UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Luis Roberto Rodriguez Trevino,	:	
	:	**Case No. 1:08-cv-00339-HJW**
Plaintiff,	:	
	:	
-vs-	:	
	:	**Magistrate Judge Timothy S. Black**
Richard K. Jones, et. al.,	:	
	:	
Defendants.	:	

DEFENDANTS RICHARD K. JONES, ROBERT E. MEDELLIN, DANIEL BERTER AND BUTLER COUNTY, OHIO'S RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST BUTLER COUNTY (DOC. 66)

Defendants Richard K. Jones, Robert E. Medellin, Daniel Berter, in their official capacity, and Butler County, Ohio (collectively, "Butler County") now respond to Plaintiff's Motion for Partial Summary Judgment Against Butler County. (Doc. 66). Plaintiff is not entitled to partial summary judgment for the following reasons: (1) there is no underlying constitutional violation upon which to base a claim for official capacity liability and (2) even assuming that there was an underlying constitutional violation, Plaintiff has failed to show that any Butler County policies were unconstitutional or that Mr. Medellin was inadequately trained. Butler County's arguments opposing Plaintiff's motion are set forth more fully in the Memorandum Contra below.

Respectfully submitted,

/s/ Andrew N. Yosowitz
Steven G. LaForge **(0036737)**
email: sgl@isaacbrant.com
Andrew N. Yosowitz **(0075306)**
email: any@isaacbrant.com
Marianne Pressman **(0059512)**
email: mpressman@butlersheriff.org
Co-Counsel for Richard K. Jones, Robert Medellin and Daniel Berter
ISAAC, BRANT, LEDMAN & TEETOR, LLP
250 East Broad Street, Suite 900
Columbus, Ohio 43215-3742
(614) 221-2121 (Phone)
(614) 365-9516 (Fax)
Attorneys for Defendants Butler County, Ohio, Richard K. Jones, Robert Medellin and Daniel Berter

TABLE OF CONTENTS

TABLE OF AUTHORITIES 4, 5

SUMMARY 6

FACTS 7

LAW AND ARGUMENT 9

A. There Is No Underlying Constitutional Violation Upon Which To Base A Claim For Official Capacity Liability 9

1. Plaintiff was not seized while talking with Mr. Medellin in the construction trailer 14

2. The evidence and case law cited by Plaintiff does not establish that he was unconstitutionally seized 19

B. Even If There Were An Underlying Constitutional Violation, Plaintiff Has Failed To Show That Any Butler County Policies Were Unconstitutional Or That Mr. Medellin Was Inadequately Trained 19

1. Plaintiff has failed to show any unconstitutional Butler County Policies 19

2. Butler County did not violate the Constitution or any State law by speaking to businesses and their employees regarding proper documentation 26

CONCLUSION 27

CERTIFICATE OF SERVICE 28

TABLE OF AUTHORITIES

Cases

Abdi v. Karnes, 556 F.Supp.2d 804 (S.D. Ohio 2008) 25

Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005)....................21

Bd. of Cty. Comm'r v. Brown, 520 U.S. 397, 404 (1997)....................24

Berkemer v. McCarty, 468 U.S. 420 (1984) 19

California v. Hodari, D., 499 U.S. 621, 113 L.Ed.2d 690, 111 S.Ct. 1547 (1991)....................10

City of Canton v. Harris, 489 U.S. 378, 103 L.Ed.2d 412, 109 S.Ct. 1197 (1989).......7, 21, 23, 25

City of Los Angeles v. Heller, 475 U.S. 796, 799, 106 S. Ct. 1571, 89 L. Ed. 2d 806 (1986).........9

Florida v. Bostick, 501 U.S. 429, 434-435, 115 L.Ed.2d 389, 111 S.Ct. 2386 (1991)......10, 15, 27

Gardenhire v. Schubert, 205 F.3d 303 (6th Cir. 2000)....................17, 18

INS v. Delgado, 466 U.S. 210 (1984) 7, 11, 12, 13, 18, 19

Muehler v. Mena, 544 U.S. 93 (2005) 12, 24, 26, 27

Owensby v. Cincinnati, 441 F.3d 596 (6th Cir. 2005) 25

Russo v. City of Cincinnati, 953 F.2d 1036 (6th Cir. 1992) 25

Shell v. Parrish, 448 F.2d 528 (6th Cir. 1971) 21

Terry v. Ohio, 392 U.S. 1, 19, 20 L.Ed.2d 889, 88 S.Ct. 1868 n.16 (1968) 7, 10

United States v. Crossley, 224 F.3d 847 (6th Cir. 2000) 13

United States v. Drayton, 536 U.S. 194 (2002) 14, 15

United States v. Garcia, 866 F.2d 147 (6th Cir. 1989)....................15, 16

TABLE OF AUTHORITIES (CONTINUED)

United States v. Jefferson, 650 F.2d 854 (6th Cir. 1981)....16

United States v. Knox, 839 F.2d 285 (6th Cir. 1988)....16, 17

United States v. Mahan, 190 F.3d 416 (6th Cir. 1999)....13

United States v. Martinez-Fuerte, 428 U.S. 543 (1976)....10

United States v. Mendenhall, 446 U.S. 544, 64 L.Ed.2d 497, 100 S.Ct. 1870 (1980)....11, 27

United States v. Morgan, 936 F.2d 1561 (10th Cir. 1991)....10

United States v. Panak, 522 F.3d 462 (6th Cir. 2009)....13

United States v. Richardson, 949 F.2d 851 (6th Cir. 1991)....7, 10

United States v. Rose, 889 F.2d 1490 (6th Cir. 1989)....19

United States v. Saperstein, 723 F.2d 1221 (6th Cir. 1983)....16

Statutes and Other Authorities

42 U.S.C. § 1983....7, 9, 21, 23, 24

MEMORANDUM CONTRA

I. SUMMARY

Defendant Medellin is a civilian employed as an immigration specialist with the Butler County Sheriff's Office. In December of 2006, he received complaints regarding a construction site located on Port Huron Road in Butler County, Ohio. The complaints were from trade unions (pipefitters, carpenters, etc.) who were upset at the presence of undocumented workers at the site. The complainants advised that there was going to be a confrontation at the worksite.

On January 2, 2007 Mr. Medellin, accompanied by Deputy Dan Berter, went out to the worksite to speak with the employers regarding the proper paperwork needed for employees, specifically, documentation relevant to an I-9 Employment Form. Mr. Medellin spoke with Bruce Geiser, a foreman for J & A Interior Systems (J & A), which was one of the companies mentioned by the complainants. Mr. Medellin asked Mr. Geiser if he (Medellin) could speak with Mr. Geiser's employees. Mr. Geiser stated that he did not have any employees, only subcontractors, and that Mr. Medellin could speak with them.

Mr. Geiser or another J & A employee summoned all of the subcontractors to a construction trailer. According to Plaintiff, once inside the trailer, Mr. Medellin asked the J & A workers to show their identifications. The workers were of varying races including Caucasian, African-American and Hispanic. Individual workers were then briefly interviewed by Mr. Medellin in one of the trailer's offices. None of the workers were arrested or charged with any crime except Plaintiff who left the trailer, went out to his vehicle, retrieved a false social security card and a false permanent resident card and then presented those cards as identification to Deputy Berter. Plaintiff was arrested for forgery. The other workers went back to work.

There was no violation of Plaintiff's constitutional rights. No seizure under the Fourth Amendment occurs simply because a law enforcement officer or state actor asks questions or requests identification. *United States v. Richardson*, 949 F.2d 851, 855 (6th Cir. 1991). A seizure of a person occurs "only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen. . . ." *Terry v. Ohio*, 392 U.S. 1, 19, 20 L.Ed.2d 889, 88 S.Ct. 1868 n.16 (1968). Numerous factors in this case indicate that none of the workers, Plaintiff included, were seized for Fourth Amendment purposes while in the construction trailer. The workers had freedom of movement, no threats were made, and Plaintiff actually left the trailer, went out to his car, and came back. Plaintiff's subjective view that he felt compelled to cooperate with Mr. Medellin is irrelevant. *INS v. Delgado*, 466 U.S. 210 (1984).

Even if there were a seizure—which is denied—Plaintiff has failed to establish official capacity liability. Plaintiff claims that Mr. Medellin was inadequately trained. When a plaintiff seeks to impose § 1983 liability on a county for its failure to train its employees, normal tort standards are replaced with heightened standards of culpability and causation. *City of Canton v. Harris*, 489 U.S. 378, 391, 103 L.Ed.2d 412, 109 S.Ct. 1197 (1989). Plaintiff has produced no evidence—other than conclusory statements—that Mr. Medellin was inadequately trained, that any alleged inadequate training was the moving force behind Plaintiff's alleged seizure or that Sheriff Jones was deliberately indifferent to Mr. Medellin's training.

II. <u>FACTS</u>

For the most part, Butler County does not dispute the facts included in Plaintiff's Statement of Facts section. Butler County, however, does take issue with the relevant and undisputed facts that Plaintiff has omitted from his motion, specifically, in regards to the events that took place at the worksite. Plaintiff omitted the following relevant facts:

- Neither Mr. Medellin nor Deputy Berter summoned Plaintiff or any other worker to the trailer. Plaintiff recalls that "one of the Hispanic guys" working for J & A told him to go to the trailer. (Deposition of Luis Roberto Rodriguez Trevino, hereinafter Trevino depo., Vol. I, p. 43). Oscar Falcon, a co-worker of Plaintiff, recalls that Bruce Geiser told the J & A workers to go to the trailer. (Deposition of Oscar Falcon, hereinafter Falcon depo., p. 14).

- Some employees simply ignored the request and did not go to the trailer. (Falcon depo., p. 15). None of the employees who failed to come to the trailer were arrested or detained. (*Id*. at 17).

- There are varying estimates as to how many people were in the trailer, however, there were approximately twenty to thirty-five people present in the trailer. (See Trevino depo., p. 45, 25 people; Deposition of Daniel Berter, hereinafter Berter depo., p. 21, 20-30 people; Deposition of Robert Medellin, hereinafter Medellin depo., p. 31, 20-22 people; Falcon depo., p. 17, 35 people).

- The construction trailer itself was roughly divided into two areas: (1) a conference area with a large table or tables in the center surrounded by chairs and (2) an office area which contained the office of Joe Kathman. (Berter depo., Exhibit Medellin 10; Medellin depo., Exhibit 3; Deposition of Joseph Kathman, hereinafter Kathman depo., pp. 14-16, Exhibit 1; Falcon depo., pp. 23-24). In addition, there were two doors that led outside the trailer. (Berter depo., Exhibit Medellin 10; Kathman depo., pp. 14-16, Exhibit 1). Finally, there was a door to Mr. Kathman's office in the back of the trailer. (*Id*.).

- As the workers came to the trailer they were not ordered where to sit or stand and simply "put [themselves] in the position [they] wanted to be in around the room." (Falcon depo., p. 21).

- Mr. Medellin introduced himself to the group. (Trevino depo., p. 52). He identified himself as an immigration specialist with the Butler County Sheriff's Office. (Berter depo., p. 28; Medellin depo, p. 36; see also Falcon depo., p. 22, indicating that Mr. Medellin stated that he worked for Butler County). Mr. Medellin made it clear that he did not work for immigration. (Affidavit of Joseph Kathman, hereinafter Kathman Affidavit, attached hereto as Exhibit 1, at ¶ 6).

- Mr. Medellin first spoke to all of the people in the trailer together. (Trevino depo., p. 52; Kathman Affidavit, ¶ 10; Falcon depo., pp. 21-22; Medellin depo., p. 35). Mr. Medellin spoke both English and Spanish to the group. (Trevino depo., p. 52; Kathman Affidavit, ¶ 10; Medellin depo., p. 39).

- It was not only Hispanics who presented identification. Every worker, except those that did not have identification, showed their papers. (Falcon depo., p. 24; Kathman Affidavit, ¶ 10). Some people either did not have identification or refused to show identification. (Trevino depo., p. 53; Falcon depo., p. 24).

Significantly, Mr. Medellin and some of the employers, including Mr. Geiser, were reviewing the identification documents. (Falcon depo., pp. 24-25; Berter depo., pp. 32-33).

- Plaintiff indicated that he had left his identification in his car. (Trevino depo., pp. 53-54; Berter depo., p. 32). Plaintiff choose to leave the trailer and walked, unescorted, back to his vehicle, got additional documents, and came back to the trailer. (Trevino depo., p. 70; Berter depo., pp. 40-41).

- Mr. Medellin spoke with Plaintiff and most, if not all, of the J & A workers, individually, in Mr. Kathman's office. (Kathman Affidavit, ¶ 11; Medellin depo., p. 41; Trevino depo., p. 55; Falcon depo., p. 27). These interviews were brief, lasting only 2-3 minutes. (Kathman Affidavit, ¶ 11; Falcon depo., p. 27).

- The workers who had finished their interview or were waiting to be interviewed were simply sitting around the conference room talking amongst themselves. (Falcon depo., p. 33). Following the interviews, most of the J & A employees/subcontractors simply returned to work. (Falcon depo., p. 30).

- The workers were not physically touched by Mr. Medellin or Deputy Berter, they were not threatened, no weapons were displayed, no handcuffs were displayed, the door to the trailer was open, and Mr. Medellin was cordial for the entire visit. (Falcon depo., pp. 25-27; Kathman Affidavit, ¶ 14).[1] In addition, Deputy Berter, the only uniformed officer present in a room of twenty-five or more people was not doing much of anything and, in fact, stood in the corner. (Falcon depo., p. 31; Kathman Affidavit, ¶ 10).

III. <u>LAW AND ARGUMENT</u>

A. <u>There Is No Underlying Constitutional Violation Upon Which To Base A Claim For Official Capacity Liability.</u>

1. Plaintiff was not seized while talking with Mr. Medellin in the construction trailer.

A county cannot be held liable under § 1983 if there is no underlying constitutional violation by any individual county employee. *City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S. Ct. 1571, 89 L. Ed. 2d 806 (1986). Plaintiff alleges that he was seized in violation of the Fourth Amendment while Mr. Medellin spoke to him and other J & A employees in the

[1] Plaintiff in his deposition states that "they told us they were going to search the cars and everything," but upon further questioning this statement turns out to be hearsay: "Somebody said Medellin said that they were going to search—search you and search your cars." (Plaintiff depo. p. 58).

construction trailer at Plaintiff's worksite. (Pltf.'s Mot. for Partial Summary Judgment, Doc. 66, pp. 12-16). Plaintiff is wrong. No seizure of Plaintiff occurred until he was arrested with probable cause for the state law offenses of forgery.[2]

The Fourth Amendment does not proscribe all contact between the police and citizens, but is designed "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976). As such, not every police/citizen encounter constitutes a seizure: "We agree that voluntary cooperation of a citizen in response to non-coercive questioning [raises no constitutional issues.]" *United States v. Richardson*, 949 F.2d 851, 855 (6th Cir. 1991), citing *United States v. Morgan*, 936 F.2d 1561, 1566 (10th Cir. 1991) (internal quotations omitted). These consensual encounters may be initiated by the police without any objective level of suspicion and do not, without more, amount to a "seizure" implicating the Fourth Amendment's protections. *Florida v. Bostick*, 501 U.S. 429, 434-435, 115 L.Ed.2d 389, 111 S.Ct. 2386 (1991). In *Bostick*, the Supreme Court observed that "even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual . . .; ask to examine the individual's identification . . .; and request consent to search his or her luggage . . . as long as the police do not convey a message that compliance with their requests is required." *Id*.

A seizure of a person occurs "only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen. . . ." *Terry v. Ohio*, 392 U.S. 1, 19, 20 L.Ed.2d 889, 88 S.Ct. 1868 n.16 (1968). The Court stated in *California v. Hodari, D.,* 499 U.S. 621, 113 L.Ed.2d 690, 111 S.Ct. 1547 (1991), that "the test for existence of a 'show of authority' is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a

[2] In his motion, Plaintiff does not argue that his arrest for forgery was made without probable cause.

reasonable person." Examples of factors that might indicate a seizure include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L.Ed.2d 497, 100 S.Ct. 1870 (1980).

The Supreme Court applied this test in the immigration context in *INS v. Delgado*, 466 U.S. 210 (1984). In that case, the Court held that workers were not seized individually or as a group by INS agents conducting factory sweeps at large garment plants. The agents displayed badges, carried walkie talkies, and wore guns, although they never drew them. Agents were posted at each exit. Others moved systematically through the factory, approaching most workers, and after identifying themselves as INS agents, asked the workers from one to several questions regarding their immigration status. If a worker gave a credible reply that he was a citizen, the questioning ended, and the agent moved on. If the worker's answer was not credible or if he admitted that he was an alien, he was asked to produce his immigration papers.

Some disruption occurred during the sweeps, as some workers fled when the INS entered the plants. The surveys lasted from one and a half to two hours. Fifteen to twenty-five agents were involved in each survey. Illegal aliens were handcuffed in the plants and led away.

In *Delgado* the district court granted the defendants' motion for summary judgment. The Ninth Circuit reversed, holding that the sweeps constituted a seizure of the work force and that the questioning violated the Fourth Amendment unless it was based on a reasonable suspicion that the worker questioned was an illegal alien. The Supreme Court reversed the Ninth Circuit. The entire Court, save Justice Marshall, who did not participate, agreed that there was no continuing seizure of an entire workforce during the sweeps.

The majority also held that individual workers were not seized, holding that the questioning and requests for papers constituted "classic consensual encounters" rather than Fourth Amendment seizures. The Court also reasoned that the stationing of INS agents at exit doors should not have led workers who were citizens or legal aliens to believe they were not free to leave the plants, as they should have realized that they could leave after brief questioning at the exits.

Under the seizure test articulated in *Delgado*, "unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed that he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment." *Id*. at 216. Further, the *Delgado* analysis is not affected in this case by the fact that Mr. Medellin, an employee for a local law enforcement agency, met with Plaintiff. In March 2005, the Supreme Court unequivocally stated that a person's immigration status is the sort of basic information that police officers may inquire about, *without* first establishing reasonable suspicion: "We certainly did not, as the Court of Appeals suggested, create a "requirement of particularized reasonable suspicion for purposes of inquiry into citizenship status.'" *Muehler v. Mena*, 544 U.S. 93, 101 n.3 (2005) (emphasis added).

Plaintiff attempts to distinguish this case from *Delgado* on the sole basis that, in *Delgado*, the agents interviewed the workers at their work stations. (Pltf.'s Mot. for Partial Summary Judgment, Doc. 66, p. 16). However, this Court must look to the totality of the circumstances. When compared to *Delgado*, the meeting between Plaintiff and Mr. Medellin was far less intrusive than the meetings in *Delgado*. In *Delgado*, there were up to twenty-five agents present, some of whom were stationed near the workplace's exists. In the instant case, there were two

Butler County employees, only one of whom was a deputy, and neither of whom blocked the exits to the construction trailer. In *Delgado*, the agents carried handcuffs and used them to detain those apparently suspected of being in this country illegally. In this case, nobody was handcuffed, detained or arrested on suspicion of being in this country illegally or having improper work documentation.

Measured by these considerations, the January 2, 2007 the encounter in the construction trailer did not rise to the level of a seizure. During the group meeting in the trailer and the brief individual interviews in Mr. Kathman's office, neither Mr. Medellin nor Deputy Berter physically restrained Plaintiff (or any other worker), handcuffed Plaintiff or limited his freedom of movement. (Falcon depo., pp. 25-27; Kathman Affidavit, ¶ 14). No weapons or handcuffs were displayed. *Id*. Most significantly, Plaintiff actually left the trailer, *unescorted*, went out to his car, and came back to the trailer. (Trevino depo., p. 70; Berter depo., pp. 40-41). That fact alone indicates that there was no seizure of Plaintiff.

Other factors also show the lack of a hostile and coercive environment:

- When the workers first got to the trailer, they were not ordered where to sit or stand, but rather, "put [themselves] in the position [they] wanted to be in around the room." (Falcon depo., p. 21).

- The workers were not threatened with arrest or told that they were going to be subjected to criminal penalties. (Falcon depo., pp. 25-27).

- The length of the interviews in Mr. Kathman's office was very brief, lasting no more that 2-3 minutes. (Kathman Affidavit, ¶ 11; Falcon depo., p. 27). The Sixth Circuit has found far longer interviews to be non-custodial. *See United States v. Crossley*, 224 F.3d 847, 862 (6th Cir. 2000) (less-than-an-hour interview); *United States v. Mahan*, 190 F.3d 416, 422 (6th Cir. 1999 (hour-and-a-half interview); *United States v. Panak*, 522 F.3d 462 (6th Cir. 2009) (45 minute interview).

- Deputy Berter was standing in a corner and not doing much of anything. (Falcon depo., p. 31; Kathman Affidavit, ¶ 10). Deputy Berter and Mr. Medellin were the only county employees present in a room of at least twenty to thirty-five people. (See Trevino depo., p. 45, 25 people; Berter depo., p. 21, 20-30 people; Medellin

depo., p. 31, 20-22 people; Falcon depo., p. 17, 35 people).

- During the interviews, the workers in the conference room sat around the table talking amongst themselves. (Falcon depo., p. 33).

- Some employees simply ignored the request and did not go to the trailer. (Falcon depo., p. 15). None of the employees who failed to come to the trailer were arrested or detained. (*Id*. at 17).

Taken together, the objective facts indicate that the meeting in the trailer was a consensual encounter. Neither Plaintiff nor any other worker was seized within the meaning of the Fourth Amendment.

2. The evidence and case law cited by Plaintiff does not establish that he was unconstitutionally seized.

The cases cited by Plaintiff in support of his seizure argument actually help show why the encounter in the construction trailer was not a seizure. Plaintiff relies first on *United States v. Drayton*, 536 U.S. 194 (2002). In *Drayton*, three members of the Tallahassee Police Department boarded a Greyhound bus as part of a routine drug and weapons interdiction effort. *Id*. at 197. One officer knelt on the driver's seat and faced rearward so that he could observe the passengers. *Id*. at 197-198. Another officer stood at the rear of the bus while the third officer spoke with individual passengers regarding their travel plans and luggage. *Id*. at 198. The officers did not inform the passengers that they did not have to cooperate. *Id*. One officer asked the defendant, "Mind if I check you?" *Id*. at 199. The defendant responded by lifting his hands about eight inches from his legs. *Id*. The officer conducted a pat-down of defendant's thighs and detected hard objects similar to those found on defendant's companion. *Id*. Defendant was arrested and a further search revealed several bundles of cocaine in defendant's boxer shorts. *Id*. The Court of Appeals granted the defendant's motion to suppress. The Supreme Court reversed.

The Supreme Court reiterated that law enforcement officers need no reasonable suspicion or probable cause to ask questions of an individual or request consent to search that individual: "Even when law enforcement officer have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search luggage—provided they do not induce cooperation by coercive means." *Id.* at 201, citing *Florida v. Bostick*, 501 U.S. 429, 434-435 (1991). In ruling that the encounter on the bus was not a seizure, the Court looked at the following factors: (1) no weapon was brandished and no intimidating movements were made by the officers, (2) the aisle of the bus was free so that defendant could exit, and (3) the officer spoke in a polite, quiet voice. *Id*. at 203. In this case, it is undisputed that neither Mr. Medellin nor Deputy Berter brandished a weapon or made intimidating movements. It is also undisputed that, like the aisle of the bus in *Drayton*, the exit to the construction trailer was open and unobstructed. (Falcon depo., p. 32). Finally, the evidence in the record indicates that Mr. Medellin was cordial and polite to the workers in the construction trailer. (Kathman Affidavit, ¶ 14) Plaintiff points out that Deputy Berter was in uniform and both Deputy Berter and Mr. Medellin were armed. (Pltf's. Mot. for Partial Summary Judgment, Doc. 66, pp. 4-5). The *Drayton* court found these factors insignificant:

> Officers are often required to wear uniforms and in many circumstances this is cause for assurance, not discomfort. Much the same can be said for wearing sidearms. That most law enforcement officers are armed is a fact well known to the public. The presence of a holstered firearm thus is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon.

Id. at 204-205. Thus, under the Supreme Court's analysis in *Drayton*, there was no seizure while Mr. Medellin was talking to Plaintiff in the construction trailer.

The remaining cases cited by Plaintiff do not advance his cause either. For example, Plaintiff cites *United States v. Garcia*, 866 F.2d 147 (6th Cir. 1989). Plaintiff, without analysis, cites one sentence from the case to posit that he was seized. A complete analysis of *Garcia*, however, shows that it does not support a seizure claim in this case. In *Garcia*, defendants John Garcia and Alan Wolfe appealed their conviction for possession of cocaine with intent to distribute. *Id*. at 148. Garcia and Wolfe were stopped by Hamilton County Sheriff's Agents as they arrived at the Cincinnati Airport from Miami, Florida. *Id*. at 149. The agents were suspicious because Garcia and Wolfe were both wearing black t-shirts and bib overalls in contrast to the majority of business travelers, who wore suits. *Id*. The agents followed as the defendants went to several different rental car booths. *Id*. Neither claimed any luggage and they were both carrying gym bags as carry-on luggage. *Id*. Garcia appeared nervous and kept glancing over his shoulder. *Id*.

As Garcia and Wolfe prepared to leave in their rental car, the agents approached them and asked to see identification and plane tickets. *Id.* The agents then asked for permission to search the defendants' carry-on bags. *Id*. A search of Garcia's bag revealed cocaine. *Id*. Defendants were then arrested. *Id*. Garcia claimed that the initial contact with the agents was a seizure. The Sixth Circuit disagreed: "This review of precedents leads us to conclude that the initial stop and subsequent search of Garcia's bag was consensual. Clearly, the stop and early questioning were permissible." *Id*. at 151. *Garcia* does not help Plaintiff—the Sixth Circuit found that there was no seizure until they were actually arrested.

Plaintiff next cites *United States v. Knox*, 839 F.2d 285 (6th Cir. 1988); *United States v. Jefferson*, 650 F.2d 854, 856 (6th Cir. 1981); *United States v. Saperstein*, 723 F.2d 1221 (6th Cir. 1983). These cases all concern alleged seizures at airports and are distinguishable. For instance,

in *Knox*, an agent for the Drug Enforcement Administration (DEA) in Atlanta notified a DEA agent in Memphis that three individuals were en route who had acted suspiciously at the Atlanta airport. *Id*. at 287. Based upon the defendants' actions when they deplaned in Memphis, DEA agent Richard Holmes believed that the defendants were involved in drug smuggling. *Id*. at 288. Agent Holmes approached the defendants and asked them if they would accompany him to the airport security office. *Id*. Defendants agreed and each was placed in separate rooms in the vicinity of the security office, along with their luggage. *Id*. Each defendant was then questioned separately. *Id*. They were not told that they could leave, but were told that they were not under arrest. *Id*. The Sixth Circuit ruled that the defendants were seized when the Agent Holmes asked them to accompany him to the airport security office for questioning. *Id*. at 289. *Knox* is distinguishable from the instant case. Surely the intrusion of between being asked to go to an airport security office by a DEA agent is much higher than being asked to report to a construction trailer that is at one's place of employment. Indeed, in the instant case, Plaintiff's co-worker, Oscar Falcon testified that work was a place he felt comfortable at. (Falcon depo., p. 10). One is not likely to feel comfortable going to a security office or police station. Unlike the defendants in *Knox*, Plaintiff's travel plans were not disrupted. He simply reported to a different part of his everyday worksite. As such, airport seizure cases such as *Knox* do not support Plaintiff's seizure argument.

Finally, in response to the uncontested fact that Plaintiff left the construction trailer and came back, Plaintiff argues that a seizure can continue even when a citizen is allowed to leave the presence of officers and come back. Plaintiff relies on *Gardenhire v. Schubert*, 205 F.3d 303 (6th Cir. 2000). Plaintiff's reliance is misplaced. In *Gardenhire* and unlike the instant case, the

Gardenhires were threatened with arrest if they did not comply with the officers' orders. The Court found the following facts significant:

> (1) Chief Schubert told the Gardenhires at their residence that they "needed to go" to the police station;
>
> (2) the Gardenhires were read their *Miranda* rights at the police station;
>
> (3) the Gardenhires were questioned extensively at the police station;
>
> (4) the Gardenhires were told later, at the store, that they "needed to go" to the Justice Center;
>
> (5) officers instructed the Gardenhires that they "needed to follow" a police officer to the station; and
>
> (6) officers advised the Gardenhires that they would be booked on criminal charges and released on bond.

Id. at 314. None of these factors are present in the instant case. Prior to his arrest for forgery, neither Mr. Medellin nor Deputy Berter ever told Plaintiff that he "needed to go" anywhere, much less that he "needed to go" with them to the Sheriff's office. No employee was "extensively questioned." It is undisputed that the length of the interviews in Mr. Kathman's office was very brief, lasting no more than 2-3 minutes. (Kathman Affidavit, ¶ 11; Falcon depo., p. 27). Finally, Plaintiff's own witness, Oscar Falcon concedes that none of the workers, Plaintiff included, were ever threatened with arrest if they did not comply. (Falcon depo., pp. 25-27). Thus, the police conduct in *Gardenhire* was much more authoritative and coercive than any conduct by Mr. Medellin or Deputy Berter. As such, Plaintiff's reliance on *Gardenhire* is not persuasive.

Plaintiff's factual arguments regarding his alleged seizure fare no better than his legal arguments. First, it is not material to the issue of seizure whether there was a specific "business purpose" for the meeting *at the very moment* that the contractors invited the workers into their

trailer. In *Delgado*, supra, there was no business purpose to the INS agents' conversations with the workers, but the Supreme Court still found no seizure. Regardless, in this case, there was a business purpose for the meeting in the workers' construction trailer. In a deposition segment omitted by the Plaintiff, Joe Kathman stated that EGC Construction, the contractor for Plaintiff's employer (J & A Interior Systems), wants to make sure that all of their subcontractor's employees are legal and have proper documentation. (Kathman depo., p. 13; Kathman Affidavit, ¶ 4). This is why the employers voluntarily offered to bring the J & A employees or subcontractors to a construction trailer. (Berter depo., p. 21). This is also why the employers, including Mr. Geiser, were reviewing the identification documents. (Falcon depo., pp. 24-25; Berter depo., pp. 32-33). Thus, the contractors acted in their own interest and were not merely compulsive agents of the state. As stated above, once in their trailer, all conversations with Mr. Medellin were voluntary.

Second, in arguing that he was seized, Plaintiff impermissibly focuses on subjective understandings of the situation rather than the understanding of an objectively reasonable person in Plaintiff's situation. Thus, it is of no importance, for example, that Plaintiff's co-worker states that he felt that he needed to cooperate with Mr. Medellin.[3] (See Falcon depo., at pp. 35-36; Pltf's. Mot. For Partial Summary Judgment, Doc. 66, p. 14). It is also not relevant that Mr. Medellin testified at Plaintiff's criminal suppression hearing that it was *possible* the workers felt the need to cooperate. (See Pltf's. Mot. for Partial Summary Judgment, Doc. 66, p. 14; Medellin depo., Ex. 5, p. 98).[4] The objective inquiry is whether a reasonable person under the

[3] Similarly, the subjective intent of police is relevant to a Fourth Amendment analysis only to the extent that they have conveyed that intent to the confronted individual. *United States v. Rose,* 889 F.2d 1490, 1493 (6th Cir. 1989); C.f. *Berkemer v. McCarty,* 468 U.S. at 442 (police officer's unarticulated plan is irrelevant to whether a suspect was "in custody" at a specific time.).

[4] Apparently, the judge presiding over Plaintiff's criminal trial did not feel that the encounter was a seizure because Plaintiff's Motion to Suppress was denied and the case proceeded to trial. (See Entry denying Plaintiff's Motion to Suppress attached hereto as Exhibit 2).

circumstances would have believed that he was not free to leave. *INS v. Delgado,* 466 U.S. 210, 215 (1984). In this case, the objective facts (described in detail above) conclusively show that the encounter was not a seizure.

B. Even If There Were An Underlying Constitutional Violation, Plaintiff Has Failed To Show That Any Butler County Policies Were Unconstitutional Or That Mr. Medellin Was Inadequately Trained.

1. Plaintiff has failed to show any unconstitutional Butler County policies.

The only cognizable official capacity claim alleged by Plaintiff is that Mr. Medellin was inadequately trained regarding the boundaries of his role as a county official. (Pltf's. Mot. for Partial Summary Judgment, Doc. 66, pp. 30-31). Specifically, Plaintiff argues that there was no job description for Mr. Medellin and no specific training as to his legal authority.

As a prelude to this claim, Plaintiff misrepresents the legal arguments supporting Defendants' Motion for Summary Judgment, Doc. 55, as the policies of Butler County, Ohio. On pages two (2) and three (3) of his Motion for Partial Summary Judgment, Doc. 66, Plaintiff, using an excerpt of a sentence from Defendants' Motion for Summary Judgment, represents the following as Butler County policy: "Defense counsel in this case insist, that….Defendant [sic] Medellin and Berter have the authority to investigate, and even make arrests, for violations of federal law and, specifically, violations of immigration law. This policy is wrong as a matter of law." (internal citations omitted).[5] Plaintiff's representation is flawed on many levels.

First, Plaintiff inaccurately quoted Defendants' Motion for Summary Judgment. The *complete* sentence from Defendants' Motion is as follows: "It is well settled that local law enforcement officials have the authority to investigate, and even make arrests, for violations of

---

[5] Plaintiff repeats this alleged policy on page 18, stating that Defendants claim "Defendant Medellin actually possessed the power to enforce federal immigration law." (Pltf.'s Mot. for Partial Summary Judgment, Doc. 66, p. 18).

federal law and, specifically, violations of immigration law." (Defs. Mot. for Summary Judgment, Doc. 55, p. 20). As discussed at length in Defendants' Motion for Summary Judgment, Doc. 55, this is a true statement of law. Further, at no point did Defendants ever state that Mr. Medellin had authority to make arrests of any kind.

Second, Plaintiff misses the point of Defendants' legal argument—that, for purposes of qualified immunity, it is not clearly established in this circuit that local law enforcement officials are prohibited from inquiring about an individual's immigration status. In his Complaint, Plaintiff states that Defendants "were not authorized by federal law to investigate immigration status…" (Complaint, ¶ 14). No authorization was needed. As explained by Defendants in their Motion for Summary Judgment, there has always been local enforcement of federal laws, including immigration laws. (See Defs. Mot. for Summary Judgment, Doc. 55, pp. 19-22). Plaintiff appears to now concede this truism. (Pltf.'s Mot. for Partial Summary Judgment, p. 19). This point is further discussed in part 2, *infra*.

Lastly, Butler County has found no case law and, apparently neither has Plaintiff, which supports Plaintiff's theory that a legal argument made by a defendant's counsel can fairly be said to represent a county or municipal policy for § 1983 purposes. The cases cited by Plaintiff, *Shell v. Parrish*, 448 F.2d 528 (6th Cir. 1971) and *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) have nothing to do with *Monell* type liability. Indeed, a reading of the Sixth Circuit's opinion in *Barnes* reveals no discussion whatsoever about party-opponent admissions. Plaintiff has no evidence that there was any Butler County policy to arrest persons for immigration violations. Plaintiff's attempt to create that policy using an inaccurately quoted legal argument from Butler County's counsel is not supportable and fails as a matter of law.

Notwithstanding Plaintiff's misrepresentation of Defendants' policy, there is no evidence that Mr. Medellin was inadequately trained. When a plaintiff seeks to impose § 1983 liability on a county for its failure to train its employees, normal tort standards are replaced with heightened standards of culpability and causation. *City of Canton v. Harris*, 489 U.S. 378, 391, 103 L.Ed.2d 412, 109 S.Ct. 1197 (1989). Liability will only attach if the county was *deliberately indifferent* to the constitutional rights of citizens—a showing of negligence or even gross negligence will not suffice. *Id*. at 388; n.7. Errors of judgment do not alone prove deliberate indifference, nor is such heightened culpability established simply by showing that a county could have ordered more or different training or even misjudged whether training was necessary. Similarly, to satisfy causation, the plaintiff must demonstrate that the failure to train was the *moving force* behind the alleged constitutional violation—"but for" causation is not enough. *Bd. of Cty. Comm'r v. Brown*, 520 U.S. 397, 404 (1997). The Supreme Court has repeatedly cautioned that if we neglect these stringent standards, we risk collapsing the distinction between vicarious liability and direct liability. *Id*. at 415.

Deliberate indifference generally requires a showing that the policymaker was made aware of the training deficiencies by a pattern of similar deprivations. *See Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24, 85 L. Ed. 2d 791, 105 S. Ct. 2427 (1985). Absent a pattern, in certain unique circumstances, the plaintiff can establish liability based upon a single violation of constitutional rights. In such a case, a failure to train constitutes municipal policy only where the need for training was "so obvious" that a failure to do so would mean the policymaker was deliberately indifferent to constitutional rights. *City of Canton*, 489 U.S. at 390. A need for training is considered sufficiently obvious only when the deprivation of constitutional rights is a "highly predicatable consequence" of the training deficiency. *Bd. of Cty. Comm'r v. Brown*, 520

U.S. at 409. Deliberate indifference is a stringent standard of fault, requiring proof that a county actor disregarded a known or obvious consequence of his action. *Id*. at 410. Plaintiff has failed to meet this stringent standard of fault.

Mr. Medellin came to the Butler County Sheriff's Office to educate local businesses and the public regarding the laws with respect to undocumented workers. (Jones depo., pp. 6, 11, 27). He also served as an advisor for Butler County's interactions with the Federal Government. (*Id*. at 43). Mr. Medellin was already well trained for these purposes. Mr. Medellin has thirty years of law enforcement experience, specifically, in the field of immigration law. (See Medellin Affidavit, generally, attached hereto as Exhibit 3). In particular, Mr. Medellin has extensive knowledge of laws relating to the employment of undocumented workers. He has participated in hundreds of worksite enforcement actions which included auditing employer/employee paperwork such as I-9 Forms. (*Id*. at ¶ 7). He has attended classes, seminars and courses regarding the Immigration Reform Control Act and fraudulent document detection. (*Id*. at ¶ 6.). In 1989, Mr. Medellin was recognized as Investigator of the Year by the National Association of Federal Investigators for his work in enforcing the employer sanctions provisions of the Immigration Reform and Control Act of 1986. (*Id*. at ¶ 5). Lastly and most importantly, Mr. Medellin was well aware of the limits of his authority and knew that he did not have law enforcement powers. (Medellin depo., p. 9). Thus, there is no plausible argument that Mr. Medellin did not have appropriate training to educate employers and employees regarding documents needed for employment. It is also undisputed that Mr. Medellin understood that he did not have law enforcement authority. To that end, Plaintiff has produced no evidence that Mr. Medellin was actually enforcing immigration laws while working for Butler County. Mr. Medellin never arrested anyone or sanctioned any employer. Assuming, *arguendo*, that Mr.

Medellin was investigating immigration violations—which is not unconstitutional—Mr. Medellin was certainly qualified to conduct such an investigation.

To safeguard the boundaries established in *Monell*, the Supreme Court has made clear that in addition to a heightened standard of culpability, plaintiffs must meet a heightened standard of causation in order to hold a county liable under § 1983. *City of Canton*, 489 U.S. at 391-92. A § 1983 plaintiff must prove that the county's custom or policy—in this case the failure to train Medellin regarding his authority—was the "moving force" that caused the specific constitutional violation. *Bd. of Cty. Comm'r v. Brown*, 520 U.S. at 404. In *City of Canton*, the Supreme Court further said:

> To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983. In virtually every instance where a person had his or her constitutional rights violated by a [county] employee, a § 1983 plaintiff will be able to point to something the [county] could have done to prevent the unfortunate incident.

Id. at 391-92 (internal citations and quotations omitted).

In this case, Plaintiff has provided no evidence that any alleged failure to train Mr. Medellin regarding his authority was the moving force behind Plaintiff's alleged unlawful seizure. In order to support his theory, Plaintiff would need to show substantial evidence that Mr. Medellin did not understand his role and that this lack of understanding caused Plaintiff to be unlawfully seized. The record in this case shows that Mr. Medellin was well aware of the limits of his authority and knew that he did not have law enforcement powers. (Medellin depo., p. 9). Plaintiff has offered no expert testimony which questions the adequacy of Mr. Medellin's training or that any alleged injury would have been avoided with additional training. Plaintiff claims that Mr. Medellin was enforcing immigration law, but provides no evidence to support this assertion. As stated above, there is no evidence that Mr. Medellin, while working for Butler

County, has arrested or detained anyone for any purpose or enforced any immigration laws. To the extent that Plaintiff argues that Mr. Medellin's worksite visits constitute enforcement, Plaintiff is mistaken. There is certainly a difference between inquiring about an employee's immigration status or an employer's documentation for the purpose of educating them about proper documentation and actually enforcing (through arrest, prosecution, fines etc.) civil and criminal provisions of immigration law. *See Muehler v. Mena*, supra. As such, Plaintiff has failed, as a matter of law, to establish the necessary direct causal link needed to prove official capacity liability.

Even assuming that Plaintiff could establish the necessary direct causal link, Plaintiff has failed to establish that Sheriff Jones, the policymaker in this case, was deliberately indifferent to the need to train Mr. Medellin regarding his authority. Plaintiff must show that the need for the training was "so obvious" that a reasonable jury could find that Sheriff Jones was "deliberately indifferent" to that need. *City of Canton*, 489 U.S. at 388. Plaintiff has not offered any evidence that there were any prior complaints involving Mr. Medellin's conduct at worksites. Mr. Medellin went on other worksite visits, yet there is no evidence of complaints similar to Plaintiff's.[6] Plaintiff relies exclusively on the instant allegations alone. Plaintiff attempts to argue that *Monell* liability can be based on a single incident. In support of his argument, he cites the following cases, *Abdi v. Karnes*, 556 F.Supp.2d 804 (S.D. Ohio 2008); *Owensby v. Cincinnati*, 441 F.3d 596 (6th Cir. 2005) and *Russo v. City of Cincinnati*, 953 F.2d 1036 (6th Cir. 1992). None of these cases even remotely concerns the type of training deficiency—failure to train as to county authority—alleged here. Plaintiff does not refer to a single reported opinion from this circuit or any other circuit that involves a similar type of violation and thus might have

[6] Plaintiff questioned Sheriff Jones regarding other complaints, but not in reference to Mr. Medellin or the worksite visits. (See Jones depo., pp. 31-32).

alerted Jones to the need for training in this area. As a matter of probability, if Mr. Medellin had been unlawfully exercising enforcement authority in his worksite visits, one would expect to see more than just one alleged violation. As such, Plaintiff has failed to show that his alleged seizure was a "highly predictable consequence" of a failure to train. This means that the need for training was not "so obvious" and thus, that Sheriff Jones was not "deliberately indifferent" to Plaintiff's constitutional rights. In sum, Plaintiff has failed to provide sufficient evidence to sustain any official capacity claim.

2. Butler County did not violate the Constitution or any State law by speaking to businesses and their employees regarding proper documentation.

The worksite visit conducted in this case by Mr. Medellin and Deputy Berter violated no constitutional or state law provisions. The Supreme Court has definitively ruled that local law enforcement officers may speak to individuals regarding their immigration status. *Muehler v. Mena*, supra. Further, no reasonable suspicion or probable cause is needed to initiate such a conversation. *Id*. Plaintiff, at length, discusses the well settled proposition that reasonable suspicion or probable cause is needed before detaining an individual. Defendants do not disagree, but, as discussed above, Plaintiff was not detained until he presented forged documents to Deputy Berter.

Plaintiff continues to characterize the worksite visit in this case as a "raid"[7] and enforcement of federal immigration laws. (See Pltf.'s Mot. for Partial Summary Judgment, pp. 25-32). Plaintiff's characterization is improper. Plaintiff is correct that local arrest authority for immigration violations only extends to criminal provisions of the INA. Defendants have never

[7] The idea that the worksite visit constituted a "raid" is absurd when the objective facts are considered: (1) out of the entire Butler County Sheriff's Office, only two persons were present, one of whom had no arrest power; and (2) only one person (Plaintiff) was arrested (on state law charges) despite the fact that many of the workers stated they were illegal immigrants or had no legal documents.

suggested otherwise and neither Plaintiff nor any other employee at the worksite was arrested for any immigration violation, civil or criminal. (See Defs. Mot. for Summary Judgment, Doc. 55, p. 22). Plaintiff has pointed to no case or provision which would prevent Butler County from speaking to employers and employees regarding proper documentation. Simply speaking to employers and employees regarding proper documentation or potential violations cannot reasonably be said to be enforcement of immigration law. In this case, Defendant Medellin inquired, about Plaintiff's immigration status—something that is entirely constitutional: "We certainly did not, as the Court of Appeals suggested, create a "requirement of particularized reasonable suspicion for purposes of inquiry into citizenship status.'" *Muehler v. Mena*, 544 U.S. 93, 101 n.3 (2005). Moreover, the Court held that merely questioning an individual about his/her immigration status <u>does not</u> constitute a seizure: "this Court has held repeatedly that mere police questioning does not constitute a seizure." *Id.*, citing *Florida v. Bostick*, 501 U.S. 429, 434, 115 L. Ed. 2d 389, 111 S. Ct. 2382. Therefore, Mr. Medellin did not violate any clearly established law by speaking with Plaintiff about his immigration status.

IV. <u>CONCLUSION</u>

Plaintiff is not entitled to summary judgment. Under the factors enumerated in *Mendenhall*, supra, Plaintiff was not seized while Mr. Medellin was merely speaking to him regarding his immigration status and identification. As such, there is no underlying constitutional violation upon which to base any official capacity liability. Even if there were a constitutional violation, Plaintiff has produced no evidence that it was the result of any failure to train or that Sheriff Jones was deliberately indifferent to any perceived need for training. Finally, Plaintiff's theory of the case—that Butler County was illegally enforcing immigration laws—is not supported by facts or case law. As such, Plaintiff's Motion for Partial Summary

Judgment should be denied and Defendants' Motion for Summary Judgment, Doc. 55, should be granted.

Respectfully submitted,

/s/ Andrew N. Yosowitz

Steven G. LaForge (0036737)
e-mail: stevelaforge@isaacbrant.com
Andrew N. Yosowitz (0075306)
email: any@isaacbrant.com
Marianne Pressman (0059512)
email: mpressman@butlersheriff.org
Co-Counsel for Richard K. Jones, Robert Medellin and Daniel Berter
ISAAC, BRANT, LEDMAN & TEETOR, LLP
250 East Broad Street, Suite 900
Columbus, Ohio 43215-3742
(614) 221-2121 (Phone)
(614) 365-9516 (Fax)
Attorneys for Defendants Butler County, Ohio, Richard K. Jones, Robert Medellin and Daniel Berter

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2009, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Andrew N. Yosowitz
Andrew N. Yosowitz