

1990

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

Utah Supreme Court

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DOCKET NO.

IN THE SUPREME COURT OF THE STATE OF UTAH

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

Plaintiff-Appellant,

**vs.**

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

**Defendants-Respondent.**

**Case No. 900052**

## REPLY BRIEF OF APPELLANT

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

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

OCT 25 1990

**Clerk, Supreme Court, Utah**

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	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	
	)	
WEST VALLEY CITY, WEST	)	
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REPLY BRIEF OF APPELLANT

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The Rules of Appellate Procedure prohibit the injection of new issues in the Reply Brief of the Appellant, and limit discussion in the Reply Brief to issues raised and discussed in Appellee's Brief. The issues raised in Appellee's Brief and which will be discussed in this Reply Brief are as follows:

1. General attempts by Appellee to urge unduly narrow interpretations of the law upon this Court.

2. Whether or not the "deliberate indifference" standard established by the U.S. Supreme Court in the City of Canton case applies to the present case.

3. Whether or not there is a legitimate right of privacy protected by the Constitution which extends to sexual molestation committed under color of law.

4. Whether or not the standard of Respondeat Superior discussed by the Utah Supreme Court in Birkner v. Salt Lake County is applicable to the facts of this case.

5. Whether or not West Valley was negligent in that it could or should have foreseen the conduct of its employee and/or had a duty to test its police employees before hiring them for police service.

#### POINT I

##### APPELLANT URGES UNREASONABLY NARROW INTERPRETATIONS

##### OF THE LAW UPON THIS COURT

A. West Valley's Constructive Knowledge Includes Knowledge of Misconduct in Other Police Departments.

Appellant argues that there was no prior history in West Valley City of hiring police officers who were sexually deviant. Appellant states: "Indeed, West Valley was in its inception at the time it hired Lyday." (Brief of Appellant at page 29.) This being the case, West Valley alleges that there has been no proof of a policy, procedure or custom of acquiescence in a known pattern of unconstitutional behavior, and that Section 1983 liability can therefore not attach.

West Valley would have this Court conclude that each individual police department throughout the entire country should be considered in a cocoon, like an ostrich with its head in the sand, devoid of knowledge of the activities and problems of any other police department. In reality, police departments are like any other entity. They are required to be observant and keep themselves informed of trends and problems in law enforcement

nationwide. Thus, West Valley cannot defend its inadequate policies in hiring on the basis that it allegedly had no prior experience with sexually deviant police officers. West Valley's actual constructive knowledge must be extended to include the experience of other police departments throughout the country. On that basis, there is a very well known history of officers taking advantage of their positions of authority to sexually molest and abuse innocent victims.

B. West Valley Did Not Require Actual Knowledge Lyday was Sexually Deviant.

Another example of the unreasonable extremes which West Valley urges upon this Court is found on page 30-31 of Appellee's Brief, wherein it is stated: "Without West Valley's actual knowledge of Lyday's prior deviant, sexual misconduct, if any, or some other notice of this employee's propensity (assuming such existed at the time), the need to screen for sexual deviancy could not have been 'so obvious' and the inadequacy 'so likely' to result in the violation of J.H.'s constitutional rights that West Valley could reasonably be said to have been 'deliberately indifferent', to the need".

In other words, West Valley argues that there is no need to test an officer for sexual deviancy unless the city has actual knowledge the officer is sexually deviant. Why there would then be a need for testing is not explained. If this standard were to be adopted by the Court, it would be akin to the Court requiring Plaintiff to prove that the city had a deliberate intent to hire sexual deviants. This is of course an improper standard, one which



neither the U.S. Supreme Court nor any other Appellate Court has required to be demonstrated before Section 1983 liability may be found.

## POINT II

### THE CITY OF CANTON STANDARD OF

#### "DELIBERATE INDIFFERENCE" APPLIES IN THIS CASE.

West Valley's Brief repeatedly questions whether or not the decision of the U.S. Supreme Court in City of Canton, Ohio v. Harris, 49 U.S. 378, 109 S.Ct. 1197 (1989) has application in the present case. West Valley contends that the Canton case involved issues regarding the "training" of police officers, rather than issues of "hiring" and "supervision". In reality, a careful and thoughtful reading of the decision of the Supreme Court in Canton reveals that "training" was not the issue, but rather, deficient policies in general, whether they be training, screening before hiring, supervising, etc. Quoting again from the pertinent holding in Canton, the Supreme Court stated as follows:

We hold today that 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 the police come into contact. This rule is most consistent with our admonition in Monell . . . that a municipality can be liable under section 1983 only where its policies are the "moving force [behind] the constitutional violation." Only where a municipality's failure to train its employees in a relevant respect evidences a "deliberate indifference" to the rights of its inhabitants can such a shortcoming be properly thought of as a city "policy or custom" that is actionable under Section 1983. . . .

"Municipal liability under Section 1983 attaches where - and only where - a deliberate choice to follow a course of action is made from among various alternatives" by city policy makers. . . . only where a failure to train reflects a "deliberate" or "conscious" choice by a municipality - a policy as defined by our prior cases - can a city be liable for such a failure under Section 1983.

. . . 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 said to represent "city policy." It may seem contrary to common sense to assert that a 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 a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury. (Id. at 1204-1205, emphasis added.)

In its holding, the Court used the term "policy" or some form thereof no less than eight times. It is clear therefore that the Court did not intend to limit the "deliberate indifference" standard to only those narrow situations where training of police officers is involved, but rather intended that the standard would extend to any "policy" of the city which leads to unconstitutional acts by its police officers.

Common sense dictates that those same concerns which motivate city policy makers in regards to the training of its police officers, should also motivate those policy makers in

regards to hiring and supervision of those same police officers. Proper practices in hiring, training and supervising police officers all work together to insure that the officers fulfill their duties appropriately, and without intrusion on the constitutional rights of citizens. They are inseparable parts of an entire program. Therefore, if West Valley can be said to have been "deliberately indifferent" to the interests and concerns of its citizens when it failed to properly screen and supervise Officer Lyday, and such deliberate indifference resulted in an unconstitutional deprivation, the city should be liable.

### POINT III

#### WEST VALLEY IGNORES PLAINTIFF'S CLAIM TO A VIOLATION OF THE CONSTITUTIONAL RIGHT OF PRIVACY

West Valley acknowledges the existence of a constitutional right of privacy, although claiming that no constitutional right of privacy of the "specific nature" alleged has ever been found. There is virtually no response or discussion regarding the many citations of authority in Appellant's Brief discussing the right of privacy which has been found to exist by both Congress and the U.S. Supreme Court.

Rather than seriously discuss the privacy issue raised in Plaintiff's Complaint and Appeal Brief, West Valley discusses in some detail the 14th Amendment and cases arising therefrom which conclude that there is no violation of liberty without due process of law if a post-deprivation remedy is provided. This is the same

tactic used by West Valley in its Motion for Summary Judgment, and which the District Court approved. However, Plaintiff has not relied upon the 14th Amendment, and citation to case law arising therefrom is totally irrelevant and inappropriate. West Valley must not be allowed to divert the Court's attention to focus on the 14th Amendment, when Plaintiff's claimed constitutional deprivation was based on the well accepted right of privacy found in the constitution.

Even when briefly discussing the privacy claims raised by Plaintiff, West Valley attempts to phrase the issues in terms of common assault. They allege that if Plaintiff's claim is upheld "any assault" that causes personal injury to ones body or mind could be characterized as a "privacy" violation. This is not correct. It is clear that a sexual intrusion of the nature alleged by Plaintiff is different from assault. It is also clear that sexual molestation calls into issue matters of "privacy" which assault does not. Indeed, body parts necessarily involved in sexual molestation are commonly referred to as "private parts". (Websters New World Dictionary, 2nd College Edition, 1986, definition of "private".) There is thus a very distinct difference between one who assaults another by punching him in the nose, and one who fondles the "private parts" of an unwilling victim.

West Valley's assertion that there has never been recognized a constitutionally protected privacy right involving sexual offenses by police officers is also incorrect. In York v. Story, 324 F.2d 450, 455 (9th Cir. 1963), Cert. Den. 376 U.S. 939,

11 L.Ed. 2d 659, 84 S. Ct. 794, a female plaintiff came to a police station to complain of an assault. The officer with whom she consulted insisted that the complainant be photographed in various nude and indecent positions. She objected to undressing and maintained that her bruises would not show on any of the photographs. The officer nevertheless proceeded to take the pictures without calling a policewoman who was present at the station. The officer thereafter printed and circulated those pictures among police personnel. It was held by the 9th Circuit that the police officer's actions constituted such an arbitrary intrusion upon the Plaintiff's privacy as to make him liable in an action under the Federal Civil Rights Act. Also, in Martin v. Covington, 541 F. Supp. 803 (E.D.Ky. 1982), a police department was held liable under the Federal Civil Rights Act for violation of a privacy right when it forced the Plaintiff to solicit homosexual acts, although such acts were never actually engaged in.

#### POINT IV

##### THE STANDARD FOR RESPONDEAT SUPERIOR CLAIMS

ESTABLISHED IN BIRKNER V. SALT LAKE COUNTY IS INAPPROPRIATE

IN THE PARTICULAR FACTS OF THIS CASE

- A. Plaintiff Believed that Lyday's Acts Were Authorized and Furthered the Interests of the Employer.

West Valley claims that Plaintiff's Respondeat Superior claim must be denied. West Valley relies on the case of Birkner v. Salt Lake County, 771 P.2d 1053 (Utah 1989), wherein the Court held that Salt Lake County was not liable under the doctrine of

Respondeat Superior for the actions of a social worker employed by the County. The social worker had engaged in sexual relations with a client, for which the client later sued. The Court held that Salt Lake County could not be held liable for the actions of its employee, citing as its main reason the fact that both the social worker and the client knew that the sexual contact was not related to the legitimate interests of the employer. The Court stated: "Neither Flowers (the social worker) nor Birkner (the client) thought their sexual conduct was part of the therapy - - the service that Flowers was hired to provide." (Id. at 1058, Emphasis added.)

The present case is very different. J.H. did believe the physical contacts initiated by Lyday were related to the interests of the employer. Lyday specifically informed J.H. before initiating the contact that he (Lyday) was going to teach J.H. "standard relaxation techniques" used by police officers. J.H. had joined the Explorer Post because he was interested in police work as a career, and because he knew that the Post had been established to train and guide young people interested in pursuing law enforcement careers. (R. at 184 [Affidavit of David C. Campbell, Para. 14.] R. at 210 [Affidavit of Jason Hepler, Para. 3-9.]) Plaintiff therefore submitted to the physical contact initiated by Lyday in the reasonable belief that Lyday was furthering the interests of his employer. This case is therefore very distinguishable from Birkner.

B. An Employer Should be Liable When the Employee's Wrongful Acts are Apparently Authorized.

Accepting for the purposes of this argument that Lyday knew that his actions were not calculated to further the interests of his employer, it is nevertheless appropriate that the doctrine of Respondeat Superior apply when the master creates a situation whereby an employee is able to deliberately injure an unsuspecting victim. If the master creates circumstances leading the victim to believe that the acts of the employee are appropriate, the master should be liable for the employee's acts. These principles are very clearly endorsed in the Restatement of Agency, 2d, Sections 261-266. Most clearly on point in this case are Sections 266 and 262 which provide as follows:

Section 266. Physical Harm Caused by Reliance Upon Representations.

A purported master or other principle is subject to liability for physical harm caused to others . . . by their reasonable reliance upon the tortious representations of one acting within his apparent authority or apparent scope of employment.

Section 262. Agent Acts for His Own Purposes.

A person who otherwise would be liable to another for the misrepresentations of one apparently acting for him is not released from liability by the fact that the servant or other agent acts entirely for his own purposes, unless the other has notice of this.

The above rules serve not only to protect innocent victims such as Plaintiff in this case, but also, in the final analysis, are beneficial to the employer. It is in the interest of employers that the statements and representations of their employees be respected and relied upon by customers and others who deal with the employee. The employer would not be served by a rule

of law which encourages customers to be questioning and suspicious of every statement and representation of the company's employees. This factor is especially important in regard to police departments. A police department would be greatly hampered in fulfilling its duties if citizens questioned and challenged every order and direction of the city's police officers. Citizens will be encouraged to abide by the directions of police officers if they have assurance those directions are backed by the police department, even if it is later determined that the officer was acting for his own purposes.

C. Higher Respondeat Superior Standards Should Apply to Police Departments.

There is, of course, one other distinguishing feature between Birkner and the present case. The employee in the present case was a police officer, whereas the employee in the Birkner case was a social worker. There are certainly major differences between police officers and social workers. Police officers are unquestionably the most conspicuous, respected, and authoritative employees of a municipality. Police officers wear distinctive uniforms and drive conspicuous automobiles. They are given guns and other badges of authority. They have the authority to stop any person at any time for any reason, or for no reason at all. A person thus detained may very reasonably believe that the officer is serving the needs of the master. Given such unique authorities and powers granted police officers, this Court should impose a strict Respondeat Superior standard upon the city for the actions of its police officers. The standards which should apply are those



enunciated in the cases of White v. County of Orange, 166 Cal. App. 3rd 566, 212 Cal. Rptr. 493 (1985); Applewhite v. City of Baton Rouge, 380 So. 119 (La. App. 1979); and Turner v. State, 494 So. 2d 1292 (La. App. 1986), which were cited in Appellant's Brief.

#### POINT V

##### NEGLIGENCE ISSUES

West Valley asserts three reasons as to why it cannot be found liable under a negligence theory:

(1) There is allegedly no evidence that West Valley could or should have known of Lyday's sexual deviancies;

(2) There is no duty to test police employees for sexual deviancy; and,

(3) The actions of Lyday were completely unforeseeable.

#### A. Evidence that West Valley Could Have Known of Lyday's Sexual Deviancies.

West Valley omits certain important facts contained in the record when it states that there is no evidence that it could have known about Lyday's sexual deviancy. The Affidavit of Arthur Brown stated very clearly that testing was available and could have been employed by West Valley at the time Lyday was hired, and that had such testing been employed it would more than likely have detected the sexually deviant attitudes and character of Lyday, thus enabling West Valley to avoid the mistake of hiring Lyday. [R. at 217-219] Indeed, this testing could have been carried out

at any time during Lyday's employment, and would certainly have been appropriate again at the time when the city first contemplated placing Lyday in a delicate position of trust and authority over vulnerable young people.

B. The Duty to Conduct Psychological Testing

There clearly is a duty on the part of police departments in the State of Utah to conduct psychological testing of police employees, or at least to insure that such psychological testing has been performed by some other agency, before the department hires a police officer.

Utah Code Ann. Section 67-16-6 (1)(h) provides that an applicant for a police department: "Shall be free of any physical, emotional, or mental condition that might affect adversely the performance of duty as a peace officer, as determined through a selection process by the employing agency." (Emphasis added.) The "selection process" envisioned by this section clearly requires something more than and different from the "background check" West Valley claims to have conducted on Lyday before he was hired. The background check conducted by West Valley is discussed in Section 67-16-6(1)(g) which provides that the applicant "shall demonstrate good moral character, as determined by a background investigation." (Emphasis added.) Acknowledging for the purposes of this argument that a background check was indeed conducted by West Valley, the question remains as to what "selection process" West Valley employed to insure that Lyday was "free of any . . . emotional or mental conditions that might affect adversely the performance of

duty as a peace officer . . ." West Valley was under a statutory obligation to conduct psychological testing, and failed to fulfill that duty.

C. The Actions of West Valley's Employee Were Foreseeable

West Valley contends that Lyday's actions were not foreseeable, and only with the benefit of hindsight is it apparent that it might have been wise to be more careful in hiring and supervising Lyday. In fact, Lyday's actions were not only foreseeable, but were almost inevitable given the totally deficient practices of West Valley.

Sexual offenses against unsuspecting and innocent citizens by police officers occur regularly throughout this country. Indeed, the headlines of local newspapers have recently been filled on several occasions with escapades of local law enforcement officials who have sexually molested or harassed others. West Valley cannot therefore be heard to say that such problems are unforeseeable. Despite knowledge of such abuses, West Valley hired Lyday without any attempt to certify his psychological fitness. This negligence was then compounded when Lyday was placed in a sensitive position of trust and authority over young people. Again, no attempt was made to certify his fitness for such position. West Valley's irresponsibility continued as Lyday was allowed to function in this position without training, and with absolutely no supervision. To grant anyone such unbridled authority over young people is totally unacceptable. Under such circumstances, abuses such as occurred in this case were

inevitable, if not from Lyday, then from some future similarly situated employee.

#### CONCLUSION

Substantial factual issues remain to be resolved in regard to each cause of action enumerated in Plaintiff's complaint against West Valley City and the West Valley City Police Department. The District Court Summary Judgment should therefore be reversed, and further proceedings conducted to resolve all issues of fact.

DATED this 22 day of October, 1990.

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CERTIFICATE OF MAILING

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