

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

Alexander Gray)
)
 Plaintiff,)
)
 vs.) No. 2023-cv-1931
)
 City of Evanston, Evanston Police Officers)
 Kubiak, Kane, Popp, Rosenbaum, and)
 Pogorzelski,)
)
 Defendants.)

**DEFENDANTS ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S FIRST
AMENDED COMPLAINT**

Defendants, City of Evanston, Evanston Police Officers Kubiak, Kane, Popp, Rosenbaum, and Pogorzelski (collectively “Defendants”) by and through their attorney NICHOLAS E. CUMMINGS, Corporation Counsel, and through Alexandra Ruggie, Deputy City Attorney, submits the foregoing Answer and Affirmative Defenses to Plaintiff’s Amended Complaint at Law, hereby state as follows:

1. This is a civil action arising under 42 U.S.C. § 1983. The jurisdiction of this Court is conferred by 28 U.S.C § 1343.

ANSWER: The Defendants admit that jurisdiction is proper as alleged in paragraph 1.

2. Plaintiff Alexander Gray is a middle-aged, law-abiding resident of the Northern District of Illinois.

ANSWER: The Defendants lack sufficient information or knowledge upon which to form a belief as to the truth of the allegations contained in paragraph 2.

3. Defendant City of Evanston is an Illinois municipal corporation.

ANSWER: The Defendants admit the allegations contained in paragraph 3.

4. Defendants Kubiak, Kane, Popp, Rosenbaum, and Pogorzelski were at all relevant times acting under color of their authority as police officers of the City of Evanston.

ANSWER: **The Defendants admit the allegations contained in paragraph 4.**

5. On March 31, 2021, the Evanston police department informed its police officers by electronic means that an anonymous caller had reported “a white male, approximately 5 feet tall to 6 feet tall, in a dark coat and jeans” carrying a handgun north of the beach at 501 Sheridan Square in the City of Evanston.

ANSWER: **The Defendants admit the allegations contained in paragraph 5.**

6. Defendants Kubiak, Kane, Popp, Rosenbaum, Pogorzelski and other Evanston police officers responded to the report of the white male, approximately 5 feet tall to 6 feet tall, in a dark coat and jeans.

ANSWER: **The Defendants admit the allegations contained in paragraph 6.**

7. Defendant Kubiak was the first officer to arrive at the scene.

ANSWER: **The Defendants admit the allegations contained in Paragraph 7.**

8. Kubiak saw plaintiff, who is a non-white male, standing about 200 feet north of the beach at 501 Sheridan Square in the City of Evanston.

ANSWER: **Defendants lack sufficient information and knowledge to form a belief as to the truth of the allegations contained in paragraph 8.**

9. Kubiak did not see plaintiff violating any law or ordinance.

ANSWER: **Defendants lack sufficient information or knowledge upon which to form a belief as to the truth of the allegations contained in Paragraph 9.**

10. Kubiak unholstered his firearm and pointed it at plaintiff in the manner shown below:

ANSWER: **Defendants admit the allegations contained in Paragraph 10.**

11. As Kubiak pointed his firearm at plaintiff, he ordered plaintiff to “Put your hands up. Get on the ground.” Plaintiff protested that he lived in the area; in response to Kubiak’s question of “What do you have in your hands?” Plaintiff showed his empty hands to Kubiak as shown below:

ANSWER: Defendants deny the allegations contained in Paragraph 11.

12. Kubiak continued to point his firearm as he approached plaintiff and repeated his order to, “Get on the ground.”

ANSWER: Defendants deny allegations contained in Paragraph 12.

13. Plaintiff was then in fear of his life.

ANSWER: Defendants lack sufficient information or knowledge to form a belief as to the truth of the allegations contained in paragraph 13.

14. Kubiak continued to point his firearm at plaintiff as plaintiff complied with Kubiak’s orders to get on the ground.

ANSWER: Defendants admit the allegations contained in paragraph 14.

15. Kubiak then stated, “Do what we tell you to do and you won’t get hurt” and ordered plaintiff to spread his hands “like Superman.”

ANSWER: Defendants admit the statement “Do what we tell you to do and you won’t get hurt” was made, but lack sufficient knowledge or information to form a belief as to the truth of the allegation that Kubiak made the statement.

16. Defendant Kubiak deprived plaintiff of rights secured by the Fourth Amendment in pointing his firearm at plaintiff in ordering plaintiff to get on the ground.

ANSWER: Defendants deny the allegations contained in paragraph 16.

17. Defendant Kane, who joined Kubiak, unholstered his firearm, and pointed it at plaintiff.

ANSWER: Defendants admit the allegations contained in paragraph 17.

18. Defendant Kane deprived plaintiff of rights secured by the Fourth Amendment in pointing his firearm at plaintiff.

ANSWER: Defendants deny the allegations contained in paragraph 18.

19. Other Evanston police officers, including defendant Popp, Rosenbaum, and Pogorzelski arrived at the scene, unholstered their firearms, and pointed their weapons at plaintiff.

ANSWER: Defendants admit that other Evanston police officers including Defendants Popp, Rosenbaum and Pogorselzki arrived at the scene and unholstered their firearms. Defendants deny that they pointed their weapons at plaintiff.

20. Two Evanston police officers, whose names are presently not known to plaintiff, then handcuffed and searched plaintiff while he remained on the ground and while defendant Rosenbaum point his assault rifle at plaintiff at point-blank range.

ANSWER: Defendants admit that two Evanston Police Officers handcuffed Plaintiff and conducted a search. Defendants deny that Defendant Rosenbaum pointed his assault rifle at plaintiff at point-blank range.

21. Defendant Rosenbaum did not have any lawful basis to point his assault rifle at plaintiff and thereby deprived plaintiff of right secured by the Fourth Amendment.

ANSWER: Defendants deny the allegations contained in paragraph 21.

22. The officers who handcuffed and searched plaintiff are depicted in the following image:

ANSWER: Defendants admit the allegations contained in paragraph 22.

23. The two Evanston police officers are depicted above who searched plaintiff did not have lawful basis to conduct that search and thereby deprived plaintiff of rights secured by the Fourth Amendment.

ANSWER: Defendants deny the allegations contained in paragraph 23.

24. All of the officers at the scene (aside from the defendant Rosenbaum) failed to intervene to stop Rosenbaum from pointing his assault rifle at plaintiff.

ANSWER: Defendants deny the allegations contained in paragraph 24.

25. All of the officers at the scene (aside from the two officers depicted above) failed to intervene to stop the two above depicted Evanston police officers from conducting an unreasonable and unconstitutional search.

ANSWER: Defendants deny the allegations contained in paragraph 25.

26. At all relevant times, an express policy of the City of Evanston authorized its police to point loaded firearms, including assault rifles, at a person without reasonable suspicion that the person was involved in criminal activity or that deadly force was reasonable. This policy was a moving force of the unconstitutional conduct described above.

ANSWER: Defendants deny the allegations contained in paragraph 26.

27. At all relevant times, the City of Evanston has failed to instruct and train its police officers that an uncorroborated anonymous tip that a person is carrying a firearm does not permit a police officer to point a firearm at a person, order that person to lay on the ground, and order that person to comply with the police orders under penalty of death while officers searched that person. This failure to train was moving force of the unconstitutional conduct as described above.

ANSWER: Defendants deny the allegations contained in paragraph 27.

28. As a result of the foregoing, plaintiff was deprived of rights secured by the Fourth and Fourteenth Amendments and incurred physical and other injuries.

ANSWER: Defendants deny the allegations contained in paragraph 28.

29. Plaintiff hereby demands trial by jury.

ANSWER: Defendants admit that Plaintiff is demanding a trial by jury.

AFFIRMATIVE DEFENSES

Defendants, City of Evanston (“City”), and Evanston Police Officers Kubiak, Kane, Popp, Rosenbaum and Pogorzelski (collectively “Defendants”), by and through their attorney, NICHOLAS E. CUMMINGS, Corporation Counsel, and through Alexander Ruggie, Deputy City Attorney assert the following affirmative defenses:

1. Defendants Kubiak, Kane, Popp, Rosenbaum and Pogorzelski, conduct was at all times objectively reasonable and did not violate any of Plaintiff’s clearly established Constitutional rights. Accordingly, Defendants Kubiak, Kane, Popp, Rosenbaum and Pogorzelski are entitled to qualified immunity.
2. Officers Kubiak, Kane, Popp, Rosenbaum and Pogorzelski cannot be held liable for Plaintiff’s 42 U.S.C. § 1983 claims unless he or she individually caused or participated in an alleged constitutional deprivation because individual liability for damages under 42 U.S.C. § 1983 is predicated upon personal responsibility. See *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 869 (7th Cir. 1983).
3. Plaintiff cannot recover punitive damages for claims against Defendants in their official capacity. See *Holly v. City of Naperville*, 571 F. Supp. 668 (N.D. Ill. 1983).
4. The City is not liable to Plaintiff for any federal claim for which its employees or agents are not liable to Plaintiff. See *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986).
5. Under the Tort Immunity Act, the City is not required to pay punitive or exemplary damages in any action brought directly or indirectly against an employee by the injured party or a third party. 745 ILCS 10/2-102.
6. To the extent Plaintiff failed to mitigate any of his claimed injuries or damages, any verdict or judgment obtained by Plaintiff must be reduced by application of the principle that Plaintiff has a duty to mitigate, commensurate with the degree of failure to mitigate attributed to Plaintiff by the jury in this case.

JURY DEMAND

Defendants, City of Evanston, Kubiak, Kane, Popp, Rosenbaum and Pogorzelski, hereby demand a jury trial for all issues so triable.

Dated: May 25, 2023

NICHOLAS E. CUMMINGS
Corporation Counsel
City of Evanston

By: /s/ Alexandra Ruggie
Deputy City Attorney

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