

A I didn't have any, no, sir.

Q During the time that you were assigned to that work, did you ever see any written standard operating procedures specifically prescribed for the Gang Task Force?

A No, sir.

Q Have you learned since this incident involving the shooting and killing of Pedro Oregon as to whether or not any written standard operating procedures have been put into place after this event?

A Yes, sir. I believe they do have a standard operating procedure now.

Q In short, were you provided any kind of specialized training of any kind as it related specifically to what you were supposed to be doing as a member of the Gang Task Force by the Houston Police Department?

A Nothing in writing, no, sir.

Q And with respect to training, aside from written manuals or written materials, were you provided with any kind of specialized training by the Houston Police Department itself with respect to what you were or were not supposed to do in the Gang Task Force?

A No, sir. Everything I learned I learned either by talking to other people or by doing my own research.

See Sworn Statement of Defendant David Russell Perkins at p. 14, l. 6 - p. 18, l.10, attached at Tab A.

The inadequacy and lack of uniformity in all aspects of training of the gang task force are the result of an organized program, deliberately adopted by the City. Although the City has apparently now begun to reform the program, its persistent, deliberate indifference to these flaws resulted in the death of Pedro Oregon. These allegations are more than sufficient to state a claim under Section 1983:

Existence of a “program” makes proof of fault and causation at least possible in an inadequate training case. If a program does not prevent constitutional violations, municipal decisionmakers may eventually be put on notice that a new program is called for. Their continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action—the “deliberate indifference”—necessary to trigger municipal liability.

Brown, 117 S. Ct. at 1390.

2. **The City’s deliberate indifference to its training policies caused Mr. Oregon’s death and the plaintiffs’ injuries.**

The plaintiffs have alleged the City’s liability and causation. *See* Plaintiffs’ Orig. Complaint at 2-3, 7. The role of a motion to dismiss for failure to state a claim is *not* to resolve issues of proof. *See* pp. 1-2 above. Thus the plaintiffs need not have *proved* causation in their complaint. *Id.* The plaintiffs need only have provided “a short and plain statement of the claim showing that the pleader is entitled to relief.” *Leatherman*, 507 U.S. at 168, 113 S. Ct. at 1163. This, the plaintiffs have done.

As discussed above, the plaintiffs have alleged, in part, that the City has deliberately permitted deficiencies and a lack of uniformity in all aspects of the training for officers assigned to the gang task force. *See* Plaintiffs’ Orig. Complaint at 2. As the Supreme Court has held, the existence of such a deficient training program “makes proof of fault and causation at least possible in an inadequate training case.” *Brown*, 117 S. Ct. at 1390. Because proof of causation is possible under the plaintiffs’ allegations, the plaintiffs have not failed to state a claim, and the City’s motion to dismiss should be denied.

The City's deliberate omissions and lack of uniformity in all aspects of training caused the death of Pedro Oregon and endangered other law-abiding citizens. The focus of the "deliberate indifference" inquiry is on the adequacy of training and the lack of uniformity in all aspects of the training program in relation to the tasks the officers must perform. *Canton*, 489 U.S. at 390-91, 109 S. Ct. at 1206. In other words, the deficiencies in the city's training program must be closely related to the injury suffered by the plaintiff. 489 U.S. at 391, 109 S. Ct. at 1206. Taking the plaintiffs' allegations as true, for purposes of Rule 12(b)(6), the complaint is sufficient to state a causal link between the City's deliberate indifference in its training policy and the injury suffered by Pedro Oregon. *See* Plaintiffs' Original Complaint at ¶¶ 2 (alleging that the deprivations of Mr. Oregon's rights "resulted from" the "policies, customs, or practices" of the City) and 29 (alleging that "the policies, customs and practices" of the City "were each a cause of and resulted in the death of Pedro Oregon Navarro and the injuries and damages to the Plaintiffs").

Given the environment in which the gang task force operates, it was inevitable that the task force would find itself in recurring situations similar to the facts of this case. Yet the City deliberately failed to provide the gang task force adequate and uniform training in all aspects of its work—specifically including supervision, assignment, and testing of officers and regularly relying on unauthorized informants and members of the gang task force rather than the narcotics squad for drug raids—necessary to ensure that they did not violate the rights of citizens.

Just two years ago, the Supreme Court explained that these facts would support an inference of a municipality's deliberate indifference to the constitutional rights of its citizens, and that such indifference was the legal cause of the plaintiffs' injuries:

[A] violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations. The likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights could justify a finding that policymakers' decision not to train the officer reflected "deliberate indifference" to the obvious consequence of the policymakers' choice—namely, a violation of a specific constitutional or statutory right. The high degree of predictability may also support an inference of causation—that the municipality's indifference led directly to the very consequence that was so predictable.

Brown, 117 S. Ct. at 1391.

C. The Plaintiffs Have Stated a Claim for Inadequate Recruiting and Screening Practices.

Plaintiffs also state a claim for relief based on recruitment and screening practices employed by the gang task force. The City deliberately applied less stringent standards in recruiting, screening, assigning, and supervising officers for the gang task force, evidencing its deliberate indifference to the rights of those law-abiding citizens among whom the gang task force operated. Although the City argues that these allegations are insufficient to state a claim for relief, it cites no authority in support of that proposition. On the contrary, a plaintiff can state a claim for deliberate indifference in a municipality's recruitment and screening practices. *See Board of County Commissioners v. Brown*, ___ U.S. ___, 117 S. Ct. 1382, 1392 (1997).

Brown itself addresses the difficult problem of attributing fault and causation to a municipality when a plaintiff alleges the municipality was deliberately indifferent to the constitutional torts of its employees, based on an isolated hiring decision. 117 S. Ct. at 1387-88, 1390-94. As the Supreme Court explained:

Respondent does not claim that she can identify any pattern of injuries linked to Sheriff Moore's hiring practices. Indeed, respondent does not contend that Sheriff Moore's hiring practices are generally defective. The only evidence on this point at trial suggested that Sheriff Moore had adequately screened the backgrounds of all prior deputies he hired. App. 106-110. Respondent instead seeks to trace liability to what can only be described as a deviation from Sheriff Moore's ordinary hiring practices. Where a claim of municipal liability rests on a single decision, not itself representing a violation of federal law and not directing such a violation, the danger that a municipality will be held liable without fault is high. Because the decision necessarily governs a single case, there can be no notice to the municipal decisionmaker, based on previous violations of federally protected rights, that his approach is inadequate. Nor will it be readily apparent that the municipality's action caused the injury in question, because the plaintiff can point to no other incident tending to make it more likely that the plaintiff's own injury flows from the municipality's action, rather than from some other intervening cause.

Id. at 1390.

This is not such a case. Unlike *Brown*, where the plaintiffs attempted to impose liability on the municipality based on a single hiring decision, the Oregon family alleges a pattern of deliberate indifference in recruitment and screening that pervades the gang task force. As with the "pattern" or "program" of deficient training procedures that would support a finding of "deliberate indifference" in an inadequate training case, *see pp. 5-6*, above, the Oregon family has alleged a pattern and program of deficient recruitment and

screening practices that would support a conclusion that the City was deliberately indifferent to the plainly obvious consequence that its employment decisions would lead to constitutional offenses by the gang task force. *See Brown*, 117 S. Ct. at 1390.

Moreover, even in *Brown*, the Supreme Court did not hold that a plaintiff could never state a claim for a single hiring decision made without adequate screening. *Id.* at 1392-94. The Court instead recognized that attributing fault and causation to the municipality presented “difficult problems of proof,” and held that “respondent’s showing was inadequate.” *Id.* at 1389, 1392-93. The Supreme Court reversed, not because the respondent had failed to state a claim, but because respondent had failed to *prove* the claim she had stated. *Id.* at 1394. But “problems of proof” are not grounds for dismissal under Rule 12(b)(6). *See pp. 1-2, above.* Because Plaintiffs have sufficiently alleged a Section 1983 claim for inadequate recruitment and hiring practices, dismissal is inappropriate.

The City contends that officers of the gang task force are certified peace officers, as if that fact alone would conclusively defeat liability. But the City has cited no authority in support of this argument. That is not surprising, because *all* police officers in Texas are certified peace officers. *See TEX. CRIM. PRO. ANN. art. 2.12(3)* (Vernon Supp. 1999). If the City were correct, it would be impossible for any Section 1983 claim to succeed against a municipality that hired and failed to train officers with deliberate indifference to the known risks. As *Brown* illustrates, however, that is not the law.

IV. The Plaintiffs Have Stated Claims for Mental Anguish

Rogelio Oregon Navarro has stated a claim as a bystander under principles recently reaffirmed by the Texas Supreme Court:

To recover as a bystander, a plaintiff is required to establish that:

(1) The plaintiff was located near the scene of the accident, as contrasted with one who was a distance away from it;

(2) The plaintiff suffered shock as a result of a direct emotional impact upon the plaintiff from a sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence; and

(3) The plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.

United Services Auto. Ass'n v. Keith, 970 S.W.2d 540, 541-42 (Tex. 1998).

Rogelio Oregon Navarro has alleged that: (1) he was present in the apartment when Pedro Oregon Navarro was shot and killed, (2) he suffered mental anguish from witnessing the events giving rise to Pedro Oregon's death, and (3) he is the brother of Pedro Oregon. Plaintiffs' Original Complaint at 3, 10. Rogelio Oregon Navarro has sufficiently stated a bystander claim under *Keith*. Any further factual development of these allegations should occur in pretrial discovery.

Unchallenged by the City, Rogelio Oregon Navarro, Salvador Lopez, and Nelly Mejia have also stated a claim for the recovery of mental anguish based on the City's numerous violations of 42 U.S.C. §§ 1983 and 1988, as well as the Fourth and Fourteenth

Amendments to the United States Constitution. *See Carey v. Piphus*, 435 U.S. 247, 264, 98 S. Ct. 1042, 1052 (1978) (recognizing that “mental and emotional distress caused by the denial of procedural due process itself is compensable under § 1983”); *Boyles v. Kerr*, 855 S.W.2d 593, 597 (Tex. 1993) (recognizing a claimant’s right to recover mental anguish damages cause by a defendant’s breach of some other legal duty). Likewise, these plaintiffs have stated a claim for mental anguish damages in conjunction with their claims for assault, battery, and false imprisonment. *See Boyles*, 855 S.W.2d at 597.

The plaintiffs agree to dismiss any claims for bystander recovery by Salvador Lopez and Nelly Mejia, and with the Court’s permission, the plaintiffs will amend their complaint to delete any such claims.

V. The Plaintiffs Have Stated Equal Protection Claims

The plaintiffs have alleged that: (1) each of the individual defendants was acting within the course and scope of his employment as a City of Houston Police Officer and under color of state law; (2) each deprived the plaintiffs of rights, privileges, and immunities secured by the United States Constitution and laws; (3) these deprivations directly resulted from official policies, customs, or practices of the City of Houston; and (4) these policies, customs, and practices were each a cause of and resulted in the death of Pedro Oregon Navarro and the injuries and damages suffered by the plaintiffs. Plaintiffs’ Orig. Complaint at 2-3, 7. The plaintiffs further identified the improper policies, customs, and practices of the City of Houston to include:

- Applying or allowing a different standard in authorizing a raid of a residence in a predominately non-anglo neighborhood than would be applied in a predominately anglo neighborhood; and
- Applying or allowing a different standard in authorizing a raid of a residence in an economically disadvantaged neighborhood than would be applied in any other neighborhood.

Plaintiff's Orig. Complaint at 2.

According to the Fifth Circuit, this is sufficient to state a claim under the equal protection clause. *See Rolf v. City of San Antonio*, 77 F.3d 823, 828 (5th Cir. 1996) (the "complaint alleges that they have been treated differently than similarly situated individuals. Accordingly, the district court erred by dismissing the equal protection claim at this stage of the proceeding.").

The defendants violated the plaintiffs' rights under the equal protection clause of the Fourteenth Amendment to the United States Constitution. The plaintiffs are Hispanics. Upon information and belief, the defendants deliberately engaged in a discriminatory purpose against the plaintiffs at least in part because of their race, which is a suspect classification. *See Massachusetts v. Feeney*, 442 U.S. 256, 272-74, 99 S. Ct. 2282, 2292-93 (1979). The defendants' decision not to have proper testing, training, procedures, and policies for the gang task force demonstrates that the City intended to discriminate against members of the Hispanic community.

Even if the failure to have proper testing, training, procedures, and policies were neutral on its face, the adverse consequences of the failure upon members of the Hispanic

community were inevitable. In fact, discovery will likely show a clear pattern of adverse consequences on the Hispanic community stemming from this failure. This pattern and the inevitable adverse consequences are sufficient to demonstrate a discriminatory purpose. *See Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66, 97 S. Ct. 555, 563-64 (1977).

This is all the more true when one considers that proper testing, training, procedures, and policies exist for other departments of the police force that are less likely to come into contact with members of the Hispanic community. The departure from the normal practice of having proper testing, training, procedures, and policies further evidences purposeful discrimination. *See* 429 U.S. at 267, 97 S. Ct. at 564.

This is also demonstrated by the absence of similar incidents in non-minority neighborhoods. *See Oliver v. Cutler*, 968 F. Supp. 83, 88 (E.D.N.Y. 1977). This tragedy would not have occurred in predominately non-minority neighborhoods. It occurred in a Hispanic neighborhood at least in part because the City intended to discriminate against Hispanics by failing to properly test and train members of the gang task force, and by failing to provide them with proper policies and procedures. Accordingly, the plaintiffs have properly stated a claim under the equal protection clause against the defendants.¹

¹ The defendants have not raised any challenge to the plaintiffs' due process claims under the Fourteenth Amendment to the United States Constitution.

VI. The Plaintiffs Have Not Sought Exemplary Damages

The City asserts the plaintiffs have attempted to state a cause of action for exemplary damages. Contrary to this assertion, the plaintiffs made no claim for exemplary damages against the City in their complaint or in their prayer for relief.

VII. The Plaintiffs Will Dismiss Any Eighth Amendment Claims

The plaintiffs agree to dismiss any claims against the City they have made under the Eighth Amendment, and with the court's permission, the plaintiffs will amend their complaint to delete any such claims.

VIII. This Court Should Grant Leave To Amend the Complaint Before Dismissing Any Other Claims.

Finally, if this Court is at all inclined to dismiss any of the plaintiffs' claims under Rule 12(b)(6), Plaintiffs request leave to amend their complaint to cure any deficiencies pursuant to Rule 15(a).

With respect to the factual details that support each of the claims for relief stated in the plaintiffs' complaint, such as the facts provided in the sworn statement of David Russell Perkins, the plaintiffs respectfully submit that such factual support should be provided in pretrial discovery. Nonetheless, if the Court requires, the plaintiffs are willing and request leave to amend their complaint to add any factual details the court requires.

Leave to amend the complaint "shall be freely given when justice so requires." FED. R. CIV. P. 15(a). The Supreme Court has emphasized that leave should be granted

freely. *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962). And the Fifth Circuit has rigorously honored this requirement. *E.g.*, *Lowrey*, 117 F.3d at 245-46.

Plaintiffs have acted promptly to assert their rights and to prosecute their claims. The City will not be prejudiced by allowing Plaintiffs to amend and cure any deficiencies. Under these circumstances, leave should be “freely given.” *Foman*, 371 U.S. at 182, 83 S. Ct. at 230. Accordingly, if this Court were inclined to dismiss any of Plaintiffs’ claims, it should first grant Plaintiffs leave to amend their complaint.

Prayer

The plaintiffs respectfully pray that the Court deny the City of Houston’s motion to dismiss. The plaintiffs will, with the Court’s permission, amend their complaint to delete any claim against the City under the Eighth Amendment to the United States Constitution. Additionally, the plaintiffs respectfully pray that they be permitted to amend their complaint to cure any deficiencies and respectfully pray for leave to do so pursuant to Rule 15(a) of the Federal Rules of Civil Procedure.