IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DAVID HACKBART,	)	
Plaintiff,	)	JUDGE CERCONE
v.	)	CV No.: 07-157
THE CITY OF PITTSBURGH, and SGT. BRIAN ELLEDGE,	)	ELECTRONICALLY FILED
Defendants.	)	

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiff David Hackbart insulted a police officer. Frustrated by another driver who prevented him from parallel parking and annoyed by the voice he heard tell him not to "flip" that driver off, Hackbart gave the middle finger to both the other driver and to Defendant Sergeant Brian Elledge, the person behind the voice. In retaliation for that perceived slight, Elledge conducted a vehicle stop of Hackbart and issued him a criminal citation for disorderly conduct for making an obscene gesture, a summary offense that carries a $300 fine and/or imprisonment of up to ninety days. But what Hackbart did was not a crime. His gesture was expressive conduct that is protected by the First Amendment to the United States Constitution. And hence, Elledge's retaliation against him for engaging in that expression violated Hackbart's First Amendment rights.

Unfortunately, this was not an isolated incident. A review of the citations issued by officers in the Pittsburgh Bureau of Police reveals that officers have issued 188 citations in the last two years alone charging people with disorderly conduct for obscene gestures or language when, in fact, the

persons charged were engaging in constitutionally protected speech. The sheer number of citations that Pittsburgh police officers have issued in violation of citizens' First Amendment rights demonstrates Defendant City of Pittsburgh's deliberate indifference to the obvious need to train, discipline, and supervise its police officers to recognize and respect constitutionally protected expression.

ARGUMENT

I. DEFENDANT ELLEDGE VIOLATED PLAINTIFF'S FIRST AMENDMENT FREE-SPEECH RIGHTS BY ISSUING HIM A CITATION FOR DISORDERLY CONDUCT IN RETALIATION FOR HIS CONSTITUTIONALLY PROTECTED EXPRESSION.

Defendant Elledge issued a citation charging Hackbart with disorderly conduct in retaliation for Hackbart's exercise of his constitutionally protected right to free expression. Under the three-part test adopted by the U.S. Court of Appeals for the Third Circuit for analyzing First Amendment retaliation claims, Elledge is liable for violating Hackbart's First Amendment free-expression rights because (1) Hackbart's conduct — gesturing with his middle finger to another driver and Elledge — is protected by the First Amendment; (2) Elledge retaliated against Hackbart by taking adverse action against him; and (3) the basis for the retaliation was Hackbart's display of his middle finger to Elledge and another driver.[1]

[1] *See Eichenlaub v. Twp. of Indiana*, 385 F.3d 274, 282 (3d Cir. 2004) (describing three-part test for analyzing First Amendment retaliation claims: "Plaintiff must prove (1) that he engaged in constitutionally-protected activity; (2) that the government responded with retaliation; and (3) that the protected activity caused the retaliation").

A. Hackbart's Display of His Middle Finger Was Expression Protected by the First Amendment.

Courts, including federal and state courts in Pennsylvania, have recognized that the expressive use of the middle finger is constitutionally protected speech.[2] Hackbart displayed his middle finger first to express his frustration at the driver of a car who prevented him from parallel parking by pulling up too closely behind him and then to convey his annoyance at being told not to "flip" the other motorist off.[3] Both gestures constituted First Amendment-protected non-verbal conduct because they were sufficiently imbued with elements of communication[4] and they did not fall into any of the well-defined and narrowly limited categories of unprotected speech.[5]

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[2] *See, e.g.*, *Sandul v. Larion*, 119 F.3d 1250, 1255 (6th Cir. 1997) (display of middle finger is protected speech); *Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990) (same); *Nichols v. Chacon*, 110 F. Supp. 2d 1099, 1110 (W.D. Ark. 2000) (same); *Brockway v. Shepherd*, 942 F. Supp. 1012, 1017 (M.D. Pa. 1996) ("The use of profane or vulgar language is protected by the First Amendment unless some exception to the general principle applies. That is, standing alone, profane or vulgar language is not itself obscene and does not amount to fighting words. The same principle applies to the use of a gesture which represents profane or vulgar language, and the communication must be looked at in its entirety and in context to determine whether an exception to the general protection of speech applies."); *Commonwealth v. Kelly*, 758 A.2d 1284, 1288 (Pa. Super. 2000) (use of middle finger was angry gesture meant to express disrespect for municipal worker and did not constitute obscenity or fighting words); *see also, e.g.*, *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (recognizing that non-verbal gestures and symbols may be entitled to First Amendment protection).

[3] *See* Plaintiff's Concise Statement of Undisputed Facts in Support of His Motion for Summary Judgment (hereinafter "Pl. Facts") at ¶¶ 6, 8.

[4] *See Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 160-61 (3d Cir. 2002) ("conduct is expressive if, 'considering the nature of [the] activity, combined with the factual context and environment in which it was undertaken, we are led to the conclusion that the activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments'") (quoting *Troster v. Pa. State Dept. of Corrections*, 65 F.3d 1086, 1090 (3d Cir. 1995)).

[5] *See, e.g.*, *Eichenlaub*, 385 F.3d at 282-83("[E]xcept for certain narrow categories deemed unworthy of full First Amendment protection — such as obscenity, "fighting words" and libel — all speech is protected by the First Amendment."); *see generally Cohen v. California*, 403 U.S. 15, 25

Hackbart's use of his middle finger to express his annoyance and frustration was expressive conduct. In gesturing with his middle finger at the driver who prevented him from parallel parking in his desired space, Hackbart intended to express to the driver his frustration with that driver's actions.[6] Given the circumstances and the common understanding of the meaning of that gesture,[7] it is highly likely that the driver understood Hackbart's display of his middle finger as an expression of frustration, anger, disapproval, and/or disrespect.[8] Likewise, Hackbart's display of his middle finger to Elledge after Elledge told him not to flip the other driver off was intended to express his annoyance at Elledge's instruction.[9] In light of the circumstances, it was highly likely that his gesture would be understood that way. In *Duran v. City of Douglas*, the U.S. Court of Appeals for the Ninth Circuit held that the plaintiff's display of his middle finger to a police officer with whom he had just had a run-in represented his expression of disapproval toward that officer and, as such, "fell squarely within the protective umbrella of the First Amendment and any action to punish or deter such speech — such as stopping or hassling the speaker — is categorically prohibited by the Constitution."[10] Like the plaintiff's gesture in *Duran*, Hackbart's use of his middle finger to convey

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(1971) ("the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us").

[6] *See* Pl. Facts at ¶ 6.

[7] *See, e.g.*, *Nichols*, 110 F. Supp. 2d at 1103 (display of middle finger "has a commonly understood meaning and connotation"); *Brockway*, 942 F. Supp. at 1015 (meaning of middle-finger gesture "is well-known and easily understood").

[8] *See Tenafly Eruv Ass'n, Inc.*, 309 F.3d at 161 (plaintiff must show that he intended to convey message through his expressive conduct and that observers understood that message).

[9] *See* Pl. Facts at ¶ 8.

[10] 904 F.2d at 1378.

his annoyance and frustration with Elledge and the other driver was expressive conduct protected by the First Amendment.

Although Elledge charged Hackbart with making an "obscene gesture" — and obscenity is not entitled to First Amendment protection — Hackbart's display of his middle finger was not "obscene" under the definition put forth by the U.S. Supreme Court in *Miller v. California*,[11] which has been adopted by Pennsylvania.[12] In *Brockway*, the court held that the display of the middle finger cannot be considered "obscene" under *Miller* because the gesture is not sexual in nature:

> That a base term for sex is represented or used does not alter the meaning and intent of the gestures or language. In other words, using a base term for sex does not change the disrespectful, offensive communication into one that appeals to the prurient interest. It would be a rare person who would be "turned on" by the display of a middle finger or the language it represents, although certainly some people may approve of or even enjoy such conduct by others.[13]

And in *Kelly*, the Pennsylvania Superior Court held that the display of the middle finger toward a highway construction worker was not obscene because it was "an angry gesture having nothing to do with sex."[14] The court's decision in that case was cited in training materials used by the Pittsburgh Bureau of Police.[15] Those training materials specifically state that "the gesture of the

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[11] *See* 413 U.S. 15, 15 (1973) (speech is obscene if (a) "the average person, applying community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value).

[12] *See Commonwealth v. Bryner*, 652 A.2d 909, 912 (Pa. Super. 1995) (holding that phrase "Go to hell Betsy" was not obscene under U.S. Supreme Court's *Miller* standard).

[13] 942 F. Supp. at 1016.

[14] 758 A.2d at 1288.

[15] *See* Pl. Facts at ¶ 47.

'finger' [is] not obscene for the purposes of disorderly conduct when * * * used in anger and not in a sexual manner."[16] Both Deputy Police Chief Paul Donaldson and Commander Kathryn Degler acknowledged in their deposition testimony that Hackbart's conduct in gesturing with his middle finger did not constitute an obscene gesture within the meaning of the disorderly conduct statute.[17]

Nor does Hackbart's display of his middle finger "fall within that small class of 'fighting words' that are 'likely to provoke the average person to retaliation, and thereby cause a breach of the peace.'"[18] The Third Circuit has held that "[t]he unprotected category of speech called 'fighting words' is an extremely narrow one. The First Amendment on the whole offers broad protection for speech, be it unpleasant, disputatious, or downright offensive. * * * To be punishable, words must do more than bother the listener; they must be nothing less than 'an invitation to exchange fisticuffs.'"[19] Thus, in *Kelly*, the court held that the conduct of a woman in her car at a public intersection who yelled "Fuck you, asshole" to a borough road worker who approached her car and gestured at the worker with her middle finger did not constitute fighting words because it did not risk an immediate breach of the peace.[20] Hackbart's simple act of displaying his middle finger from

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[16] *See id.*

[17] *See id.* at ¶¶ 33, 50, 51.

[18] *Johnson*, 491 U.S. at 409 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942)).

[19] *Johnson v. Campbell*, 332 F.3d 199, 212 (3d Cir. 2003) (quoting *Johnson*, 491 U.S. at 409).

[20] 758 A.2d at 1288; *see also Sandul*, 119 F.3d at 1255 (holding that words and actions of driver who yelled profanity and extended middle finger at abortion protesters did not rise to level of fighting words because fact that driver was in moving vehicle and there was no face-to-face contact between driver and protestors made it "inconceivable that [driver's] fleeting actions and words would provoke the type of lawless action alluded to in *Chaplinsky*"); *Spiller v. City of Texas City,*

inside his car to the driver of another car was far less confrontational that the conduct at issue in *Kelly* and certainly does not rise to the level of an invitation to exchange fisticuffs.

Hackbart's display of his middle finger to Elledge was even less provocative, as "the Supreme Court has suggested that the 'fighting words' exception 'might require a narrower application in cases involving words addressed to a police officer because a properly trained officer may reasonably be expected to exercise a higher degree of restraint than the average citizen, and thus be less likely to respond belligerently to fighting words.'"[21] Hackbart's use of his middle finger to express his annoyance at Elledge's instruction not to flip the other driver off was merely a fleeting demonstration, made as the two vehicles passed each other going in opposite directions. Even when directed at a non-police officer, displaying one's middle finger from inside one's car to another driver is not expression that "by [its] very utterance inflict[s] injury or tend[s] to incite an immediate breach of the peace."[22] Accordingly, Hackbart's display of his middle finger to Elledge cannot constitute "fighting words."[23]

Police Dept., 130 F.3d 162, 165 (5th Cir. 1997) (driver's complaint to police officer to "move his damn truck" did not give officer probable cause to believe that her reference to his truck was likely to incite immediate breach of peace because driver's expression of frustration from inside automobile was not part of confrontational face-to-face exchange and thus could not "reasonably be interpreted as an invitation to fisticuffs"); *Buffkins v. City of Omaha*, 922 F.2d 465, 472 (8th Cir. 1990) (police did not have probable cause to arrest woman who called them "asshole" because directing that word to officers was not incitement to immediate lawless action and could not reasonably have prompted violent response from officers, and thus was not within category of "fighting words" excluded from protection of First Amendment).

[21] *Campbell*, 332 F.3d at 212 (quoting *City of Houston v. Hill*, 482 U.S. 451, 462 (1987)).

[22] *Chaplinsky*, 315 U.S. at 572.

[23] *See Nichols*, 110 F. Supp. 2d. at 1110 (holding that conduct of driver who extended middle finger toward police officer in marked car several times while traveling in opposite direction "did not constitute 'fighting words,' and was protected as 'free speech' under the First Amendment");

Because Hackbart's gesture does not fit within the narrow definitions of "obscene" speech or "fighting words" that fall outside First Amendment protection, his display of his middle finger is constitutionally protected speech.

B. Elledge Responded to Hackbart's Display of His Middle Finger with Retaliation.

Elledge's vehicle stop of Hackbart and issuance of a citation to him for disorderly conduct were adverse retaliatory actions. The Third Circuit has held that the government's denial of a benefit simply because the plaintiff exercised his First Amendment rights is a retaliatory action.[24] In this case, Hackbart was denied his Fourth Amendment right to be free from unreasonable seizures and his First Amendment right to express himself without fear of criminal prosecution.

"A traffic stop is a 'seizure' within the meaning of the Fourth Amendment, 'even though the purpose of the stop is limited and the resulting detention quite brief.'"[25] Accordingly, Elledge's traffic stop of Hackbart — simply because Hackbart had displayed his middle finger to Elledge and another driver — was an adverse action that deprived Hackbart of his Fourth Amendment rights.[26]

Cook v. Bd. of County Comm'rs, 966 F. Supp. 1049, 1052 (D. Kan. 1997) (rejecting argument that display of middle finger toward highway patrol officer constituted fighting words); *see also Corey v. Nassan*, No. 05-114, 2006 WL 2773465, *12 (W.D. Pa. Sept. 25, 2006) ("The weight of federal authority establishes that directing the middle finger at a police officer is protected expression under the First Amendment absent some particularized showing that the gesture in the specific factual context constitutes 'fighting words' or is otherwise illegal.").

[24] *See Anderson v. Davila*, 125 F.3d 148, 163 (3d Cir. 1997) (denying plaintiff "the benefit of initiating litigation without the harassment of otherwise uncalled for surveillance, simply because he filed a potentially vexatious lawsuit against his former employers" was retaliatory action).

[25] *United States v. Delfin-Colina*, 464 F.3d 392, 396 (3d Cir. 2006).

[26] *See, e.g.*, *Duran*, 904 F.2d at 1377-78 (police officer's stop of car for insults he received from passenger, including middle-finger gesture, was retaliatory action); *Nichols*, 110 F. Supp. 2d at 1103, 1110 (police officer's stop of car for driver's display of middle finger to officer was

Elledge's issuance of a citation to Hackbart for displaying his middle finger was also an adverse act.[27] "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."[28] Display of one's middle finger to express frustration, annoyance, disapproval, or disrespect is protected speech.[29] Elledge deprived Hackbart of his right to free expression by citing him for disorderly conduct for displaying his middle finger.

C. Hackbart's Display of His Middle Finger Caused Elledge to Issue Him a Citation for Disorderly Conduct.

There is no doubt that Hackbart's expressive conduct — gesturing with his middle finger — was the motivating factor in Elledge's issuance of a citation to him for disorderly conduct. Indeed, the face of the citation and the crime for which Hackbart was charged demonstrate that it was the *only* factor.[30] Accordingly, Elledge's citation of Hackbart for disorderly conduct solely on the basis of Hackbart's display of his middle finger to Elledge and another driver is illegitimate and unconstitutional regardless of Elledge's motive in issuing the citation. In other words, the issuance of a criminal citation for constitutionally protected speech is retaliation *per se*.[31]

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retaliatory action).

[27] *See, e.g.*, *Nichols*, 110 F. Supp. 2d at 1103, 1110 (police officer's issuance of ticket to driver who gave officer middle finger was retaliatory act).

[28] *City of Houston*, 482 U.S. at 462-63; *accord Campbell*, 332 F.3d at 212.

[29] *See, e.g.*, *Nichols*, 110 F. Supp. 2d at 1110.

[30] *See* Pl. Facts at ¶ 16.

[31] *See Nichols*, 110 F. Supp. 2d at 1101 (granting summary judgment in favor of plaintiff when defendant officer admitted that he "gave him what he deserved, a citation" for disorderly conduct based on plaintiff's middle-finger gesture at officer).

And the fact that Elledge issued Hackbart a citation for disorderly conduct because he "made an obscene gesture towards [Elledge]" and did not issue Hackbart a citation for any traffic violation[32] demonstrates that Elledge's vehicle stop of Hackbart was motivated by Hackbart's display of his middle finger toward Elledge.[33]

In short, the only reason why Elledge conducted a vehicle stop and charged Hackbart with disorderly conduct is that Elledge disliked Hackbart's expressive conduct. But the First Amendment prohibits police officers from issuing a citation to someone just because the officer disagrees with or is offended by what that person says. Hackbart's display of his middle finger was constitutionally protected expression, and Elledge's retaliation against him for that expression violated Hackbart's First Amendment rights.

II. DEFENDANT ELLEDGE VIOLATED PLAINTIFF'S FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEIZURES BY STOPPING PLAINTIFF'S CAR AND DETAINING HIM WITHOUT REASONABLE SUSPICION THAT HE HAD COMMITTED A CRIME.

Elledge's stop of Hackbart's car constituted a "seizure" within the meaning of the Forth Amendment.[34] Thus, the stop was constitutionally permissible only if the Elledge had "a reasonable,

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[32] Pl. Facts at ¶ 16.

[33] *See Anderson*, 125 F.3d at 161 (plaintiff must prove that adverse governmental action was motivated by protected activity to prevail on retaliation claim); *see also McCurdy v. Montgomery County, Ohio*, 240 F.3d 512, 520 (6th Cir 2001) ("adverse state action 'motivated at least in part as a response to the exercise of the plaintiff's constitutional rights' presents an actionable claim of retaliation") (quoting *Bloch v. Ribar*, 156 F.3d 673, 678 (6th Cir. 1998)).

[34] *See Delfin-Colina*, 464 F.3d at 396 ("A traffic stop is a seizure within the meaning of the Fourth Amendment 'even though the purpose of the stop is limited and the resulting detention quite brief.'") (quoting *Delaware v. Prouse*, 440 U.S. 648, 653 (1979)).

articulable suspicion that criminal activity [was] afoot."[35] It is Elledge who has the burden of providing the "'specific, articulable facts' to justify a reasonable suspicion to believe" that Hackbart had violated the law.[36] Elledge cannot meet that burden. The only statute that he has identified as being violated by Hackbart was the section of the disorderly conduct statute prohibiting obscene language and gestures.[37] For the reasons explained above, the middle-finger gesture that Hackbart used is not obscene under the statute.[38] Accordingly, no officer could have reasonably believed that Hackbart's gesture violated the disorderly conduct statute.[39] The absence of any objectively reasonable basis for believing that a crime had been committed by Hackbart rendered the stop illegal under the Fourth Amendment.

III. DEFENDANT CITY OF PITTSBURGH IS LIABLE FOR THE VIOLATION OF PLAINTIFF'S FIRST AND FOURTH AMENDMENT RIGHTS BECAUSE IT HAS A PATTERN, PRACTICE, CUSTOM AND/OR POLICY OF FAILING TO ADEQUATELY TRAIN, SUPERVISE, AND DISCIPLINE OFFICERS TO PREVENT CONSTITUTIONAL VIOLATIONS.

By failing to adequately train, supervise, and discipline police officers who issue disorderly conduct citations in violation of citizens' First Amendment rights, the City of Pittsburgh has evinced

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[35] *Id.*

[36] *Id.* at 397 (quoting *United States v. Valentine*, 232 F.3d 350, 353 (3d Cir. 2000)).

[37] *See* Pl. Facts at ¶ 16.

[38] *See* Section IA, *supra*.

[39] *Delfin-Colina*, 464 F.3d at 399 ("an officer's Fourth Amendment burden of production is to (1) identify the ordinance or statute that he believed had been violated, and (2) provide specific, articulable facts that support an objective determination of whether any officer could have possessed reasonable suspicion of the alleged infraction").

a deliberate indifference to the rights of persons with whom its police officers come into contact.[40] First, the City of Pittsburgh's commanding officers know that police officers will confront situations in which people direct profane language or gestures at the officers or others. Second, there is a substantial history of police officers mishandling such situations by issuing people citations for disorderly conduct for profane language and/or gestures. And third, the issuance of disorderly conduct citations in such situations is highly likely to cause the deprivation of First Amendment free-expression rights.[41]

Commanding officers in the Pittsburgh Police Bureau know that police officers will be presented with situations in which people direct profane language and gestures toward the officers or other people.[42] Indeed, we expect police officers to be trained "to absorb a certain amount of abuse" because of the likelihood that they will be subjected to hostile remarks in the performance of their duties.[43] The Supreme Court has noted that "city policymakers know to a moral certainty

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[40] *See Carter v. City of Philadelphia*, 181 F.3d 339, 357 (3d Cir. 1999).

[41] *See id.* (applying three-part test for determining whether municipality's failure to train or supervise amounts to deliberate indifference in case alleging municipal liability for failure to adequately train police officers regarding perjury); *see also Model Civil Jury Instructions*, U.S. Court of Appeals for the Third Circuit, Chapter 4, p. 42 (January 2008), available at http://www.ca3.uscourts.gov/civiljuryinstructions/Final-Instructions/january2008/Chap_4_2008_revised.pdf.

[42] *Carter*, 181 F.3d at 357 (noting that although some courts have indicated that policymaker's knowledge should be "to a moral certainty," use of that qualifying phrase does nothing more than add emphasis to requirement of "ordinary knowledge").

[43] *Lamar v. Banks*, 684 F.2d 714, 719 (11th Cir. 1982); *see Lewis v. City of New Orleans,* 408 U.S. 913, 913 (1972) (Powell, J., concurring) (explaining that police are trained "to exercise a higher degree of restraint than the average citizen" when they are subjects of hostile remarks).

that their police officers will be required to arrest fleeing felons."[44] And the Third Circuit has held that "city policymakers know to a moral certainty that police officers will be presented with opportunities to commit perjury or proceed against the innocent."[45] Because "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers,"[46] Pittsburgh police officers are no less likely to confront people who hurl epithets at them and express disrespect and disapproval of the officers' actions than they are to arrest a fleeing felon, testify in court, or initiate a criminal prosecution. Accordingly, they must be trained to exercise restraint in such encounters and be subject to discipline when they fail to act within constitutional constraints.

Despite the recognized need to train officers to exercise restraint when confronting people who direct profane language or gestures toward the officers themselves or others, there is a substantial history of police officers mishandling such situations by issuing citations for disorderly conduct to people for engaging in constitutionally protected expression.[47] From March 2005 through October 2007, City of Pittsburgh police officers issued 188 citations under 18 Pa. Cons. Stat. Ann. § 5503(a)(3) for using profane language or making profane gestures.[48] That section of the statute

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[44] *City of Canton v. Harris*, 489 U.S. 378, 390 (1989).

[45] *Carter*, 181 F.3d at 357 (quoting *Walker v. City of New York*, 974 F.2d 293, 299 (2d Cir. 1992)).

[46] *City of Houston*, 482 U.S. at 461.

[47] *See Board of County Comm'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 407-408 (1997) ("the existence of a pattern of tortious conduct by inadequately trained employees may tend to show that the lack of proper training, rather than a one-time negligent administration of the program or factors peculiar to the officer involved in a particular incident, is the 'moving force' behind the plaintiff's injury").

[48] *See* Pl. Facts at ¶ 56.

makes it a crime to use obscene language or make an obscene gesture with intent to cause public inconvenience, annoyance or alarm, or recklessly create a risk thereof.[49] As explained above, the Pennsylvania courts have held that, to be obscene, expression must meet the Supreme Court's *Miller* test.[50] None of the 188 citations that Hackbart has identified involved language or gestures that were "obscene" under the statute.[51] The fact that none of the citations were issued under § 5503(a)(1) (fighting or threatening, or violent or tumultuous behavior) or § 5503(a)(4) (creating hazardous or physically offensive condition) indicates that the persons cited had not used "fighting words," either.[52] Accordingly, all 188 of the citations were issued in retaliation for engaging in constitutionally protected expression. Such a large number of citations issued for First Amendment-protected expression in a twenty-month period demonstrates a pattern of underlying constitutional violations.[53]

Those constitutional violations can be directly linked to the City's failure to adequately train, supervise, and discipline officers who issue disorderly conduct citations in violation of people's First Amendment rights.[54] For example, the City of Pittsburgh Police Bureau has never conducted any supplemental training for its officers on the application of Pennsylvania's disorderly conduct statute

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[49] 18 Pa. Cons. Stat. Ann. § 5503(a)(3).

[50] *See* Section IA, *supra*.

[51] *See* Pl. Facts at ¶ 56.

[52] *Cf. Brockway*, 942 F. Supp. at 1016-17 ("fighting words" prohibited by § 5503(a)(1) and § 5503(a)(4) of disorderly conduct statute, not § 5503(a)(3).

[53] *See Berg v. County of Allegheny*, 219 F.3d 261, 276 (3d Cir.2000).

[54] *See Grazier ex rel. White v. City of Philadelphia*, 328 F.3d 120, 124-25 (3d Cir.2003).

despite an obvious need to do so.[55] Although the City points to a legal update it provided to its officers in 2002 alerting them to the Pennsylvania Superior Court's decision in *Kelly* and advising officers that the phrase "fuck you, asshole" and the gesture of the middle finger are not obscene under the disorderly conduct statute,[56] that one handout does not absolve the City of its obligation to train its police officers to respect citizens' free-expression rights.[57] Defendant Elledge testified that he recalled receiving the update, but could not recall its contents, and his supervisor, Cmdr. Degler, testified that, at the time she learned of Hackbart's Office of Municipal Investigations complaint regarding the citation he was issued by Elledge, she had to review the training materials to determine whether the citation Elledge issued to Hackbart was appropriate or not.[58] The fact that a police commander does not immediately recognize that the middle-finger gesture is not obscene under the disorderly conduct statute — more than five years after a Pennsylvania appellate court issued a ruling about that very issue — indicates that there is an utter failure to train Pittsburgh Police Bureau employees — from commanders on down — that profane language and gestures are constitutionally protected conduct and that citing people who use them for disorderly conduct violates the First Amendment.

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[55] *See* Pl. Facts at ¶¶ 54, 56. The Pittsburgh Police Bureau can administer additional supplemental training, other than that mandated by the state, on an as-needed basis if it determines that its officers do not understand a concept or area of the law or if there is a pattern that officers are not performing their duties in accordance with the law. *See id.* at ¶ 53

[56] *See id.* at ¶ 47.

[57] *See Russo v. City of Cincinnati*, 953 F.2d 1036, 1047 (6th Cir. 1992) (rejecting notion "that a municipality may shield itself from liability for failure to train its police officers in a given area simply by offering a course nominally covering the subject, regardless of how substandard the content and quality of that training is").

[58] *See* Pl. Facts at ¶ 30.

The City of Pittsburgh also fails to discipline officers who issue citations for disorderly conduct for obscene language or gestures in violation of the First Amendment.[59] From March 2005 through October 2007, Pittsburgh police officers issued 188 disorderly conduct citations in violation of the First Amendment rights of the persons to whom they were issued, but not a single officer was disciplined for issuing those citations, even those officers who issued multiple disorderly conduct citations over that two-year period.[60] The reason that no officers were disciplined is clear: Unless the person cited files a complaint with the Office of Municipal Investigations, no supervisor will ever review the citation.[61] And if the person fails to file a complaint with the Office of Municipal Investigation within ninety days of receiving the citation, no officer will be disciplined for issuing it.[62]

The lack of any oversight of summary citations demonstrates the Bureau's failure to supervise the issuance of disorderly conduct citations for obscene language and gestures. If a police officer issues a non-traffic citation without making an arrest, there is no requirement that the citation or the charges contained therein be approved by a supervisor.[63] When a citation is issued, one copy is given to the person cited, three copies are given to the court, and the final copy is turned in to the

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[59] *See Colburn v. Upper Darby Twp.*, 838 F.2d 663 (3d Cir. 1988).

[60] *See* Pl. Facts at ¶¶ 56-58.

[61] *See id.* at ¶¶ 28, 61-62.

[62] *See id.* at ¶ 28.

[63] *See id.* at ¶ 61.

station-house clerk.[64] The clerk then puts the citation into the paperwork bin.[65] Supervisors have an opportunity to review all the paperwork in the bin, so a supervisor *may* review citations issued for disorderly conduct, but is not required to.[66] But because there is no requirement that a supervisor sign off on a citation, unlike arrest reports, there is no way to know whether a supervisor has in fact reviewed a particular citation or not.[67] This haphazard system makes it unlikely that supervisors would recognize a pattern of citations issued in violation of people's First Amendment rights — unless they submitted a request to the Pittsburgh Municipal Court for all of the citations issued by Pittsburgh Police Bureau officers under 18 Pa. Cons. Stat. Ann. § 5503(a)(3), as plaintiff did.[68] Cmdr. Degler, for example, was unaware of any disorderly citations issued to people by the approximately seventy-nine officers in her command for obscene gestures or language even though, excluding the citation issued to Hackbart, fifteen such citations had been issued by officers in her zone (zone four) in the previous two years.[69]

"The continued failure of the city to prevent known constitutional violations by its police force is precisely the type of informal policy or custom that is actionable under section 1983."[70] The City was on notice as early as 2002 that its officers were citing people for disorderly conduct for

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[64] *See id.* at ¶ 60.

[65] *See id.* at ¶ 60.

[66] *See id.* at ¶ 61.

[67] *See id.* at ¶ 61.

[68] *See id.* at ¶¶ 56, 61.

[69] *See id.* at ¶¶ 48, 56

[70] *Depew v. City of St. Mary's, Georgia*, 787 F.2d 1496, 1499 (11th Cir. 1986).

engaging in constitutionally protected expression.[71] And the high number of disorderly conduct citations issued in retaliation for protected speech in the past two years demonstrates that "the police, in exercising their discretion, [have] so often violate[d] constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are 'deliberately indifferent' to the need."[72] The sheer number of disorderly conduct citations issued in violation of people's constitutional rights also demonstrates that the single "legal update" handout about the meaning of obscenity in the disorderly conduct statute that officers were provided in 2002 was not sufficient to educate officers about the free-expression rights of those with whom they come into contact. And the lack of disciplinary action against officers who issue disorderly conduct citations in retaliation for protected expression simply serves to reinforce the inadequate training they receive and allows officers to retaliate against people who use language or gestures that the officer finds offensive with impunity. Adequate training, discipline, and supervision of officers regarding the appropriate issuance of disorderly conduct citations under § 5503(a)(3) would ensure that officers do not initiate criminal prosecutions of people who engage in protected speech and would most likely have prevented the deprivation of First and Fourth Amendment rights complained of in this case.[73]

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[71] *See* Pl. Facts at ¶ 59. This court held a jury trial in 2002 in a civil-rights case filed by a man who claimed he was, among other things, cited by a City of Pittsburgh police officer for disorderly conduct in violation of his First Amendment free-speech rights. *Id.*

[72] *City of Canton*, 489 U.S. at 390.

[73] *See Jiminez v. All American Rathskeller*, 503 F.3d 247, 249 (3d Cir. 2007) ("There must be a direct causal link between a municipal policy or custom and the alleged constitutional deprivation to ground municipal liability.").

Finally, officers who issue disorderly conduct citations for using profane or offensive language and gestures deprive those cited of their right to engage in constitutionally protected expression and create a chilling effect on speech.[74] The people who are detained by the police and issued criminal citations as a result of their expression suffer a constitutional deprivation, and they — and their family, friends, and neighbors who learn about the citation — will be chilled from engaging in such expression in the future.[75] Whatever one may think of the expression for which those charged with disorderly conduct were cited, "'the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.'"[76] The Supreme Court has cautioned that "[w]e cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, * * * fundamental societal values are truly implicated" when such speech is censored.[77] Given the large number of disorderly conduct citations that Pittsburgh police officers have issued for constitutionally protected speech, it is so obvious that failing to train, supervise, and discipline officers regarding the constitutional limits on

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[74] *See Carter*, 181 F.3d at 357.

[75] *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) (government officials violate First Amendment when their acts "would chill or silence a person of ordinary firmness from future First Amendment activities"); *accord Pilchesky v. Miller*, No. 3:CV-05-2074, 2006 WL 2884445, *8 (M.D. Pa. Oct. 10, 2006).

[76] *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988) (quoting *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978)).

[77] *Cohen*, 403 U.S. at 25.

their power to issue citations for protected speech will result in additional constitutional violations that the City's failure to respond amounts to deliberate indifference.[78]

CONCLUSION

For the foregoing reasons, plaintiff requests that an Order be entered granting Plaintiff's Motion for Summary Judgment.

[78] *See Bd. of County Comm'rs of Bryan County, Okl.*, 520 U.S. at 409-10 ("The likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle the situation will violate citizens' rights could justify a finding that policymakers' decision not to train the officer reflected 'deliberate indifference' to the obvious consequences."); *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 216 (3d Cir. 2001) (plaintiff "must present evidence that the need for more or different training was so obvious and so likely to lead to the violation of constitutional rights that the policymaker's failure to respond amounts to deliberate indifference").

Respectfully submitted,

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