In the

United States Court of Appeals

for the Seventh Circuit

No. 20-3125

BRADFORD BOHANON,

Plaintiff-Appellant,

v.

CITY OF INDIANAPOLIS,

Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division.
No. 1:16-cv-02117-JRS-MJD — **James R. Sweeney II**, *Judge*.

ARGUED MARCH 31, 2021 — DECIDED AUGUST 22, 2022

Before SYKES, *Chief Judge*, and FLAUM and EASTERBROOK, *Circuit Judges*.

SYKES, *Chief Judge*. In August 2014 Indianapolis Police Officers Michael Reiger and John Serban went to Mikie's Pub in Indianapolis to celebrate Reiger's birthday. Both officers were off duty and in plain clothes. Sometime after the two started drinking, Bradford Bohanon arrived at the bar. After receiving his bill, Bohanon argued with the bartender that he had been overcharged. Reiger and Serban

intervened, a fight ensued, and the officers brutally beat Bohanon in the pub's parking lot.

Bohanon sued the City of Indianapolis under 42 U.S.C. § 1983 alleging that the officers used excessive force in violation of his rights under the Fourth Amendment. His theory of municipal liability under *Monell* is that his injuries were caused by a "gap" in the City's policies. The City's substance-abuse policy prohibits off-duty officers with any alcohol in their blood from performing law-enforcement functions subject to a narrow exception. An officer may do so only in an "extreme emergency situation[]" where police "action is required to prevent injury to the off duty [officer] or another, or to prevent the commission of a felony or other serious offense." Bohanon argues that in crafting this exception, the City was deliberately indifferent to the obvious risk of constitutional violations and therefore caused the officers to use excessive force against him.

The district judge denied the City's motion for summary judgment on the excessive-force claim, and the case proceeded to trial. A jury found the City liable and awarded Bohanon $1.24 million in damages. The City moved for judgment as a matter of law, and the judge granted the motion and vacated the jury's verdict.

We affirm. The officers' conduct was egregious, but Bohanon's theory for holding the City liable is flawed. Municipalities cannot be held vicariously liable under § 1983 for the constitutional torts of their employees; for the City to be liable, a municipal policy or custom must have caused Bohanon's constitutional injury. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). A claim against a municipality under § 1983 requires proof of both municipal fault and

causation. Bohanon did not prove municipal fault because the narrow exception in the City's substance-abuse policy did not present a policy "gap" that made it glaringly obvious that off-duty officers would use excessive force in violation of the Fourth Amendment. And because no extreme emergency situation existed at the time of the incident, the City's policies expressly *prohibited* the officers' conduct and were not the "moving force" cause of Bohanon's injury. *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 404 (1997).

I. Background

At around 1 a.m. on August 7, 2014, Officers Reiger and Serban visited Mikie's Pub in Indianapolis. They were off duty, wore plain clothes, and arrived in Reiger's personal vehicle. They each drank several beers and at least one shot while at the pub.

After the officers began drinking, Bohanon arrived and ordered a double scotch. Feeling generous, he also ordered a round of shots for everyone at the bar. But when Bohanon received his tab, his mood soured. He believed that he had been overcharged and asked the bartender for an itemized receipt. When she refused, Bohanon became loud and combative. The bartender took the tab from Bohanon and asked him to leave. Bohanon refused and continued to argue. The doorman of Mikie's Pub intervened, but Bohanon still refused to leave.

When the situation did not de-escalate, Serban decided to get involved. He identified himself as a police officer, waved his badge in Bohanon's face, and told him to leave. Reiger acted as a cover officer, standing behind Serban in the "tactical v" position used to provide protection for an officer

engaging a suspect. Bohanon then grabbed Serban's badge and threw it on the floor. At that point Reiger joined in the confrontation and grabbed Bohanon's right arm. Serban threw two punches, striking the doorman with the first and Bohanon with the second. Serban placed Bohanon in a chokehold, and Reiger punched Bohanon several times in the back of the head.

Serban's chokehold caused Bohanon to lose consciousness. The officers then dragged him by his feet, face down, out of the pub and into the parking lot. Once outside, the officers kicked the still-unconscious Bohanon in the back and stepped on his head, grinding his face into the pavement. Bohanon briefly regained consciousness but was stomped back into the ground and knocked unconscious again. When Bohanon awoke, one of the officers said, "[i]f you try to report us[,] we will find you." The officers then kicked or hit Bohanon in the head, knocking him unconscious for a third and final time. When he regained consciousness, he was covered in blood and the cash from his wallet was gone.

Bohanon filed a complaint with the Indianapolis Police Department. Both the Department's Special Investigations Unit and Internal Affairs Division launched an investigation. The Department found that Reiger's and Serban's actions violated a host of City policies, including impermissibly using excessive force, using an inappropriate chokehold, failing to render medical aid, and failing to report the incident and contact a supervisor about it. The Department also determined that there was probable cause to believe that the officers had committed felony offenses, and both officers were charged with felony battery. (They were later acquit-

ted.) Both officers were discharged on the recommendation of the Chief of Police.

As the Department's investigation revealed, the officers' actions in brutally beating Bohanon were plainly prohibited by the City's express policies. The Department's General Order 3.24 covers substance abuse and was enacted "to ensure [that officers] are not under the influence of alcohol or other drugs while acting in any law enforcement capacity." The policy categorically prohibits both on-duty officers and off-duty officers in uniform from having alcohol in their blood. It also prohibits off-duty officers with alcohol in their blood from performing any law-enforcement function subject to a very narrow and precisely stated exception. An officer who has consumed alcohol may engage in a law-enforcement function *only* "in extreme emergency situations where injury to the officer or another person is likely without law enforcement intervention." General Order 3.12, which details the responsibilities of off-duty officers, defines "[a]n extreme emergency … to be a situation where action is required to prevent injury to the off-duty [officer] or another, or to prevent the commission of a felony or other serious offense."

General Order 3.12 also creates a reporting requirement for an off-duty officer who takes law-enforcement action. Off-duty officers "must make [an] incident report if they are directly involved in … action" as a law-enforcement officer. This reporting requirement applies irrespective of whether the off-duty officer had consumed alcohol.

The City's policies also set guidelines for the use of force. General Order 1.30 limits the use of force to "only that amount of force that is reasonable, given the facts and

circumstances known by the officer at the time of the event."[1] The City considers the use of force appropriate "only when necessary and justified to accomplish lawful objectives." These limitations apply even if there's an "extreme emergency situation" and even if the officer is off duty when performing a law-enforcement function. Additionally, General Order 1.30 requires an officer to "promptly document any use of force" and to obtain medical assistance for anyone harmed.

In August 2016 Bohanon filed suit against Reiger, Serban, and the City alleging constitutional claims under § 1983 and additional state-law claims. Bohanon ultimately settled out of court with both Reiger and Serban. Bohanon and the City stipulated that Bohanon's state-law respondeat superior claim against the City should be dismissed with prejudice. All that remained was Bohanon's § 1983 claim for municipal liability against the City under *Monell*. Bohanon's principal allegation was that the City caused his constitutional injury when the officers used excessive force against him in violation of his Fourth Amendment rights. He also alleged that the City violated his constitutional rights based on Reiger's failure to intervene to stop Serban's conduct, the officers' illegal seizure of the money in his wallet, and their deliberate indifference to his medical needs when they failed to obtain medical assistance.

The City moved for summary judgment, arguing that the undisputed facts did not support the conclusion that it was

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[1] General Order 1.30 was revised on August 10, 2016, and again on August 3, 2020. We refer to the order in effect on August 7, 2014, the date of the incident.

deliberately indifferent to Bohanon's constitutional rights or that its policies caused the constitutional violations. The judge granted the motion for Bohanon's claims alleging failure to intervene, illegal seizure, and deliberate indifference to his medical needs. However, relying largely on *Glisson v. Indiana Department of Corrections*, 849 F.3d 372 (7th Cir. 2017) (en banc), the judge denied the motion for Bohanon's *Monell* claim based on the officers' excessive use of force.

At trial the parties stipulated that Reiger and Serban used excessive force against Bohanon at Mikie's Pub. And they stipulated that the City permits officers to use only an amount of force that is reasonable under the circumstances. The evidence at trial established that Bohanon's argument with the bartender at Mikie's Pub did not qualify as an extreme emergency situation under the City's policies.

The judge instructed the jury to consider whether Bohanon proved by a preponderance of the evidence (1) that "the City was deliberately indifferent to a likelihood that its policies would cause off-duty police officers to use unreasonable force while having alcohol in their blood" and (2) that Reiger's and Serban's use of unreasonable force was "caused by the City's policies." The judge then instructed the jury on damages: "If you find that plaintiff proved each of these things by a preponderance of the evidence, then you must decide for plaintiff and go on to consider the question of damages." The jury returned a verdict for Bohanon and awarded $1,241,500 in damages.

The City then moved for judgment as a matter of law under Rule 50(b) of the Federal Rules of Civil Procedure. It again argued that it was not deliberately indifferent to

Bohanon's constitutional rights and that no municipal policy or custom caused Bohanon's injury, so it couldn't be held liable under *Monell*, 436 U.S. at 692. The judge agreed, granted the motion, and entered judgment for the City.

II. Discussion

We review de novo the judge's decision to grant the City's motion for judgment as a matter of law, drawing all reasonable inferences in Bohanon's favor. *Ruiz-Cortez v. City of Chicago*, 931 F.3d 592, 601 (7th Cir. 2019). We may not reweigh the evidence and must affirm the jury's verdict "unless there is no legally sufficient evidentiary basis for a reasonable jury to find for the non-moving party." *J.K.J. v. Polk County*, 960 F.3d 367, 378 (7th Cir. 2020) (en banc) (quotation marks omitted).

Section 1983 provides a federal remedy against state actors who deprive others of federal rights. *First Midwest Bank ex rel. Est. of LaPorta v. City of Chicago*, 988 F.3d 978, 986 (7th Cir. 2021). To prevail on a § 1983 claim, the plaintiff must prove "that: (1) he was deprived of a right secured by the Constitution or laws of the United States; and (2) the deprivation was visited upon him by a person or persons acting under color of state law." *Buchanan-Moore v. County of Milwaukee*, 570 F.3d 824, 827 (7th Cir. 2009).

A municipality is a "person" under § 1983 and may be held liable for its own violations of the federal Constitution and laws. *Monell*, 436 U.S. at 690–91. "Its own" is an important qualifier—a municipality is *not* vicariously liable for the torts of its employees or agents. *J.K.J.*, 960 F.3d at 377. As the Supreme Court has repeatedly cautioned, the statute

does not incorporate the common-law doctrine of respondeat superior. *See id.*

Accordingly, a plaintiff can prevail on a *Monell* claim for municipal liability only when challenging the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." 436 U.S. at 694. We have recognized three types of municipal action that can support municipal liability under § 1983: "(1) an express policy that causes a constitutional deprivation when enforced; (2) a widespread practice that is so permanent and well-settled that it constitutes a custom or practice; or (3) an allegation that the constitutional injury was caused by a person with final policymaking authority." *Spiegel v. McClintic*, 916 F.3d 611, 617 (7th Cir. 2019) (quotation marks omitted). Inaction can also give rise to liability if it reflects the municipality's "conscious decision not to take action." *Glisson*, 849 F.3d at 381.

Next, a plaintiff bringing a *Monell* claim against a municipality "must show that the policy or custom demonstrates municipal fault." *Dean v. Wexford Health Sources, Inc.*, 18 F.4th 214, 235 (7th Cir. 2021) (quotation marks omitted). Municipal fault is easily established when a municipality acts, or directs an employee to act, in a way that facially violates a federal right. *Brown*, 520 U.S. at 404–05. On the other hand, where the plaintiff does not allege that the municipality's action was facially unconstitutional but merely alleges that the municipality caused an employee to violate a federal right, a "rigorous standard[] of culpability … applie[s] to ensure that the municipality is not held liable solely for the actions of its employee." *Id.* at 405. The plaintiff must

demonstrate that the municipality itself acted with "deliberate indifference" to his constitutional rights. *Id.* at 407. This is not an easy showing. It requires the plaintiff to "prove that it was obvious that the municipality's action would lead to constitutional violations and that the municipality consciously disregarded those consequences." *LaPorta*, 988 F.3d at 987.

Finally, a plaintiff bringing a *Monell* claim must prove that the municipality's action was the "moving force" behind the federal rights violation. *Brown*, 520 U.S. at 404. This is a "rigorous causation standard" that requires the plaintiff to "show a 'direct causal link' between the challenged municipal action and the violation of his constitutional rights." *LaPorta*, 988 F.3d at 987 (quoting *Brown*, 520 U.S. at 404).

These three requirements to establish a *Monell* claim—policy or custom, municipal fault, and "moving force" causation—are by now familiar. And they "must be scrupulously applied" to avoid a claim for municipal liability backsliding into an impermissible claim for vicarious liability. *Id.* That's especially true of the municipal-fault and causation requirements where (as here) "a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so." *Brown*, 520 U.S. at 405. In these circumstances a rigorous application of the proof requirements is especially important. *Id.*

Bohanon's *Monell* claim is premised on the Fourth Amendment right to be free from unreasonable seizures. *See King v. Hendricks Cnty. Comm'rs*, 954 F.3d 981, 984 (7th Cir. 2020). The parties agree that his claim satisfies the threshold requirement that the officers acted under color of law when they engaged and then brutally beat Bohanon at Mikie's

Pub.[2] Bohanon also satisfies the first requirement necessary to bring a *Monell* claim. General Order 3.24 is an express policy prohibiting police action by off-duty officers who have been drinking (subject to a narrow exception). Bohanon claims that it caused the officers to use excessive force against him. And municipal liability can be premised, as here, on municipal inaction, such as "a gap in express[] policies." *Daniel v. Cook County*, 833 F.3d 728, 734 (7th Cir. 2016); *see also J.K.J.*, 960 F.3d at 378.

It's at steps two and three—municipal fault and "moving force" causation—that Bohanon's claim collapses. It's undisputed that the officers violated General Order 3.24 when taking off-duty police action while drinking because no extreme emergency situation was present at Mikie's Pub. The parties stipulated to this fact at trial. And it's undisputed that the officers violated General Order 1.30 by using unreasonable force against Bohanon. Therefore, the City's policies expressly *prohibited* both the officers' off-duty law-enforcement action and the excessive force used against Bohanon. The City's policies prohibiting these actions are clearly not facially unconstitutional.

Bohanon's theory is that General Order 3.24 should not have included an exception for extreme emergency situations. He contends that this "gap" in the policy led to the "highly predictable" outcome of his assault. In Bohanon's

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[2] Because the City concedes that both officers engaged in police action, we have no occasion to consider whether Bohanon suffered a constitutional injury. *See, e.g.*, *First Midwest Bank ex rel. Est. of LaPorta v. City of Chicago*, 988 F.3d 978, 992–93 (7th Cir. 2021) (holding that the plaintiff suffered no constitutional injury when he was shot by an off-duty police officer).

view the existence of *any* exception permitting off-duty officers to take police action with alcohol in their blood demonstrates that the City was deliberately indifferent to the obvious risk of constitutional violations based on police use of excessive force.

We note at the outset that because Bohanon does not allege that the City directly violated his rights, his "claim presents 'difficult problems of proof.'" *Dean*, 18 F.4th at 236 (quoting *Brown*, 520 U.S. at 406). A gap in policy "amounts to municipal action for *Monell* purposes *only if* the [municipality] has notice that its program will cause constitutional violations." *J.K.J.*, 960 F.3d at 379 (emphasis added). Typically notice is established by "a prior pattern of similar constitutional violations." *Id.* at 380. Here, the parties agree that no similar incident—let alone a *pattern* of similar incidents—had occurred since General Order 3.24 was enacted.

Bohanon therefore must establish that his case is within the "narrow range of circumstances" where notice can be inferred from the obviousness of the consequences of failing to act. *Id.* (quoting *Brown*, 520 U.S. at 409). These cases are "rare." *Dean*, 18 F.4th at 236 (quoting *Connick v. Thompson*, 563 U.S. 51, 64 (2011)). To succeed, Bohanon must show that the "risk of constitutional violations" was "so high … that the municipality's failure to act can reflect deliberate indifference and allow an inference of institutional culpability, even in the absence of a similar prior constitutional violation." *J.K.J.*, 960 F.3d at 380.

Bohanon did not clear this high bar. In the rare cases where we have found this standard to be met, the risks of municipal inaction have been blatantly obvious. *See, e.g.*, *id.* at 379, 384 (holding that the lack of a confidential system for

reporting sexual abuse in prison would lead to more assaults); *Glisson*, 849 F.3d at 378, 382 (holding that the failure to coordinate cancer treatment would lead to health harms); *Daniel*, 833 F.3d at 736 (holding that systemic problems with healthcare scheduling and recordkeeping at a county prison would lead to constitutionally deficient healthcare); *Woodward v. Corr. Med. Servs. of Ill., Inc.*, 368 F.3d 917, 929 (7th Cir. 2004) (holding that completely inadequate suicide-prevention training for prison guards would lead to more suicides). In contrast, it is not at all obvious that a policy *prohibiting* police action while drinking, subject to a narrow and specific exception to protect life and limb, would lead off-duty officers to use excessive force in violation of the Constitution. That's especially true when coupled with the City's policy prohibiting the use of excessive force. Nothing about the text of General Order 3.24 alone put the City on notice that constitutional violations of this kind were likely to occur. "To hold otherwise would significantly expand *Monell* and lead us down the road to vicarious liability." *Thomas v. Cook Cnty. Sheriff's Dep't*, 604 F.3d 293, 307 (7th Cir. 2010).

Bohanon has also failed to prove that the City's policies were the cause of his injuries. It "is an explicit requirement of § 1983 and an uncontroversial application of basic tort law" that a plaintiff must prove that the defendant caused his injury. *Id.* at 306. This requirement is particularly rigorous when the plaintiff claims that the municipality has not directly caused the injury. *Brown*, 520 U.S. at 405; *see also Monell*, 436 U.S. at 694 (holding that the municipal policy must be the "moving force" behind the constitutional deprivation).

There is simply no evidence that the City's policies caused Bohanon's injuries. The officers violated City policy; their actions did not fall within General Order 3.24's narrow exception. At trial Reiger testified that he didn't care if he was disciplined for violating policy. In other words, City policy did not influence Reiger's decision to use excessive force, let alone cause it. Causation is similarly attenuated for Serban, who testified that he used force based on Bohanon's actions, not because of any gap in the City's policies. Bohanon presented no evidence to the contrary. Here, the officers violated City policy that otherwise would have prevented Bohanon's injuries. City policy clearly was not the moving force behind the constitutional violation.

What happened to Bradford Bohanon was a tragedy, and we share the district judge's sympathy for Bohanon. But "a municipality cannot be held liable *solely* because it employs a tortfeasor." *Monell*, 436 U.S. at 691. Because Bohanon did not establish municipal fault and moving-force causation, the judge was right to set aside the jury's verdict and enter judgment for the City.

AFFIRMED