

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

KENT MAYNARD, JR,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 24-cv-3612
	)	
THE CITY OF CHICAGO, a municipal	)	District Judge Elaine E. Bucklo
corporation; the CHICAGO POLICE	)	
DEPARTMENT, as AGENT of the City of	)	Magistrate Judge Young B. Kim
Chicago; and Chicago Police Officer CARMEN	)	
MOSTEK (Star 8664);	)	
Defendants.	)	Jury Trial Demanded
	)	

**RESPONSE IN OPPOSITION TO THE
CITY’S MOTION FOR SUMMARY JUDGMENT**

Plaintiff Kent Maynard, Jr., by and through his attorney, James D. Benak Attorney LLC, hereby responds in opposition to the Motion for Summary Judgment (“Motion”) on scope of employment filed by Defendant City of Chicago (“the City”):

INTRODUCTION

The City seeks to avoid vicarious responsibility for Defendant Chicago Police Department (“CPD”) Officer Carmen Mostek’s (“Mostek’s”) conduct by portraying the nearly-fatal shooting of Plaintiff (sometimes referred to herein as “Maynard”) and the fatal shooting of Maynard’s companion dog (“Aggie”) as a purely “personal” act divorced from her role as a sworn CPD peace officer. However, the existing record—including CPD’s Tactical Response Report, COPA’s investigation, Mostek’s own statements and deposition testimony, and undisputed facts about badge-wearing and CPD-authorized weapons—creates, at minimum, genuine disputes on each prong of the applicable three-prong Restatement (Second) scope of employment test. This Court

has already held that the Complaint adequately alleged scope. Discovery since then has only confirmed the appropriateness of that holding. Summary judgment is therefore improper.

More specifically, this Court has already once rejected, in response to a motion to dismiss, the City's contention that in the Incident, Mostek acted outside the scope of her employment. *See* Doc. # 49, November 4, 2024 Memorandum Opinion and Order. There, the Court noted that the CPD officially classified the shooting as "Destruction of Animal *by Police*" (emphasis supplied), and memorialized the Incident in a Tactical Response Report ("TRR"), a pre-printed form designed to report use of force by CPD officers acting in their official capacity. Also, Mostek's consistent and repeated references to being an "off-duty [police officer]" at all times immediately after the Incident and thereafter seem consistent with a belief that she was acting in her official capacity during the Incident.

The Court found that, taken together, the foregoing facts plausibly showed that Mostek's actions in the Incident were of the type she was employed to perform, and were at least partly motivated by a desire to serve the City, and were not outside the temporal and geographic bounds of her office, making dismissal of Maynard's respondeat superior and indemnification claims inappropriate at the pleading stage. Thereafter, discovery commenced, and Mostek testified in her deposition, under oath, to the foregoing and additional facts supporting that same conclusion. *See* Plaintiff's Response To Defendant City Of Chicago's Statement Of Undisputed Material Facts (Plaintiff's Additional Facts Section) ("SOAF") at ¶ 16. Moreover, Maynard deposed multiple members of the CPD on issues related to scope of employment, and the City fails to cite a single statement from those depositions that supports the contention that Mostek was outside the scope of her employment during the Incident. That is because not one CPD deponent testified that Mostek was outside the scope of her employment during the Incident.

Not surprisingly, the City admits in its discovery responses, as it must, that it has no new facts to support the instant motion, which asks this Court to rule summarily, as a matter of undisputed fact, that Mostek was not within the scope of her employment during the Incident. SOAF ¶ 36. While this admission might seem to suggest that the City intends to rely on expert testimony, the City does not offer any expert testimony in support of its Motion. The City does not even recite testimony from its own FRCP Rule 30(b)(6) witnesses to support the Motion. In any event, to the extent that such 30(b)(6) deposition testimony does not entirely *preclude* the notion that Mostek was outside the scope of her employment, it raises factual issues about whether Mostek was acting within the scope of her employment in the Incident.

LEGAL STANDARD

Summary judgment is proper only when “there is no genuine dispute as to any material fact.” Fed. R. Civ. P. 56(a). The Court must view the evidence in the light most favorable to the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Credibility determinations, motive, and the reasonableness of inferences are jury questions. *See Tolan v. Cotton*, 572 U.S. 650, 657 (2014).

ARGUMENT

I. A Reasonable Jury Could Find That Officer Mostek Acted Within the Scope of Her Employment.

Illinois applies the conjunctive three-prong test of Restatement (Second) § 228 (hereinafter “Section 228”) to determine scope of employment. Conduct within the scope of employment is: (1) of the kind the agent was employed to perform, (2) substantially within time and space authorized, and (3) motivated, at least in part, to serve the employer. See *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 163-65 (adopting Restatement (Second) of Agency § 228 (1958)); *Elston v. Cnty. of Kane*, 948 F.3d 884, 887, 889-92 (7th Cir. 2020) (discussing scope of authority in

context of statutory indemnity, 745 ILCS 10/9-102); Restatement (Second) of Agency § 228 (1958). The City¹ denies that the record of the Incident satisfies any of the three Section 228 elements. Maynard disagrees and submits that material facts of record at the very least raise a dispute as to whether Mostek acted within the scope of her employment.

A. Nature of the Conduct.

This Court may take judicial notice that the City's official job description of "police officer" in force as of April 21, 2024, was the Department of Human Resources class specification, "CLASS TITLE: POLICE OFFICER (Job Code 9161)," revised in October 2023 and published on the City's official "Police Job Specifications" website.² That job description states that a police officer, as defined, "works for the benefit of citizens by protecting life and property from harm and maintains order," and "accomplishes the mission through his or her presence and the use of enforcement of Federal, State, and Municipal laws as necessary." As such, the police officer has various "essential duties," including, without limitation: "[r]espond[ing] to incidents either assigned or observed as required;" "[g]ather[ing] relevant information at an incident to conduct a preliminary investigation;" "[p]rotect[ing] citizens from life threatening situations by the use of movement or protective cover," and "[c]omply[ing] with Department rules, regulations, and

¹ In point of fact, it is not "the City" *qua* CPD that denies Mostek was acting within the scope of her employment. The only City department that has raised concerns about the scope of employment is the Law Department, without support from Mostek or any other quarter. After the Law Department invoked scope and threatened not to defend Mostek unless she contributed to a settlement of this lawsuit, Mostek filed an FOP grievance. See SOAF ¶ 25, 26.

² It is appropriate for the Court to take judicial notice of CPD publications and manuals. "Courts may take judicial notice of any fact that is 'not subject to reasonable dispute in that it is either: (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.' FED. R. EVID. 201(b)." *Driebel v. City of Milwaukee*, 298 F.3d 622 at fn 2 (7th Cir. 2002). See: Exhibit 1 attached hereto and https://www.chicago.gov/content/dam/city/depts/dhr/supp_info/JobSpecifications/Police/9161%20POLICE%20OFFICER%20October%202023.pdf.

policies and all Federal, State, and Municipal laws that govern the activities of Police Officers.”³ Also, included among the City’s fact statement exhibits is CPD Special Order S04-12, styled, “Incident Involving Animals.” Section II. B. of that Order states “Department members will respond to animal bite incidents, situations where the immediate safety and well-being of a person is threatened by an animal, and reports of animal abuse, animal torture, or animal fighting.” *See* SOAF at ¶ 44.

The City cannot dispute that the record (especially the COPA interview of Mostek, the TRR, and her deposition) could, *if believed*, support a jury finding that Mostek responded to an animal bite incident to protect life and property from harm and maintain order; purported to report to Sgt. Butler and others relevant information she gathered at the Incident to facilitate a preliminary investigation and a Tactical Response Report (“TRR”); was attempting to protect at least one citizen from a life-threatening situation by the use of movement or protective cover; and acted in compliance with Department rules, regulations, and policies and all Federal, State, and Municipal laws governing the activities of Police Officers. Nor can the City dispute that Mostek, if believed, responded to a person threatened by an animal or animal fighting by discharging a firearm, or that CPD officers are trained and employed to respond to dangerous situations, including animal encounters, firearm discharges, and threats to public safety. SOAF ¶ 38. Police-dog encounters are at the essential core of police employment, not private conduct. Furthermore, the Civilian Office of Police Accountability has necessarily investigated Mostek’s conduct as *police* conduct, within

³ The publicly posted CPD Annual Use of Force Report for 2024 states that “[e]ach TRR has its unique identifier . . . and . . . represents the interaction between a single department member and another person (*or in some cases, a dog or other animal*).” (Emphasis supplied.) *See*: https://www.chicagopolice.org/wp-content/uploads/UseOfForce_finalforpublication30July25b.pdf.

the scope of her employment as a police officer, because COPA has no jurisdiction over non-police officers. SOAF ¶ 37.

Based on the foregoing record evidence, a reasonable jury could readily find that Mostek's weapons discharge, ostensibly to stop a dog attack endangering one dog (Buddy) and at least two human beings (Mostek and Maynard), was the sort of conduct that the City employed Mostek to perform. Indeed, COPA not only concluded that Mostek was acting within the scope of her authority but also substantially supported Maynard's allegations of excessive force.⁴

The City argues that Mostek's use of her off-duty firearm -- as opposed to her on-duty firearm -- to kill Aggie (and almost kill Maynard) indicates she was acting as a civilian and not as a police officer during the Incident. This argument is meritless. While CPD officers are entitled to own and conceal-carry an "off-duty [firearm]" other than and in addition to their service weapon, that personal firearm must be on a list approved by, and registered with, the Superintendent of Police. In addition, the owner of the off-duty weapon is subject to annual firearm qualification requirements to develop, maintain, and demonstrate proficiency in the registered firearm's use, as with a service weapon. Mostek was aware of these requirements, and her firearm was registered with the Superintendent. SOAF ¶¶ 5-7⁵.

⁴ "[W]itness statements and available video evidence confirm that Maynard was holding his dog, placing him in extreme proximity to the animal when Officer Mostek discharged her weapon. Firing under these circumstances posed a risk to Maynard's well-being. This action raises concerns about Officer Mostek's ability to make sound, risk-averse decisions concerning the use of deadly force as a last resort. Her decision-making in situations involving force could potentially endanger herself, members of the public, and other CPD officers by exposing them to unnecessary risks and harm." SOAF ¶ 35.

⁵ Defendant City asserts that the pistol Mostek carried was not an "authorized" CPD pistol. See Memo at 12 ("Mostek was not carrying a weapon that was authorized by CPD"). That statement is patently false. Defendant's own FRCP 30(b)(6) witnesses testified that off-duty officers are allowed to carry only pistols registered with the Superintendent of Police, and they are authorized to carry a registered weapon off duty *only* because they are CPD officers. SOAF ¶¶ 1-7. Mostek's Sig Sauer P365 semiautomatic pistol was registered and therefore authorized by the Superintendent of Police. It was that authorization that gave her the right to carry it. The Department does not "qualify" weapons, but rather approves them. See, *id.*, SOAF ¶¶ 5-7.

City's FRCP 30(b)(6) witnesses testified uniformly that an officer is authorized to conceal-carry a pistol off duty only if that pistol is registered with the Superintendent of Police. SOAF ¶¶ 1-7. Mostek did not have a civilian concealed carry permit—as would be required of a civilian—and was allowed to conceal-carry her personal firearm off-duty *only* because she was authorized to do so as a CPD police officer.

A police officer is not required to carry a pistol while off-duty. But if she chooses to carry a pistol off-duty, she is required to adhere to all the attendant weapons-related regulations of the CPD -- just as if she were on duty and carrying her service weapon. SOAF ¶ 9. As such, when Mostek holstered her SIG pistol on the morning of the Incident, she stepped into the scope of her employment as a police officer. And, if she is to be believed, when Mostek unholstered and fired her weapon, she was benefiting citizens by protecting life and property from harm and maintaining order. As such, a reasonable jury could find that Mostek was trying to fulfil some of her various “essential duties,” including, without limitation: “[r]espond[ing] to incidents either assigned or observed as required” and “[p]rotect[ing] citizens from life threatening situations by the use of movement or protective cover,” while complying with Department rules, regulations, and policies and all Federal, State, and Municipal laws that govern the activities of Police Officers. SOAF ¶ 8.

Moreover, there is no dispute that Mostek was wearing her badge at the time of the Incident or that she made a point of lifting her jacket to show it, directly adjacent to her SIG pistol, to CPD officers who responded to the scene:

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SOAF ¶ 29 (still image from BWC of Officer Cortez, timestamp 11:39, or less than ten minutes after the Incident).

Curiously, the City makes much of the fact that Mostek didn't *show* her badge to Maynard before shooting his dog. This argument fails for multiple reasons. First, Maynard was Mostek's neighbor, only superficially acquainted with her, but acquainted well enough to know Mostek was a police officer. SOAF ¶ 30. Second, to suggest that this Court should characterize Mostek as a civilian because she failed to show her badge in the three seconds before she discharged her gun, as she was responding to the perceived emergency, is unreasonable. To have done so was not just

needless but also potentially dangerous. This Court should reject the notion that Mostek was outside the scope of her employment because she did not unholster a loaded pistol with one hand while flashing her badge with the other, while trying to respond to an emergency she had already decided—rightly or wrongly—was a grave threat to public safety.

Applicable law precludes the City’s arguments. Illinois law does not talismanically require a uniform or service weapon to establish scope of employment. *Powell v. City of Chicago*, 2021 IL App (1st) 192145, ¶¶ 16–17 (reciting § 228 and noting courts *consider all the surrounding circumstances*, citing *Bagent*, 224 Ill. 2d at 165). Speaking on color of law, but instructive by analogy here, at least one court in this District has found that “the accouterments of state authority, such as the police uniform, patrol car, badge, or gun, are not dispositive. Instead, the essential inquiry is whether the police officer’s actions related in some way to the performance of a police duty.” *Coles v. The City of Chicago*, 361 F.Supp.2d 740, 748-49 (N.D. Ill. 2005) (citations omitted).

Furthermore, Mostek *was* wearing her badge at the time, albeit obscured by her jacket. Whether she was on the clock or off the clock, on a day off or a regular work day, a reasonable jury could find that she was acting within the scope of her employment as a CPD police officer. All off-duty police officers—even those not carrying their badge and gun—are required to respond to police emergencies. While the presence of a badge and gun would buttress a finding that Mostek was acting within the scope of her employment at the time she shot Aggie and almost shot Maynard, it is not essential. At the very least, they point to the existence of a bona fide factual dispute as to the nature of her conduct on April 21, 2024, at 11:30 AM.

B. Time and Space Limits.

The incident occurred within the City limits, within Mostek's jurisdiction as a CPD officer. The Incident occurred at 11:30 AM. At that time, Mostek was between a shift that had ended earlier that day at 3:30 AM and another shift that would begin later that day at 7:00 PM. Mostek was scheduled to work 8.5 hours on what the City says is a "regular day off." Even if this were not the case, courts have held that even off-duty officers may act within the "space and time" of their employment when engaging in law enforcement functions within their jurisdiction. *See Karas v. Snell*, 11 Ill.2d 233, 238-39 (1957). Unlike cases cited by the City where officers were outside the geographic scope of their jurisdiction or engaged in wholly private disputes, the shooting here occurred on a public street within the City.

The City claims that because Mostek was off-duty, walking her own dog at the time of the Incident, she was acting as a civilian and not as a police officer when she shot Aggie. In order to distance itself from the Incident, the City suggests that on April 21, 2024, Mostek was "on a regular day off and not on duty." Citing UMF ¶¶ 8-9. However, as stated, *supra*, the cited record evidence shows that on April 21, 2024, Mostek had finished a shift at 3:30 AM and was scheduled to report for her next shift at 7:00 PM that same day. To be sure, Mostek was not required to be in uniform or physically at her duty post between 3:30 AM and 7:00 PM on April 21, 2024, but she was otherwise in uniform and at her post for 8.5 hours on the day in question. The Incident occurred at 11:30 AM, 8.5 hours into the 14.5-hour period between shifts on that day. As such, April 21, 2024, was not a day Mostek had "off."

Significantly, all of the City's FRCP 30(b)(6) deponents testified that the Rules and Regulations of the Chicago Police Department require that off-duty police officers respond to emergencies just as they would if on duty (SOAF ¶ 10), and that an officer's subjective belief that she is responding to an emergency within the scope of her obligations as a peace officer is a factor

in determining whether she was acting within the scope of her employment as a police officer. SOAF ¶ 18. *See also Coles*, 361 F. Supp. 2d 740, 748, *cited infra* (“the question whether a police officer acted under color of state law is not answered by whether the officer was on or off duty at the time”).

C. Motive at Least in Part to Serve the Employer.

In *Bagent v. Blessing Care Corporation*, 224 Ill. 2d 154 (2007), the Illinois Supreme Court considered whether a litigant had satisfied the third (“motive”) prong of the Section 228 test. As a threshold matter, the *Bagent* Court stated:

It is well settled that summary judgment “is generally inappropriate when scope of employment is at issue. [Citations.] Only if no reasonable person could conclude from the evidence that an employee was acting within the course of employment should a court hold as a matter of law that the employee was not so acting.” *Pyne [v. Witmer]*, 129 Ill. 2d 351, 359 [(1989)]; accord Restatement (Second) of Agency §228, Comment d, at 505 (1958) (“The question whether or not the act done is so different from the act authorized that it is not within the scope of the employment is decided by the court if the answer is clearly indicated; otherwise, it is decided by the jury”).

Bagent, 224 Ill. 2d at 165-66; Restatement (Second) of Agency §228, Comment d, at 505 (1958).

This reasoning applies with equal force here. In any event, *Bagent* also found that determining scope under Section 228 required examining Section 235 of the Restatement, and that:

Section 235 explains that, rather than “the needs and requirements of the employer” [cites omitted], it is the state of mind of the employee that is material. See, e.g., 1 J. Lee & B. Lindahl, *Modern Tort Law* § 7:7, at 7-12 (2d ed.2002) [cites omitted] However, it is only from the manifestations of the employee and the surrounding circumstances that, ordinarily, the employee's intent can be determined. Restatement (Second) of Agency § 235, Comment a, at 520-21 (1958).

Bagent, 224 Ill. 2d at 170; Restatement (Second) of Agency §235 cmt. a (1958). Here, if it lent credence to Mostek’s manifestations about the Incident and the surrounding circumstances of the Incident (including her official statements in the TRR, to COPA, and in her sworn deposition in

the instant litigation), a jury could find Mostek's state of mind was to prevent injury to herself or Maynard and preserve public order, thereby "work[ing] for the benefit of citizens by protecting life and property from harm and maintain[ing] order." Code 9161. That Mostek did not explicitly announce herself as an officer to a neighbor who already knew she was a cop is not dispositive of her state of mind.

As discussed above, off-duty police officers are required to respond to emergencies when they are off-duty. SOAF ¶ 10. They are specifically required to respond to emergencies involving animals. SOAF ¶ 44. Whether or not a police officer should respond to an emergency is part of her training as a police officer. SOAF ¶ 12. Responding to an emergency with deadly force as an off-duty officer would be subject to the same training as an on-duty officer. SOAF ¶ 13. Mostek believed at the time that, as an off-duty officer, she had an obligation to call 911 or engage to stop the crime, SOAF ¶ 14, and believed she was protecting the public safety, SOAF ¶ 15, and her own safety, SOAF ¶ 16, when she shot Aggie. An officer's subjective understanding and intent are relevant to understanding her conduct. SOAF ¶ 17.

Whether Mostek acted solely in furtherance of a personal interest, or with a mixed motive, is a fact question for the jury. Summary judgment based on baseless speculation (speculation that contradicts Mostek's sworn testimony) that her motive was purely personal is therefore improper.

II. The City's Argument that It Has No Liability if It Has No Liability is Not Just a Tautology, but Ignores the Record on Mostek's Motion for Summary Judgment, and Its Own Potential Liability

The City's first argument is that if Mostek is not liable for the Incident, then the City has no derivative, *respondeat superior* liability for the Incident. Curiously, this "if my grandmother were a bicycle" argument seems to be based on a tautological assumption of its own validity. Take away that tautology, however, and the argument fails. Whether Mostek is liable for an

unconstitutional seizure and use of excessive force in the Incident and for her post-incident conduct, including witness intimidation and defamation, are matters for a jury to decide. If the jury decides, based on all the facts, that Mostek is responsible for police misconduct, then the City is liable derivatively.

More to the point, however, the City's argument highlights the conflict between its own police officer, Carmen Mostek, and its own CPD, on the one hand, and the City, on the other. Having argued that Mostek is incorrect—actually, not just incorrect, but intentionally mendacious—in her assertion that she was serving the City during the Incident, and having argued further that the CPD and its officers were no more than thoughtless scribes or worse when they reported Mostek's actions as police actions, the City is forced to argue here that the obvious conflict between Mostek and the City doesn't matter, because this Court, will, of course, grant summary judgment in Mostek's favor, thereby mooting the disparity in positions.⁶

CONCLUSION

The record evidence developed in discovery in this case demonstrates, at the very least, that there is an issue of fact whether Defendant Mostek was acting within the scope of her employment as a CPD police officer at the time of the Incident. The record generated after this Court denied the City's motion to dismiss is voluminous and precludes any judgment that Defendant Mostek was acting solely in her individual capacity as a civilian when she used a CPD-authorized gun while wearing a CPD badge to kill Maynard's dog and nearly kill Maynard himself in what she believed—rightly or wrongly—was a police emergency.

⁶ One would expect the City's lawyer representing Carmen Mostek to file a full-throated rebuttal of the City's assertion that Mostek was not acting as a CPD officer, since without the indemnity provided by the City, Carmen Mostek has no protection from a potentially significant verdict against her. At the time of writing this response, however, Plaintiff is aware of no such argument having been made.

For all of the reasons cited above, Plaintiff submits that the City's Motion for Summary judgment should be denied.

Dated: October 6, 2025

Respectfully,

Kent Maynard, Jr.

By: /s/ James D. Benak

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