts of the case, within the course and scope of Lyday's employment with West Valley and that West Valley would therefore be liable to Plaintiff under the theory of Respondeat Superior. Plaintiff finally alleged that West Valley is liable for the acts of Lyday because it had

placed Lyday in a position of trust and authority, whereby Lyday was able to defraud and otherwise take advantage of Plaintiff.

West Valley filed a Motion for Summary Judgment with memorandums in support thereof. Plaintiff filed memorandums opposing summary judgment. A hearing was held before Judge David S. Young of the Third Judicial District Court, Salt Lake County, on October 30, 1989. Judge Young ruled that there was no genuine issue as to any material fact regarding any of Plaintiff's claims, and that West Valley was entitled to summary judgment on all claims raised by Plaintiff. A written order was subsequently signed by Judge Young on November 29, 1989 granting summary judgment to West Valley as to all claims of Plaintiff.

The summary judgment granted in favor of West Valley was not a complete and final disposition of the matter inasmuch as claims against Jene Lyday still remained pending. A Rule 54(b) certification was therefore signed by Judge Young on January 17, 1990. Plaintiff's Notice of Appeal was later filed on January 26, 1990.

Facts

Jene V. Lyday was hired as a police officer by West Valley in July of 1980. (Lyday Deposition, pp. 10-11.) The decision to hire Mr. Lyday as an officer was made by David C. Campbell, the newly appointed chief of the West Valley City Police Department. (Affidavit of David C. Campbell, para. 13.) Mr. Campbell had known Lyday previously, as both had served on the Salt Lake City Police Department. (Lyday Deposition, pp 9-10.) The

only background check to confirm Mr. Lyday's fitness for service as a police officer consisted of (1) a criminal background check, and (2) an "extensive Personal Statement Form" completed by Lyday, wherein he was given an opportunity to list examples of prior conduct or other information which might disqualify him from service as a police officer. Beyond the criminal background check, there was no attempt to verify Lyday's claims in the Personal Statement Form. There was no attempt to contact his wife, family, friends or associates. There was likewise no effort to perform psychological testing, which might reveal deviant characteristics. (Affidavit of Gerald Maughan, paras. 10-12; Lyday Deposition, p. 49.)

Mr. Lyday was subsequently asked by Chief Campbell to serve as the advisor of a Law Enforcement Explorer Post which West Valley had determined to organize and sponsor. Lyday agreed to serve in this capacity. (Lyday Deposition p. 16; Affidavit of David C. Campbell, para. 16.) He was not required at this time to undergo any additional testing or background checks to verify his fitness to serve in this delicate capacity. He served as the advisor to the Explorer Post from September of 1984 to April of 1986. He did not submit to any ongoing training program during this period of time, nor was he observed or supervised by any other person in the fulfillment of his duties. (Lyday Deposition, pp. 15, 24, 43-45, 48-49, 62-63.)

Plaintiff joined the Law Enforcement Explorer Post sponsored by West Valley in October of 1985. (Affidavit of J. H.,

para. 1.) Plaintiff joined the Post because of his interest in police work and his desire to consider making police work his own career. (Lyday Deposition pp. 22-23.) He, along with all other young men and women who joined the Post, was informed at the time of his acceptance into the Post that it was imperative that he obey the commands and instructions of West Valley police officers, and that he would particularly be subject to the supervision, direction and control of Jene V. Lyday, the advisor of the Explorer Post. He and other members of the post were advised that failure to obey the directions and instructions of Lyday could result in dismissal from the Post. (Affidavit of J. H., Paras. 5, 8-10.)

While a member of the Explorer Post, Plaintiff performed various duties and responsibilities. He frequently interacted with Lyday in the performance of these duties and responsibilities. (Lyday deposition, pp. 29-30, 34-35, 47-48.)

Lyday finally sexually molested Plaintiff on April 10, 1986, and again on April 17, 1986. In each of these instances, Plaintiff was with Lyday in Lyday's patrol car being driven home following a Post activity. (Affidavit of J. H., paras. 15, 17.) Lyday committed the molestations under the pretense that he was teaching Plaintiff standard and accepted "relaxation techniques" which police officers relied upon to deal with their stressful occupation. (Affidavit of J. H., para. 14; Lyday Deposition, p. 69.)

Summary of Arguments

1. Summary Judgment should be granted only when there is no genuine issue as to any material fact after considering the evidence in the light most favorable to the party opposing the motion.

2. West Valley acted with "deliberate indifference" to the rights of its citizens when it hired a police officer without conducting proper background checks and otherwise verifying the fitness of Lyday for police service. This "deliberate indifference" continued when Lyday was placed in a delicate position of trust dealing with young people as Explorer Post Advisor without being properly trained, qualified or supervised.

3. Plaintiff's constitutional "right of privacy" was violated when he was sexually molested by Lyday.

4. West Valley is liable for the acts of Lyday under the doctrine of Respondeat Superior because Lyday was in the scope of his employment when the wrongful acts occurred.

5. West Valley negligently hired and placed Lyday in a delicate position of trust as the manager and supervisor of young people in the Explorer Post. A special situation was thereby created imposing liability on West Valley for the wrongful acts which later resulted.

ARGUMENT

POINT I

STANDARDS FOR SUMMARY JUDGMENT

Summary Judgment is appropriate only if there exists no genuine issue as to any material fact. Utah R. Civ. P. 56(c). The moving party has the burden of proving there is no genuine issue of material fact and must show entitlement to Summary Judgment beyond any doubt. Adickes v. Kress & Company, 398 U.S. 144, 157; 26 L.Ed. 2d 142; 9 S.Ct. 1598 (1970). Madison v. Deseret Livestock Company, 574 F.2d 1027, 1037 (10th Cir. 1978). In considering a Motion for Summary Judgment, the materials presented by the parties must be viewed in the light most favorable to the party opposing the motion. United States v. Diebold, Inc., 369 U.S. 654; 8 L.Ed. 2d 176; 82 S.Ct. 993 (1962). If any inferences can be drawn from the facts that might allow recovery, then Summary Judgment is not appropriate. Exnicous v. United States, 563 F.2d 418, 423-24 (10th Cir. 1977). Courts are generally not in a good position to render summary judgment on issues of negligence, and the prerogative of a jury to make its own determination on such issues should not be infringed. Singleton v. Alexander, 431 P.2d 126, 19 Utah 2d 292 (1967).

POINT II

A MUNICIPALITY WHICH ACTS WITH "DELIBERATE INDIFFERENCE"

FOR THE SAFETY OF ITS CITIZENS, IS SUBJECT TO SUIT

UNDER SECTION 1983

The U.S. Supreme Court has clearly ruled in the case of City of Canton, Ohio v. Harris, 489 U.S. _____, 103 L.Ed. 2d 412; 109 S.Ct. 1197 (1989), that a municipality is liable under 42 U.S.C.A. Section 1983 if it acts with "deliberate indifference" to the rights of its citizens with constitutional violations later resulting from its failure to screen, train and supervise municipal employees.

In Canton, the Plaintiff brought an action against the city alleging that police employees failed to provide proper medical treatment to her while she was in custody. The lack of proper medical treatment resulted in her subsequent hospitalization. Testimony was offered to the effect that the city of Canton did not provide any special medical training for shift commanders who were responsible for insuring that detainees receive appropriate medical treatment. A jury verdict was awarded in the Plaintiff's favor and the city appealed.

The City contended that only unconstitutional policies followed by a municipality should be subject to suit under Section 1983. The Court held that "failure to train" actually constitutes in an appropriate case a "policy" of the municipality and can be the basis for liability under Section 1983. (Id. at 1200.) The Court noted that all Courts of Appeals have ruled similarly,

although there was confusion as to the degree of fault that must be evidenced before liability can be imposed. (Id. at 1204.) The Supreme Court then defined the standard as one of "deliberate indifference", stating: "the inadequacy of police training may serve as the basis for Section 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom police come into contact." (Id.) The Court elaborated:

The issue in a case like this one, however, is whether that training program is adequate; and if it is not the question becomes whether such inadequate training can justifiably be said to represent "city policy." It may seem contrary to common sense to assert the municipality will actually have a policy of not taking reasonable steps to train its employees. But it may happen 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 policy makers of the city can reasonably be said to have been deliberately indifferent to the need. In that event the failure to provide proper training may fairly be said to represent the policy for which the city is responsible, and for which the city may be held liable if it actually causes injury. (Id. at 1205. Emphasis added.)

The 10th Circuit Court of Appeals has also found that a municipality can be found liable for "deliberate indifference" to the needs of its citizens when it fails to take appropriate steps to train members of its police force. In Garcia v. Salt Lake County, 768 F.2d 303 (10th Cir. 1985) the 10th Circuit considered a case where a party had died while in custody of Salt Lake County jail officials. At the time of his incarceration it was known that

the decedent had medical problems, and his jailers were instructed to check on him every fifteen to twenty minutes. He died several hours after his incarceration, apparently due to a drug overdose. Experts testified at trial that proper observation by jail personnel of decedent's condition would have resulted in his being transferred to a proper medical facility where his life could have been saved. A judgment against Salt Lake County in the amount of \$150,000.00 was awarded by the jury.

On appeal, the 10th Circuit held that failure to provide adequate medical care is a violation of a prisoner's constitutional rights "if it is a result of deliberate indifference to a prisoner's serious medical need." (Id. at 307.) The court then defined "deliberate indifference" as "such gross deficiencies in staffing, facilities, equipment, or procedures that the inmate is effectively denied access to adequate medical care." (Id. at 308). The Court concluded that the jury's verdict against the County was supported by sufficient evidence of gross deficiencies in staffing and other procedures at the jail. (Id.)

Plaintiff claims that West Valley was deliberately indifferent to the rights of its citizens when it hired Lyday, and later placed him in a powerful position of trust and authority over young people, without first taking appropriate steps to certify that Lyday did not present an unreasonable danger to West Valley citizens. This "deliberate indifference" continued as Lyday was allowed to interact with the young people and "stalk his prey" with virtually no interference from superiors to supervise or observe

his activities. West Valley counters that it was careful, and that Lyday was screened through (1) a criminal background investigation, and (2) an "extensive Personal Statement Form" completed by Lyday inquiring of prior conduct of a disqualifying nature. However, it is clear that the criminal background check revealed nothing more than that Lyday had been successful in repressing his desires, and/or eluding discovery. Beyond that, to assume that Lyday would deliberately reveal his deviant desires in the Personal Statement Form, and thus disqualify himself from his chosen career, is simply ludicrous. It is thus clear that the screening techniques of West Valley were superficial and inadequate.

West Valley declined the opportunity to conduct more in-depth and reliable checks into the character of Lyday. Interviews with his wife, family, friends or associates would certainly be more reliable forms of information than a "Personal Statement Form". More importantly, psychological testing might have been conducted which could have revealed disorders that Lyday outwardly hid. In this regard, Plaintiff relied on the Affidavit of Arthur Brown, Ph.D, which certified that:

1. Individuals with deviant sexual traits gravitate to those occupations which will enable them to prey upon children;
2. Young people are easily influenced and manipulated by authority figures such as police officers;

3. Appropriate psychological tests which can detect and weed out individuals who are threats to molest children were available when Lyday was hired by West Valley.

In Wassum v. City of Bellaire, Texas, 861 F.2d 453 (5th Cir. 1988) the Court considered a case where a police dispatcher for the Bellaire Police Department was raped by one of the police officers on the force. The victim filed an action against the city under Section 1983, alleging negligence in hiring the officer. The city moved for Summary Judgment which was granted by the trial court, and upheld by the 5th Circuit on appeal. In upholding Defendant's motion for Summary Judgment, the Court noted the extensive efforts on the part of the city to verify the fitness of the officer for service:

. . . the uncontradicted evidence reflects that in 1981 it was the policy of Bellaire to generally follow the recommended hiring guidelines of the Texas Commission on Law Enforcement Officers Standards and Education (TCLEOSE). In accordance with these guidelines, Bellaire interviewed supervisors at two previous police departments that employed Casey (the defendant); conducted national (NCIC) and state criminal record computer checks; submitted Casey's finger prints to state and federal authorities; interviewed Casey's former wife and several references; and required Casey to be certified as physically and psychologically fit by a licensed physician. (Emphasis added.)

On the other hand, other Courts have ruled that reliance on lesser standards in the hiring of police officers can result in municipal liability under Section 1983. In Hild v. Bruner, 496 F. Supp. 93 (D.N.J. 1980) the municipality appealed from a jury verdict for alleged false arrest and civil rights violations under

Section 1983. Plaintiff's civil rights claims were based on the failure of the city to administer psychological testing to its police officers. Expert testimony at trial established that such testing had become widely accepted by at least 1975. On the basis of this evidence, the Court held that the jury reasonably could conclude that the City's failure to administer psychological testing constituted gross negligence, thus entitling Plaintiff to relief under Section 1983. (Id. at 99.)

It should also be observed that standards mandated by the Utah State Legislature indicate that the screening procedure employed by West Valley was inadequate in this case. At the time Lyday was hired as a police officer by West Valley, Utah Code Annotated Section 67-15-6(7) required that every applicant for a position on a police force be "free of any physical, emotional or mental conditions which may adversely affect the performance of duty as a peace officer." It would be impossible to confirm that an applicant is free of disqualifying mental or emotional conditions without administering some form of psychological test. Nevertheless, West Valley did not require Lyday to submit to any psychological or mental testing which might certify his compliance with this requirement. In fact, no evidence currently available suggests that West Valley had any information as to the psychological fitness of Lyday when he was hired by the West Valley City Police Department.

The above facts clearly establish that there are substantial factual issues which are not resolved appropriately by

Summary Judgment. The standards employed by West Valley in hiring and supervising the activities of Mr. Lyday do not meet standards followed by other law enforcement agencies, nor do they satisfy standards mandated by the Utah State Legislature. Furthermore, Dr. Brown would testify that appropriate screening and supervision of Mr. Lyday would likely have prevented the abuse from occurring. In view of these facts, it is inappropriate for a Court to state as a matter of law that the City adhered to the standards of care required of it. A reasonable juror could find that the City's deficient procedures evidenced a "deliberate indifference" to the interests of the citizens of the City.

POINT III

PLAINTIFF'S CONSTITUTIONAL "RIGHT OF PRIVACY"

WAS VIOLATED

Both the Utah Supreme Court and the United States Supreme Court have clearly recognized that there is a constitutionally protected "right of privacy". In Redding v. Brady, 606 P.2d 1193 (Utah 1980) the Utah Supreme Court was confronted with a case where a student newspaper had sought information regarding salaries of Weber State College employees. The college refused to provide the requested information, whereupon the newspaper filed an action in Court which resulted in a court order requiring the college to supply the requested salary information. The college appealed, arguing that to supply such information would be a violation of the

rights of privacy of its employees. In discussing this constitutional "right of privacy" the Court stated:

It seems sufficient for our purpose herein to say that what the right of privacy protects is to be determined by applying the commonly accepted standards of social propriety. This includes those aspects of an individuals activities and manner of living that would generally be regarded as being of such personal and private nature as to belong to himself and to be of no proper concern to others. The right should extend to protect intrusion into or exposure of not only things which might result in actual harm or damage, but also to things which might result in shame or humiliation, or merely violate ones pride in keeping his private affairs to himself.

Id. at 1195 (Emphasis added.)

The United States Supreme Court has also affirmed on many occasions that there is a constitutionally protected right to privacy. This constitutional right of privacy was recognized early on by the United States Supreme Court in Interstate Commerce Commission v. Brimson, 154 U.S. 447, 38 L.Ed. 1047; 14 S.Ct. 1125, (1894) wherein the Court stated that the principles that embody the essence of constitutional liberty and security forbid all invasions of the sanctity of a man's home, "and the privacies of his life." [See also Griswold v. Connecticut, 381 U.S. 479, 14 L.Ed. 2d 510, 85 S.Ct. 1678 (1965) referring to the right of privacy as a right older than the Bill of Rights; Katz v. United States, 389 U.S. 347, 19 L.Ed. 2d 576, 88 S.Ct. 507 (1967) stating that various provisions of the Federal Constitution protect personal privacy from governmental invasion; Cox Broadcasting Corporation v. Cohn, 420 U.S. 469, 43 L.Ed. 2d 328, 95 S.Ct. 1029 (1975). See generally

16 Am.Jur. 2nd, Constitutional Law, Sections 601-603.] Furthermore, the Privacy Act of 1974 (5 U.S.C.A. Section 552a) contains a congressional finding that "the right to privacy is a personal and fundamental right protected by the Constitution of the United States."

In Martin v. Covington, Ky., 541 F. Supp. 803 (E. D. Ky. 1982) the Court considered a case where a minor plaintiff had been forced by police to solicit homosexual acts. He was not required to actually engage in such acts, but he was forced to engage in negotiations for the same. The Defendants claimed that there had been no violation of the Plaintiff's Federal constitutional rights, and that a Section 1983 claim would therefore not lie. The Court responded: ". . . for the police through threats, intimidation, harassment and abuse of official power to force someone to engage in homosexual solicitation against his will is an undoubted violation of his human dignity and constitutional right of privacy, and thus is a deprivation of liberty committed under color of state law. Such violation may be redressed, if proven, by an action under 42 U.S.C. Section 1983."

If the right of privacy exists at all, it must certainly extend to the right of a person to be free from undesired sexual molestation at the hands of another. There can be little doubt that Lyday's sexual misconduct and abuse of Plaintiff was a violation of Plaintiff's constitutional right of privacy. Furthermore, the violation was committed while Lyday was on duty with the police department, participating in activities which were

approved and authorized by the City. The violation occurred in Lyday's police patrol car, with all the paraphernalia of his employment as a police officer close at hand. It is thus reasonable to conclude that the violation occurred "under color of law", and is actionable under Section 1983.

POINT IV

THE MUNICIPALITY IS LIABLE FOR THE TORTIOUS ACTS OF A POLICE OFFICER WHO ACTS UNDER COLOR OF AUTHORITY

In Phillips v. JCM Development Corporation, 666 P.2d (Utah 1983), the Utah Supreme Court adopted the general rule concerning the familiar doctrine of "Respondeat Superior". The court stated the rule as follows:

The general rule is that a principal [employer] is liable civilly for the tortious acts of his agent [employee] which are done within the course and scope of the agent's employment [citation omitted].

Id. at 881.

In Birkner v. Salt Lake County 771 P.2d 1053, 1057 (Utah 1989), the Court stated:

As a general rule, the issue of whether an employee acted within the scope of employment is a factual question to be decided by the trier of fact [citation omitted]. The scope of employment issue must be submitted to the jury [w]henever reasonable minds may differ as to whether the [employee] was at a certain time involved wholly or partly in the performance of his masters business or within the scope of his employment..." [citation omitted].

Id. at 20. See also Lane v. Messer, 731 P.2d 488 (Utah 1986).

In White v. County of Orange 166 Cal. App. 3d 566, 571-72, 212 Cal. Rptr. 493 (1985) the County was held civilly liable for an officer's threat of rape because it was done under authority

of a Deputy Sheriff, an agent of the County. The Court found that the actions of the officer were "incident to his duties". The policy arguments cited by the Court in reaching this conclusion are very pertinent to this case, and are therefore cited at some length:

A police officer is entrusted with a great deal of authority. . . . the police officer carries the authority of the law with him into the community. The officer is supplied with a conspicuous automobile, a badge and a gun to insure immediate compliance with his directions. The officer's method of dealing with this authority is certainly incidental to his duties; indeed, it is an integral part of them. . . .

It follows that the employer/government must be responsible for acts done during the exercise of this authority. In Clark Equipment Co. v. Wheat (1979) 92 Cal. App. 3d 503, 154 Cal. Rptr. 874, the court, quoting the Restatement, 2d, agency, stated: If the principal places the agent in a position to defraud, and the third person relies upon his apparent authority to make the representations, the principal is liable even though the agent was acting for his own purposes [citations]. The theory is that the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in an ordinary course of the business confided to him. It is immaterial that the principal receives no benefit from the transaction. [citation omitted].

This reasoning directly addresses the situation presented here. White alleges she stopped solely because she was ordered to do so by the Deputy Sheriff. In other words, she relied on the officer's apparent authority. Had Laudermilk not been a Deputy Sheriff, in uniform, in a marked patrol vehicle using flashing red lights, White would not have stopped at his direction and the events that followed would not have occurred. Because the County placed Laudermilk in this position of authority, they will be liable for his actions should White prove her allegations at trial.

The use of authority is incidental to the duties of a police officer. The County enjoys tremendous benefits from the public's respect of that authority. Therefore,

they must suffer the consequences when the authority is abused.

In Applewhite v. City of Baton Rouge, 380 So. 119, 121, (La. App. 1979) a woman filed a complaint against the city alleging a cause of action under respondeat superior for sexual acts which a police officer forced her to engage in against her will. The court ruled that there was a valid claim against the city:

The City maintains that the actions of Crowe (the police officer) are far removed from the course and scope of his employment and that it should not be vicariously responsible for sexual abuses committed by its officers. Due to the particular facts of this case, that argument has no merit.

We particularly note that Officer Crowe was on duty in uniform and armed and was operating a police unit at the time of this incident. He was able to separate the plaintiff from her companions because of the force and authority of the position which he held. He took her into police custody and then committed the sexual abuses upon her in the vehicle provided for his use by his employer.

A police officer is a public servant given considerable public trust and authority. Our review of the jurisprudence indicates that, almost uniformly, where excesses are committed by such officers, their employers are held to be responsible for their actions even though those actions maybe somewhat removed from their usual duties. This is unquestionably the case because of the position of such officers in our society.

In another Louisiana case, Turner v. State, 494 So. 2d 1292, 1295-6 (La. App. 1986) the Court held that the State was liable for sexual abuses committed by a National Guard Recruiting Officer. The recruiting officer had represented to women whom he was attempting to recruit that he was authorized to perform physical examinations. He was thereby able to persuade the young women to

disrobe and submit to his examination. The court discussed the State's liability as follows:

If the tortious conduct of the employee is so closely connected in time, place, and causation to his employment duties as to be regarded a risk of harm fairly attributable to the employer's business . . . it can then be regarded as within the scope of the employee's employment, so that the employer is liable in tort to third persons injured thereby.

Sudduth's (the officer's) battery upon the young women was closely connected in time, place, and causation to his employment duties. The sergeant visited the girls in his capacity as a recruiting officer after they expressed a desire to enter the Louisiana National Guard. The Turner home where the incident occurred was located in . . . the recruiting area assigned to Sgt. Sudduth and the incident occurred during working hours. During the interview process, he mislead the young women into believing that he had authority to conduct a physical examination. Thus, the tortious conduct committed by Sgt. Sudduth was reasonably incidental to the performance of his duties as a recruiting officer although totally unauthorized by the employer and obviously motivated by his personal interest. Furthermore, the sergeants actions were so closely connected to his employment duties that the risk of harm faced by the young women was fairly attributable to his employer who had placed the sergeant in a position of trust and authority in contacting young persons for recruitment into the Guard.

. .

Sudduth's conduct, we conclude, was within the scope of his employment. The State of Louisiana is thus answerable in damages for the injuries sustained by the Plaintiffs.

In this case, Lyday assumed roles of a police officer and a teacher/advisor. Both roles had been conferred upon him by West Valley, which authorized, directed and sanctioned his position. West Valley entrusted Lyday with a powerful position of authority over Plaintiff, both in his capacity as a police officer and as advisor to the Explorer Post. West Valley taught, directed and insisted that Plaintiff and other members of the Post follow the

direction of all police officers, especially Lyday. Plaintiff would have been subject to discipline and possible expulsion from the Post if he had not followed Lyday's directions. Within the hours of Lyday's work and the boundaries of his employment, (that is the city assigned police vehicle,) the incident occurred while Lyday was supposedly teaching Plaintiff how to cope with stress as a police officer. As in those cases cited above, the municipality endowed its employee with extraordinary power and authority which enabled the employee to sexually exploit another. The municipality should therefore be liable for the consequences of its agents misconduct.

POINT V

WEST VALLEY NEGLIGENTLY HIRED

AND SUPERVISED ITS EMPLOYEE, AND PLACED

LYDAY IN A POSITION TO DEFRAUD

AND TAKE ADVANTAGE OF OTHERS

In Lane v. Messer, 731 P.2d 488 (Utah 1986) a Honeywell employee, Messer, left work at 5:00 p.m., went home, changed clothes and then drove his Honeywell van to a club to drink with friends. On his way home from the club, more than seven hours after leaving work, an accident occurred. Messer was clearly not on the clock with Honeywell. The Supreme Court ruled that there was no basis for imposing liability on Honeywell, and sustained the trial Court's grant of Honeywell's Motion for Summary Judgment.

In so ruling, the court discussed the issue of Respondeat Superior. The Court noted that "[t]he question of whether an

employee is acting within the scope of his employment at a particular time is normally a question for the fact finder" (Id. at 490). In a concurring opinion, Justice Zimmerman observed that there are circumstances where an employer is liable for conduct of an employee, even though outside the scope of employment. Justice Zimmerman referred to Restatement (Second) of Torts Section 315 (1965) which states:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless...a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third persons conduct...

Id. at 492.

Justice Zimmerman continued:

In some cases, a special relationship may exist between an employer and an employee that will give rise to such a duty to control even when the employee is acting outside the scope of employment. However, because the employee is acting outside the scope of employment, the exposure to liability . . . does not arise simply because the employment relationship exists; it is imposed only when special circumstances exist and are known to the employer.

Id. at 492.

In Agarwal v. Johnson 603 P.2d 58, 160 Cal. Rptr. 141 (1979), the Court noted one of those "special circumstances" which will impose liability on the employer. In that case, the employer was found liable for willful misconduct of its managerial employees. The court stated:

The reason for the imposition of liability is to encourage careful selection and control of persons placed in important management positions [citation omitted].

Id. at 67.

Lyday certainly fits the criterion of being in an "important management position". Besides his general managerial power as a police officer, he was specifically placed in a management position as Explorer advisor over Plaintiff, a Law Enforcement Explorer. Lyday directly supervised Plaintiff on the nights of the incidents. West Valley was using Plaintiff, under Lyday's management, to free it's paid employees for other duties.

West Valley must be careful to insure that employees granted positions of power and authority will not abuse their position of trust. Imposition of liability on West Valley would encourage careful selection, screening, supervision and control of persons placed in important management positions. These policy considerations are especially compelling in a situation such as this where the persons being supervised are young and vulnerable.

West Valley City may not avoid liability by saying it didn't know what was going on. In Lane v. Messer, Supra, Justice Zimmerman stated:

For example, an employer must exercise reasonable care to control an employee acting outside of the scope of employment to prevent that employee from creating an "unreasonable risk of harm to others" if the employee is using the employer's chattels and the employer "knows or should know of the necessity and opportunity for exercising control". Restatement (Second) of Torts Section 317 (1965); see also Ann. 48 ALR 3rd 359, Section 2(b).

Id. at 492 (emphasis applied).

Because of the special relationships involved here, West Valley had a special obligation to screen, train, observe, and supervise Lyday. Had it fulfilled these duties properly, West

Valley would have known that Lyday was not an appropriate person to be working with young people and could have prevented the injury to Plaintiff. It cannot hide behind the fact that it simply did not look.

CONCLUSION

There are numerous facts in this case upon which reasonable minds could rely to conclude that:

1. West Valley was grossly negligent and ignored statutory requirements when it hired Lyday without conducting appropriate background investigations and psychological testing;
2. The gross negligence continued and was compounded when Lyday was placed in charge of vulnerable young people;
3. Sexual abuse committed by Lyday in his car on police time was an unconstitutional invasion of privacy committed under color of law;
4. Wrongful acts committed by Lyday on company time and while otherwise engaging in authorized activities subject West Valley to liability under the doctrine of Respondeat Superior; and,
5. West Valley placed Lyday in a special position of trust whereby Lyday fraudulently took advantage of Plaintiff.

With the above factual issues remaining to be resolved, it is clearly inappropriate to rule as a matter of law that there is no

set of facts upon which a jury could reasonably rule in Plaintiff's favor. The summary judgment of the District Court should therefore be set aside, with this case remanded for further proceedings.

Respectfully submitted this 13 day of August,
1990.

ASHTON, BRAUNBERGER, POULSEN
& BOUD, P.C.

David Alan Wilde

Richard I. Ashton
Wayne H. Braunberger
David A. Wilde

ORDER AND JUDGMENT DATED NOVEMBER 29, 1989

ALLAN L. LARSON (A1896)
RICHARD A. VAN WAGONER (A4690)
SNOW, CHRISTENSEN & MARTINEAU
Attorneys for Defendants West Valley
City and West Valley City
Police Department
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

JASON HEPLER, by and through
his guardian ad litem, DENNIS
HEPLER,

Plaintiff,

vs.

WEST VALLEY CITY, WEST VALLEY
CITY POLICE DEPARTMENT, and
JENE V. LYDAY, individually
and as a Police Officer of
West Valley City,

Defendants.

ORDER AND JUDGMENT

Civil No. C87-06590

Judge David S. Young

Defendants West Valley City's and West Valley City Police
Department's Motion for Summary Judgment came before the Court
for hearing on October 30, 1989, pursuant to request for oral
argument and notice under Rule 4-501 of the Utah Code of Judicial
Administration. Plaintiff was represented by Richard I. Ashton
and Wayne H. Braunberger and defendants were represented by Allan
L. Larson and Richard A. Van Wagoner. Having considered the oral

arguments of counsel and reviewed the entire file, including defendants' Motion for Summary Judgment and Memoranda in Support Thereof, plaintiff's Memorandum in Opposition to the Motion for Summary Judgment and the depositions, affidavits and pleadings, and being fully advised in the premises, the Court hereby enters summary judgment for defendants, for the following reasons:

1. No genuine issue of material fact exists with respect to whether plaintiff's alleged constitutional deprivation arose from a policy, procedure, custom or practice of the defendants because the undisputed facts as a matter of law do not rise to the level of a showing of deliberate indifference by defendants to plaintiff's constitutional rights; and

2. No cognizable, recognized constitutional right or interest was deprived or implicated by the acts of defendant Lyday; and

3. No genuine issue of material fact exists with respect to plaintiff's claim of respondeat superior because the undisputed facts show that defendant Lyday's conduct toward the plaintiff was not of the general kind the employee was employed to perform, was not generally directed toward the accomplishment of objectives within the scope of the employee's duties and authority or reasonably incidental thereto, was not a part of the employer's business and the duties assigned to Mr. Lyday by the

employer, and was not motivated by the purpose of serving the employer's interests;

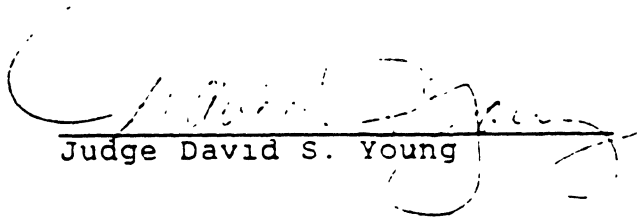
4. No genuine issue of material fact exists with respect to plaintiff's negligence claim because the undisputed facts show that defendants did not know, and had no reason to know, of a propensity of defendant Lyday toward sexually deviant behavior, and absent such notice, defendants had no legal duty to conduct general psychological or sexual deviancy testing on Mr. Lyday.

For the foregoing reasons, and those reasons set forth in defendants' Memoranda in Support of the Motion for Summary Judgment, incorporated by reference herein, defendants' Motion for Summary Judgment should be and is hereby granted as to all of plaintiff's claims, and plaintiff's Complaint is hereby dismissed with prejudice as against West Valley City and its Police Department, and judgment is hereby entered in favor of West Valley City and its Police Department as against the plaintiff, no cause of action, defendant to recover costs.

IT IS SO ORDERED.

DATED this 29th day of November, 1989.

BY THE COURT:


Judge David S. Young

RULE 54(b) CERTIFICATION DATED JANUARY 17, 1990

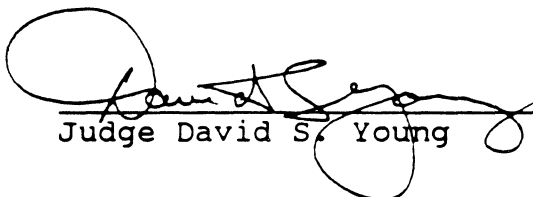
David J. Bennion, Esq.
PACKARD, PACKARD, BENNION
& BURK
260 Sheridan Avenue
Suite 208
Palo Alto, CA 94306
Telephone (415) 327-0701

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

Judge David S. Young

ORDERED, ADJUDGED, DECREED and directed that Summary Judgment in favor of West Valley City and West Valley City Police Department be and hereby is entered.

DATED this 17th day of January, 1990.
BY THE COURT



Judge David S. Young

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the foregoing 54(b) CERTIFICATION was mailed, postage prepaid, this 17 day of January, 1990 to the following:

Allan L. Larson, Esq.
Richard A. Van Wagoner, Esq.
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
P.O. Box 45000
Salt Lake City, Utah 84145

James M. Dunn
Michael N. Zundel
Laurie S. Hart
JARDINE, LINEBAUGH, BROWN & DUNN
370 East South Temple, Suite 400
Salt Lake City, Utah 84111

Mark Emmett
102 West 500 South, #202
Salt Lake City, Utah 84101



DETERMINATIVE STATUTORY PROVISIONS

42 U.S.C. Section 1983 provides in pertinent part as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunity secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings or redress. . .

Utah Code Annotated Section 67-15-6(7) provides in pertinent parts as follows:

Every applicant for admission to the training programs conducted by a certified peace officer training academy. . . shall meet the following standards and requirement before being admitted: . . . (7) free of any physical, emotional or mental conditions which might adversely affect the performance of duty as a peace officer as determined through a selection process.

Utah Code Annotated Section 67-15-6.5 provides:

At the time a person is employed or appointed as a peace officer the chief executive officer of the agency employing or appointing shall submit an application together with the required background information as provided for in section 67-15-6. (Emphasis added.)

Utah Code Annotated Section 67-15-9 provides:

The minimum standards set forth in this act concerning peace officer qualifications and training shall in no way be deemed to preclude counties, cities or towns in establishing standards higher than the minimum standards contained in this act. (Emphasis added.)

Utah Rule of Civil Procedure 56(b) provides:

Summary Judgment for defending party. The party against whom a claim, counter-claim or cross-claim is asserted or a declaratory

judgment is sought may, at any time, move with or without supporting affidavits for a Summary Judgment in his favor as to all or any part thereof.

Utah Rule of Civil Procedure 56(c) provides:

Motion and Proceedings Thereon. . . . 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 facts and that the moving party is entitled to judgment as a matter of law. . .

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the foregoing MEMORANDUM IN OPPOSITION TO DEFENDANT WEST VALLEY AND WEST VALLEY CITY POLICE DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT was mailed, postage prepaid, this 13 day of August, 1990 to the following:

Allan L. Larson, Esq.
Richard A. Van Wagoner, Esq.
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
P.O. Box 45000
Salt Lake City, Utah 84145

James M. Dunn
Michael N. Zundel
Laurie S. Hart
JARDINE, LINEBAUGH, BROWN & DUNN
370 East South Temple, Suite 400
Salt Lake City, Utah 84111

David Alan Wilde

204-230,db