

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ALEXINE FLECK,)	
)	
<i>Plaintiff,</i>)	
)	
v.)	Civil Action No. _____
)	
CITY OF PHILADELPHIA,)	
POLICE OFFICERS ALEX NICHOLSON and)	
JANE DOE)	
)	
<i>Defendants.</i>)	
)	

COMPLAINT

INTRODUCTION

Observing police officers' behavior in public is activity protected by the First Amendment to the U.S. Constitution. It is not a crime. Nevertheless, Philadelphia police officers, due to serious deficits in the training, supervision, and discipline provided by the City of Philadelphia, have routinely punished civilians who observe or record police activity by filing false criminal charges against them. This case is brought by a woman who was arrested, handcuffed, and subjected to unnecessarily painful and injurious physical restraint on her own street and then prosecuted simply for observing a police officer at work. This civil rights action seeks declaratory relief and damages.

JURISDICTION AND VENUE

1. This action to vindicate plaintiff's rights protected by the First, Fourth, and Fourteenth Amendments to the U.S. Constitution is brought under 42 U.S.C. § 1983. This Court has jurisdiction over this civil rights action under 28 U.S.C. §§ 1331 and 1343. This Court also has jurisdiction under 28 U.S.C. §§ 2201 and 2202 to declare the rights of the parties and to grant all further relief found necessary and proper.

2. Venue is proper in the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1391(a) in that the defendants are subject to personal jurisdiction within the Eastern District of Pennsylvania and the events that give rise to this action occurred within the Eastern District of Pennsylvania.

PARTIES

3. Plaintiff Alexine Fleck is a resident of the City of Philadelphia in the Commonwealth of Pennsylvania.

4. Defendant City of Philadelphia is a political subdivision of the Commonwealth of Pennsylvania and manages, directs, and controls the Philadelphia Police Department ("PPD"), which employs Defendant Nicholson.

5. Defendant Alex Nicholson was, at all times here mentioned, an officer with the PPD and was acting under color of state law. Defendant Nicholson is sued in his individual capacity.

6. Defendant Jane Doe was, at all times here mentioned, an officer with the PPD and was acting under color of state law. Defendant Doe is sued in her individual capacity.

FACTUAL ALLEGATIONS

7. Plaintiff, Ms. Fleck, is a professor at the Community College of Philadelphia.

8. On the morning of June 15, 2011, at approximately 10:15 AM, Ms. Fleck left her home on the 4800 block of Larchwood Avenue in West Philadelphia and walked east, on her way to work.

9. As Ms. Fleck walked down the street, she observed an unidentified semi-conscious male sitting on a stoop and Defendant Nicholson pointing a baton at the unidentified male from a distance of approximately two to three feet in a manner Ms. Fleck interpreted as unduly aggressive.

10. Ms. Fleck passed Defendant Nicholson and the unidentified male, and then stopped, turned around and asked them if everything was okay.

11. Ms. Fleck observed an uncapped syringe between the unidentified male's feet and offered to dispose of it safely in a glass container to prevent injury to any passersby. Ms. Fleck is knowledgeable about needle safety because of her prior work as an HIV prevention researcher and a volunteer at Prevention Point, a needle exchange program in Philadelphia.

12. When Ms. Fleck addressed Defendant Nicholson and the unidentified male, she was standing approximately five feet from Defendant Nicholson and six feet from the unidentified male.

13. Defendant Nicholson directed Ms. Fleck to take ten steps back.

14. Ms. Fleck took ten steps back as requested and asked Defendant Nicholson to provide his name and badge number.

15. Defendant Nicholson told Ms. Fleck she would have to wait.

16. Ms. Fleck responded to Defendant Nicholson, "I'm just going to observe you."

17. Defendant Nicholson then told Ms. Fleck she had to leave the area.

18. A few moments later, a marked police vehicle arrived with its lights flashing. Defendant Jane Doe exited the vehicle.

19. Defendant Nicholson walked to his own police car, which was parked on the south side of Larchwood; Defendant Doe walked to Defendant Nicholson and began to speak with him.

20. Ms. Fleck remained where she had been standing and the unidentified male remained sitting on the stoop. Ms. Fleck was unable to hear the officers' conversation.

21. After a brief conversation with Defendant Nicholson, Defendant Doe approached Ms. Fleck while Defendant Nicholson returned to the stoop and the unidentified male.

22. Ms. Fleck explained to Defendant Doe that she was just observing.

23. Defendant Doe stated that the unidentified male was in possession of a syringe, which Defendant Doe said was illegal.

24. Ms. Fleck told Defendant Doe that it was not illegal to possess a syringe, and offered to show Defendant Doe the executive order permitting drug users to carry syringes.

25. Defendant Doe instructed Ms. Fleck to "put your bag down," indicating the houndstooth handbag that Ms. Fleck was carrying.

26. Ms. Fleck asked "Why?" and Defendant Doe replied, "I'm going to cuff you."

27. Ms. Fleck did not put her bag down and asked Defendant Doe "Are you serious?" because she was surprised and did not believe that she had done anything unlawful. Indeed, Ms. Fleck had done nothing unlawful.

28. Defendant Doe again directed Ms. Fleck to "put your bag down," warning her "or this could get ugly."

29. Ms. Fleck put down her bag.

30. As she was handcuffed, Ms. Fleck advised Defendant Doe that her right shoulder was injured and to have both arms pulled behind her back would cause her great pain. She had previously been diagnosed with a small tear in her rotator cuff.

31. Defendant Doe nonetheless pulled Ms. Fleck's arms tightly behind her back, causing pain in her right shoulder, and handcuffed her, thereby placing her under arrest. Ms. Fleck said, "Ow, that hurts."

32. Ms. Fleck was transported to the Philadelphia Police Department's 18th District Headquarters by Defendant Doe.

33. Ms. Fleck arrived at the District Headquarters shortly before the time she was scheduled to teach a course at Community College of Philadelphia, but she was denied the opportunity to make a phone call informing her employer and students of her arrest, despite making several requests.

34. Ms. Fleck remained in handcuffs for the entire duration of her approximately 3-hour detention, causing pain in her right shoulder.

35. From approximately 10:45am until she left the station between 2pm and 2:30pm, except as described in the succeeding paragraphs, Ms. Fleck was handcuffed by her right arm to a bench. Although she asked every officer she saw many times for the handcuff to be placed on her left arm, because her right arm and injured shoulder were in pain, her requests were refused or ignored.

36. When Ms. Fleck asked to use the bathroom, she was escorted by a male Police Officer to a jail cell to use the toilet.

37. Defendant Nicholson informed Ms. Fleck that she was being charged with failing to "disperse" under 18 Pa. C.S. § 5502.

38. Defendant Nicholson then transported Ms. Fleck, with her hands cuffed behind her back again, to Philadelphia Community Court for an arraignment.

39. Shortly after arriving at Community Court, Ms. Fleck was released from handcuffs.

40. After her arraignment, Ms. Fleck left Community Court at approximately 2:30pm and returned home. She was given a subpoena to return to Community Court on July 27, 2012.

41. Because Ms. Fleck had received a subpoena to attend Community Court and would have been subject to arrest and prosecution had she failed to comply with that subpoena, she remained subject to the seizure caused by defendants Nicholson and Doe.

42. Ms. Fleck returned to Community Court on July 27, 2011, on which date the charges against her were dismissed.

43. At no time did Ms. Fleck act in a fashion that provided probable cause to arrest her for disorderly conduct under 18 Pa. C.S. § 5503 or any other statute. Nor did Ms. Fleck participate in a course of conduct with three or more persons that provided probable cause to arrest her for failure to disperse under 18 Pa. C.S. § 5502 or any other statute; in fact, during the entirety of her interaction with Defendant Nicholson on Larchwood Avenue, Ms. Fleck was unaccompanied.

44. At no time did Ms. Fleck participate in a course of disorderly conduct which caused or may reasonably have been expected to cause substantial harm or serious inconvenience, annoyance, or alarm.

45. At no time did Defendant Nicholson or any other City of Philadelphia Police Officer issue a lawful order to disperse.

46. At no time did Ms. Fleck refuse or knowingly fail to obey a lawful order to disperse.

47. Ms. Fleck's observation of the police undertaking their official duties is protected by the First Amendment to the United States Constitution, and therefore cannot be said to serve "no legitimate purpose."

48. Defendants Doe and Nicholson arrested Ms. Fleck and Defendant Nicholson initiated criminal charges against Ms. Fleck without probable cause and in retaliation for her observation and questioning of Defendant Nicholson.

49. Ms. Fleck's experience is a direct result of the policies, practices and customs of Defendant City of Philadelphia ("City").

50. Prior to September 2011, Philadelphia police officers routinely instituted criminal proceedings against civilians who observed or recorded police activities.

51. Officers instituted these proceedings in order to intimidate civilians so that they would not continue to monitor and record police behavior and in retaliation against civilians' constitutionally protected activity.

52. Supervisory police officials, up to and including Police Commissioner Charles H. Ramsey, knew that Philadelphia police officers routinely retaliated against civilians for observing and/or recording them. Those officials did nothing to halt these practices but instead, encouraged and directed such practices for years.

53. In March 2011, Commissioner Ramsey personally directed PPD detectives to "re-investigate" a February 13, 2011 incident involving Mark Fiorino, who was stopped and threatened – *but not charged* – by a Philadelphia police officer for openly carrying his licensed firearm. According to a PPD spokesperson, the Commissioner gave this order after learning that Mr. Fiorino had posted an audio recording of the February 13 incident on YouTube and the PPD had been alerted to the recording by a caller. As a result of this "re-investigation," on April 15,

2011 – two months after the incident – a PPD detective initiated charges against Mr. Fiorino, alleging that his simultaneous possession of a licensed firearm *and an audio recorder* meant that Mr. Fiorino was trying to spark a violent police reaction. Mr. Fiorino was ultimately found not guilty of all charges.

54. There have been numerous other incidents of PPD officers threatening to or actually arresting Philadelphians who watch or record the actions of on-duty police officers. Indeed, dozens of such incidents have been reported to the media and to Philadelphia civil rights groups.

55. For instance, on July 23, 2010, Melissa Hurling and Shakir Riley were assaulted by PPD officers when they attempted to use their cellphones to record what they considered to be a violent arrest. *See Jan Ransom, Even a Top Cop Concedes a Right to Record Video Arrests – but the Street Tells a Different Story*, Philly.com, Sept. 3, 2011 (attached as Exhibit B; hereinafter *Even a Top Cop Concedes Right to Record*). According to reports, officers confronted Riley and destroyed his cellphone, along with the footage he had just recorded, while two other officers approached Hurling and, after exchanging a few words, arrested her. Riley and Hurling were charged with disorderly conduct, however the charges were later dismissed against both of them following a summary trial in March 2011. *See Commonwealth of Pennsylvania v. Hurling*, Docket No. MC-51-SU-0010415-2010, Mar. 10, 2011 (attached as Exhibit C); *Commonwealth of Pennsylvania v. Riley*, Docket No. MC-51-SU-0010571-2010, Mar. 10, 2011 (attached as Exhibit D).

56. On July 2, 2011, Philadelphia resident Zanberle Sheppard was told by neighbors that PPD officers were beating her handcuffed boyfriend in an alley outside their home. *See Even a Top Cop Concedes Right to Record*. Using her cellphone, she peered out a window of her home and recorded the arrest. Sheppard then ran outside into the alley where, following an altercation,

the officers seized her phone. When Sheppard later received her phone back from the PPD, the battery was missing and the video was gone. Sheppard, who had no prior criminal record, was charged with disorderly conduct. *Id.* She was found guilty on August 22, 2011 following a summary trial and was fined. *Commonwealth v. Sheppard*, Docket No. MC-51-SU-0008673-2011, Aug. 22, 2011 (attached as Exhibit E).

57. Finally, in September 2011, Commissioner Ramsey issued a memorandum to “remove any confusion as to duties and responsibilities of sworn personnel when being photographed, videotaped, or audibly recorded while conducting official business or while acting in an official capacity in any public place” and instructed PPD officers to allow themselves to be recorded. *See* Memorandum from Charles H. Ramsey, Commissioner, Phila. Police Dep’t, to Phila. Police Dep’t personnel (Sept. 23, 2011) (attached as Exhibit A).

58. Since Commissioner Ramsey’s September 2011 Memorandum, however, PPD officers have continued to arrest citizens for observing or recording the police. For example, a photojournalism student at Temple University was arrested on March 14, 2012. *See* Angelo Fichera, *After Arrest, Press Network Pushes for Dismissal of Charges*, The Temple News, Mar. 26, 2012 (attached as Exhibit F); Kathy Matheson, *Ian Van Kuyk, Temple Univ. Student Charged After Taking Traffic Stop Pics*, The Huffington Post, Mar. 26, 2012 (attached as Exhibit G). According to reports, the student, Ian Van Kuyk, was photographing a traffic stop as part of a course assignment for night photography. When Van Kuyk refused to stop photographing, PPD officers arrested him and his girlfriend, who attempted to rescue Van Kuyk’s camera. Van Kuyk was charged with disorderly conduct, obstruction of justice, resisting arrest and hindering apprehension; his girlfriend was charged with obstruction and disorderly conduct. Six days after the incident, Van Kuyk’s girlfriend entered an Accelerated Misdemeanor Program, agreed to 12

hours of community service and to pay a \$200 fine for her charges. *Id.* On November 27, 2012, Van Kuyk was found not guilty on all charges following a trial. *Commonwealth of Pennsylvania v. Van Kuyk*, Docket No. MC-51-CR-0010679-2012, Nov. 27, 2012 (attached as Exhibit H).

59. Further, as is detailed in separate complaints filed by the undersigned counsel, additional instances have occurred where PPD officers retaliated against civilians attempting to record them in the performance of their official duties. Specifically:

- Christopher Montgomery, a journalism student at Temple University, was arrested for using his cellphone to record PPD officers making arrests on the corner of 15th and Chestnut Streets. Mr. Montgomery, along with the rest of the crowd that was observing the arrests, complied with the police officers' requests to step back. Mr. Montgomery remained approximately fifteen feet from the arresting officers and did not attempt to interfere with the investigation in any way. Nevertheless, he was charged with disorderly conduct; he was later found not guilty of those charges.
- Coulter Loeb had been observing and photographing police in Rittenhouse Square as they evicted an apparently homeless couple from the park. As the police walked the woman along the sidewalk leading to the street, Mr. Loeb followed at a distance. One of the officers directed Mr. Loeb to walk in the other direction. When Mr. Loeb refused, the officer accused Mr. Loeb of interfering with police business, then arrested him and charged him with disorderly conduct. The charges were later dismissed.

60. As the September 2011 Memorandum from Commissioner Ramsey indicates, PPD officers should expect to be photographed, videotaped, or recorded while performing their official duties in public. Further, the Memorandum specifically orders that PPD officers "shall

not interfere with any member of the general public or individuals temporarily detained” who seeks to photograph, videotape, or record police personnel while they are acting in their official capacities.

61. Based on the numerous incidents identified above and the acknowledgment by the Police Commissioner of “confusion” concerning police responsibilities on these issues, at the time of plaintiff’s arrest, the custom of the officers of the Philadelphia Police Department was to regularly arrest persons who observe and document the behavior of PPD officers.

62. The policymaking officials of the Police Department and the City of Philadelphia knew of this custom. At the time of plaintiff’s arrest, the policy-making officials of the Police Department acted with deliberate indifference to the constitutional rights of the persons who watch or record police behavior in this City by: (a) failing to properly train, supervise, and discipline PPD officers who retaliate against people who observe or record them; (b) inadequately monitoring PPD officers and their practices related to people who watch or record their activities; (c) failing to properly discipline PPD officers who initiate criminal proceedings against people who watch or record their activities; and (d) failing to rectify the PPD’s unconstitutional custom of instituting criminal proceedings against people who watch or record the actions of PPD officers.

63. As a direct and proximate result of the City’s policies, practices, and/or customs, Ms. Fleck suffered the following injuries and damages:

- Violation of her rights under the First Amendment to the United States Constitution, as applied to the states by the Fourteenth Amendment, to be free from criminal prosecution or to be retaliated against for engaging in constitutionally protected expressive activity;

- Violation of her rights under the Fourth Amendment to the United States Constitution, as applied to the states by the Fourteenth Amendment, to be free from malicious prosecution, illegal search and seizure, and excessive use of force;
- Loss of her physical liberty;
- Monetary losses;
- Pain, emotional trauma, humiliation, and distress.

CAUSES OF ACTION

Count I – First Amendment Retaliation (Against All Defendants)

64. Plaintiff incorporates by reference the allegations of the preceding paragraphs as though set forth at length herein.

65. Observing public police activities, without interfering with those duties, is a legitimate means of gathering information for public dissemination and is expressive conduct protected by the First Amendment to the United States Constitution.

66. Defendants Doe and Nicholson's arrest and prosecution of Plaintiff in the absence of probable cause that she had committed a crime constituted unlawful retaliation against Plaintiff by public officials for engaging in activity protected by the First Amendment to the U.S. Constitution.

67. Defendant City of Philadelphia is responsible for the violation of Plaintiff's constitutional rights because Defendant Nicholson's and Defendant Doe's actions resulted from the City's custom, pattern, practice, or policy of allowing officers to arrest individuals for their expressive conduct in videotaping police undertaking their official duties.

Count II – Malicious Prosecution (Against All Defendants)

68. Plaintiff incorporates by reference the allegations of the preceding paragraphs as though set forth at length herein.

69. Plaintiff has a clearly established right under the Fourth and Fourteenth Amendments to the U.S. Constitution to be free from unreasonable seizure of her person. Defendants Nicholson and Doe violated this right when they initiated the criminal proceeding against Plaintiff in retaliation for Plaintiff's constitutionally protected recording of Defendants Nicholson and Doe's public activities as law enforcement officers with the PPD and in absence of any probable cause to believe that Plaintiff had committed a crime.

70. The charges against Plaintiff were later terminated in her favor.

71. Defendants Nicholson and Doe pursued this prosecution of Plaintiff with malice in retaliation for Plaintiff engaging in constitutionally protected activity, and without any probable cause or reasonable basis for believing that Plaintiff violated Pennsylvania's disorderly conduct statute or failure to disperse statute, or committed any other crime.

72. Defendant City of Philadelphia is responsible for the violation of Plaintiff's constitutional rights because Defendants Nicholson and Doe's actions resulted from the City's custom, pattern, practice, or policy of allowing officers to arrest and charge individuals in retaliation for their expressive conduct in monitoring police undertaking their official duties in public places.

Count III – False Arrest and False Imprisonment (Against All Defendants)

73. Plaintiff incorporates by reference the allegations of the preceding paragraphs as though set forth at length herein.

74. Plaintiff has a clearly established right under the Fourth and Fourteenth Amendments to the U.S. Constitution to be free from unreasonable seizure of her person, a right Defendants

Nicholson and Doe violated by handcuffing Plaintiff and arresting her without probable cause or reasonable belief that Plaintiff was committing a crime.

75. Defendant City of Philadelphia is responsible for the violation of Plaintiff's constitutional rights because Defendants Nicholson and Doe's actions resulted from the City's custom, pattern, practice, or policy of allowing officers to retaliate against individuals for their expressive conduct in videotaping police undertaking their official duties.

Count IV – Excessive Force (Against All Defendants)

76. Plaintiff incorporates by reference the allegations of the preceding paragraphs as though set forth at length herein.

77. Plaintiff has a clearly established right under the Fourteenth Amendment to be free from use of excessive force, a right Defendants Doe and Nicholson violated when, despite Plaintiff's complaints, they handcuffed Plaintiff's arms tightly behind her back so as to cause pain in her injured right shoulder and, despite Plaintiff's requests, refused to loosen the restraints.

78. Based on the extreme and unjustified use of force in this case, Defendant City of Philadelphia is responsible for the unconstitutional use of excessive force because Defendants Nicholson and Doe's actions resulted from the City's custom, pattern, practice, or policy of failing to train and supervise officers in the appropriate use of force during arrest and discipline officers for the unreasonable use of force.

PRAYER FOR RELIEF

Wherefore, in light of the foregoing, Plaintiff respectfully requests the following:

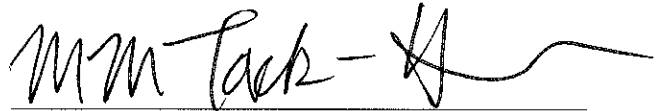
- a. Enter a declaratory judgment that the Defendants violated Plaintiff's First Amendment right to observe police activity;

- b. Enter a declaratory judgment that the Defendants violated Plaintiff's Fourth Amendment right to be free from unreasonable seizure, malicious prosecution, and excessive force;
- c. Award compensatory damages against all Defendants, joint and severally, in an amount to be determined at trial;
- d. Award punitive damages against Defendants Nicholson and Doe;
- e. Enter an award for costs, expenses, and counsel fees pursuant to 42 U.S.C. § 1988; and
- f. Enter such other relief as this honorable Court may deem just and deserving.

Plaintiff hereby demands a jury trial.

June 5, 2013

Respectfully submitted,



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