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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

HEADWATERS FOREST DEFENSE, et al.

Plaintiffs,

vs.

COUNTY OF HUMBOLDT, et al.,

Defendants.

No. C-97-3989-SI

PLAINTIFFS' MOTIONS IN LIMINE

Date: March 29, 2005
Time: 3:30 p.m.
Judge ILLSTON
Trial Date: April 11, 2005

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INTRODUCTION

Plaintiffs renew their previous motion, GRANTED by the court in the previous trial, to exclude:

1. Mention or reference to the Earth First! "Direct Action Manual", first acquired by the defendants after the events in question (Ex. A);

2. Playing of the videotape of the October 6, 1999 "Art and Revolution" demonstration in Eureka (Ex. M);

3. Any enlarged photograph of "hooded figure" taken at the Riggs event (Ex. O-3);

4. Any admission of the "fur protest videotape" (Exhibit H);

5. Any admission of various videotapes and photographs of disparate protests pre-dating the three protests at issue (Exhibits I, J, K, L, M, P, Q, R, GG, and anything in N, O, U, V, W, FF, NN, OO that violates this order);

Addressing new issues, Plaintiffs move to bar the following evidence at trial, based on both relevance and FRE 403, as it sheds no light on the "objective reasonableness" of the officers' decision to deploy pepper spray at the time of the events in question:

6. The testimony of Rhonda Pellegrini, the secretary at the office of Congressman Frank Riggs, on the "danger" posed by the protesters;

7. The testimony of David Dubay, the director of research for Defense Technologies, who previously offered non-expert testimony on the use of pepper spray;

8. The testimony of Marvin Kirkpatrick or any defense witness regarding the after-the-fact, new, 1998 POST standards on the use of pepper spray.

RELEVANT LEGAL AUTHORITIES

Plaintiffs ask the court to apply the "objective reasonableness" test to the evidence presented by the Defendants. On the three days in question, what did the Defendants rely on in

deciding to use pepper spray? That question should be the center of the inquiry.

In *Graham v. Connor*, 490 U.S. 397 (1989), the court ruled that excessive force claims arising out of arrests are properly analyzed under the Fourth Amendment's objective reasonableness standard. The court stated that reasonableness is to be determined by the "facts and circumstances of each particular case, including the *severity of the crime* at issue, *whether the suspect poses an immediate threat to the safety of the officers* or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."

The emphasized portions indicate the key issues to examine in determining whether or not Rhonda Pellegrini should be allowed to testify, as well as the analysis in *Chew v. Gates,* 27 F.3d 1432, 1440 n5 (9th Cir. 1994) suggesting the court review "whether other dangerous or exigent circumstances existed at the time of the arrest";

Act Up!/Portland v. Bagley, 988 F.2d 868, 871 (9th Cir. 1993) states:

"When a law enforcement officer asserts qualified immunity from liability for Fourth Amendment violations, the district court must determine whether, in light of clearly established principles governing the conduct in question, *the officer objectively could have believed that his conduct was lawful.* See *Anderson v. Creighton*, 483 U.S. 635, 641, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). This standard requires a two-part analysis: 1) Was the law governing the official's conduct clearly established? 2) Under that law, could a reasonable officer have believed the conduct was lawful?" (Emphasis added)

ANY TESTIMONY ON POST STANDARDS MUST BE EXCLUDED

No testimony or evidence about the 1998 POST standards should be allowed. As stated in ActUp!, *supra*, whether the officer *objectively* – not subjectively - could have believed that his conduct was legal depends on whether the law was *clearly established* and whether, under that law, *a reasonable officer could have believed the conduct was lawful.*

The *Headwaters* case has held that the law regarding the use of excessive force, which addresses pepper spray like any other use of force, was clearly established as of 1997. Clearly,

the later-established POST guidelines purporting to authorize the use of pepper spray on non-combative subjects could not have affected the officers or the defendants in their decisions to use the pepper spray. The supposed light that it sheds on objective reasonableness generally - if any - is surely outweighed by the prejudicial effect on having such an authoritative, official source of approval for a practice condemned by the Ninth Circuit.

ActUp! illustrates why the POST guidelines should not be allowed in this trial.

RHONDA PELLEGRINI's TESTIMONY SHOULD BE EXCLUDED

As seen below, Ms. Pellegrini's testimony offers nothing to the calculus of "objective reasonableness" as to what the officers "knew or should have known" about the supposed dangerousness of the protesters in determining whether to use pepper spray at the "Riggs incident" . Nor does it show that the protesters' actions had created any kind of emergency situation - or that she viewed it as such. Her entire testimony should be ruled as irrelevant, or alternatively as inadmissible pursuant to FRE 403.

The gist of Rhonda Pellegrini's testimony is that she states that she was "scared" when the protesters arrived at Riggs' office with a stump in a hand truck, because two or three people who initially entered the office were wearing black and one of them was wearing a ski mask to obscure his identity. (Declaration of Josh Morsell, T-1103-1104 (first trial testimony)) She also claims that when they entered the office, the windows shook and she thought that a "bomb" had gone off. (*Id.,* T-1103) She proceeds to regale the jury with her imagined flashbacks of "Oklahoma City", the "Unabomber" and the "constant threat" aimed at federal workers. (*Id.,* T-1106) At the second trial, she recalled how her "two little girls" had been in her office with her

in the past, as she prepared to "die". (Declaration of Josh Morsell, 9/20/04 testimony, p. 59)

Ms. Pellegrini also unsuccessfully tried to lock this allegedly frightening people "inside the office" when they tried to leave after delivering the stump. (*Id.,* T-1105) She added that as "a good marine", she was simply acting "to secure the perimeter".

If the court declines to bar Ms. Pellegrini's testimony altogether, Plaintiffs still seek a ruling barring the following statements:

1. That an unknown member of the demonstration was hiding his identity ("the hooded man") Whether one person was hiding his identity has nothing to do with "objective reasonableness" as defined above, which is the core of the test. There is no showing that the officers knew of a hooded man, or that the presence of the hooded man played any role in the officers' determination of what had to be done at the Riggs event. See *Carias-Reyes v. Lee* (1996 WL 169139, E.D. La.) "since (the officer) did not have this information, it could not have informed his behavior; hence it is not relevant to the objective reasonableness of his action." (p. 2) Neither is there any showing what conceivable effect the anonymity of this man would have on the officer's judgment if they *did* know about the "hooded man".

The plaintiffs had not committed a crime by entering a public place such as the congressman's office - it only became a crime when the Plaintiffs refused to leave after requested to do so. The evidence is uncontroverted that the hooded man left the congressman's office before that point.

Finally, any such testimony that might be considered relevant is more prejudical than probative, as it links Plaintiffs to this "scary" man for no good reason, and causes jurors to view

the Plaintiffs in the same light as this scary man for no good reason.

2. That it was "scary" to see the plaintiffs and other protesters in a circle around the conference room with a tree stump; whether Ms. Pellegrini was personally "scared" has nothing to do with "objective reasonableness" - which is the core of the test. Nor is there any showing that her alleged fear played any role in the officers' decision to use pepper spray.

Even if there is some minimal relevance, such testimony is more prejudicial than probative.

3. The comments about "the Unabomber", Oklahoma City, the "constant threat" to federal workers, the safety of her children, or her purported fear that she was going to "die" are entirely idiosyncratic, prejudicial, and add nothing to the determination of objective reasonableness, and should be stricken for the same reasons as stated above.

THE TESTIMONY OF DAVID DUBAY SHOULD BE STRICKEN

David Dubay, the director of research for Defense Technologies, testified at the previous trial as a non-expert witness. His specialty is product design. His testimony showed:

1. His familarity with the warning label, including its recommendation to use pepper spray from a minimum distance of 3 feet. (Declaration, 9/16/04, p. 5)

2. His opinion that he saw nothing in the videotape showing the application of pepper spray to the Plaintiffs that "constituted a misuse of (our) product." (*Id.*, p. 6)

3. His opinion that human blink reflex would protect one from "hydraulic needle effect", moreover, that the "hydraulic needle effect" (propellant propelled onto soft tissue, and the

possibility that a particle could be picked up in the air and propelled into the eyeball) could not possibly occur in this case because the video reveals that the "individual closed eyes in two applications" (*Id.*, p. 5-6)

4. After testifying that his then-company DefTech "sells spray bottle that is used as first aid for OC applications", DuBay offered his opinion that the purpose of using spray bottle is to put water in skin in small enough droplets that it will evaporate. (*Id.*, p. 5)

5. "Food grade" ingredients are used in pepper spray. (*Id.*, p. 1-2)

There is no reason for DuBay to testify at this trial. A review of *Headwaters Forest Defense v. County of Humboldt,* 276 F.3d 1125 (9th Cir. 2002) reveals that there is very little about pepper spray that is relevant in the calculus of determining "objective reasonableness".

The Plaintiffs' view is in harmony with the appellate court, while held:

"(T)he essence of the *Graham* objective reasonableness analysis" is that " '[t]he force which was applied must be balanced against the *need* for that force: it is the need for force which is at the heart of the *Graham* factors.' " *Liston v. County of Riverside*, 120 F.3d 965, 976 (9th Cir.1997) (quoting *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1367 (9th Cir.1994)) (emphasis in original). The facts reflect that: (1) the pepper spray was unnecessary to subdue, remove, or arrest the protestors; (2) the officers could safely and quickly remove the protestors, while in "black bears," from protest sites; and (3) the officers could remove the "black bears" with electric grinders in a matter of minutes and without causing pain or injury to the protestors." (*Id.* at 1130)

Only factor (1) has anything to do with pepper spray. The court has found that the pepper spray was unnecessary "to subdue, remove, or arrest the protestors". *Id.* DuBay can offer no testimony regarding the *use* of pepper spray in police work.

Nor can he offer any testimony about whether the pepper spray was *misused*. The

officers can read the instructions as well as DuBay. DuBay can offer no testimony on their state of mind. As the *Headwaters* court stated, Lewis and Philip "authorized full spray blasts of [pepper spray], not just Q-tip applications," despite the fact that the manufacturer's label on the canisters of pepper spray defendants used " 'expressly discouraged' spraying [pepper spray] from distances of less than three feet." *Id.* at 1130.

Finally, the *Headwaters* court remarked that a refusal without cause to alleviate [pepper spray's] harmful effects constitutes excessive force...In two of the protests, officers threatened that they would not provide the protestors with water to wash out their eyes until they released themselves from the "black bears," and in one of the protests, the officers did not provide the protestors with water for over twenty minutes." *Id.,* at 1130-1131.

Once again, DuBay had no relevant information that he could add to the discussion. He cannot offer testimony that the officers "knew" that it was OK to not provide water to the protesters after an application of pepper spray. The same is true as to the "hydraulic needle effect" - the important issue is whether the officers knew about this effect, not DuBay.

The testimony about pepper spray being a "food product" is worse than useless. Such testimony is designed to prejudice the jury, without educating them in any meaningful way about the strength of the product. Once again, the focus must be on what the officers knew about the force of the product - not on what DuBay knew.

DuBay's testimony is designed to mislead the jury into believing that the police acted properly, and he sheds no light on any probative issues. His testimony should be excluded. Alternatively, all five of the issues above should be excluded.

CONCLUSION

The court is respectfully requested to issue motions *in limine* to uphold the rulings in the 2004 trial, and to issue the three new requests in this trial.

DATED: March 18, 2005

/s/

William M. Simpich
Attorney for plaintiffs

CERTIFICATE:

I certify that I served the within **Trial Brief** on defendants by FAX and mailing a copy to Nancy Delaney and William Mitchell, Esq. at their offices in Eureka, CA on March 18, 2005.

/s/

William M. Simpich