

proceedings, the evidence is not viewed in the light most favorable to the Plaintiff. Therefore, the Defendant is due to be granted qualified immunity on all claims because the Plaintiff has failed to prove by a preponderance of the evidence that her seizure was illegal.

Ala. Code § 15-10-3 (1975) states as follows:

“(a) An officer may arrest a person without a warrant, on any day and at any time in any of the following instances:

- (i) If a public offense has been committed or a breach of the peace threatened in the presence of the officer.”

The evidence of the case clearly demonstrates that the Plaintiff threatened a breach of the peace in the presence of the Defendant. Likewise, the evidence of the case conclusively demonstrates that the Plaintiff committed several public offenses in the presence of the Defendant.

Under § 13A-11-8 Ala. Code (1975), a person commits the crime of harassment if, with intent to harass, annoy or alarm another person, she directs abusive language towards another person. *Id.*

Under § 13A-11-7 Ala. Code (1975), a person commits the crime of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, she engages in threatening behavior. *Id.*

Under § 13A-10-15 Ala. Code (1975), a person commits the crime of making

a terrorist threat when she threatens by any means to commit any crime of violence by intentionally or recklessly causing the disruption of school activities. *Id.* The subjective intentions of the officer play no role in the Fourth Amendment Analysis. *Whren v. United States*, 517 U.S. 806 (1996).

3. The evidence of the case conclusively demonstrates that the Defendant had probable cause to seize the Plaintiff. The United States Supreme Court has held that probable cause for a warrantless seizure “depends... upon whether, at the moment the arrest was made,... the facts and circumstances within the [law officer’s] knowledge and of which he had reasonable trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense.” *Beck v. Ohio*, 379 U.S. 89 (1964). Furthermore, a seizure supported by probable cause does not violate the Fourth Amendment. *Whren v. United States*, 517 U.S. 806 (1996).

The evidence of the case conclusively demonstrates that Defendant Bostic heard the threat made by Plaintiff. The threat provides Defendant with probable cause. Thus, he is entitled to qualified immunity as he could not have violated Plaintiff’s constitutional rights. Plaintiff, in her case in chief, has failed to prove by a preponderance of the evidence that Deputy Bostic lacked probable cause.

Additionally, the 11th Circuit has already ruled that Gray’s excessive force claim

is not an independent claim, but rather is subsumed in her illegal seizure claim. See *Gray Ex Rel. Alexander v. Bostic*, _____ F.3d 3461 (11th Cir. 2006). Therefore, Deputy Bostic's use of handcuffs in the seizure is completely inconsequential. Either the seizure was constitutional or it was not. Probable cause makes it constitutional. Accordingly, Defendant is entitled to qualified immunity.

4. The evidence of the case conclusively demonstrates that Defendant Bostic had arguable probable cause to seize Gray under the previously cited Ala. Code sections. Plaintiff has failed to prove by the preponderance of the evidence that Deputy Bostic lacked arguable probable cause. The evidence demonstrates Plaintiff threatened to assault her teacher and that it was reasonable for Defendant to believe she had committed a misdemeanor in his presence or that she had threatened a breach of the peace under § 15-10-3 Ala. Code (1975).

5. In *Gray Ex Rel. Alexander v. Bostic, supra*, the 11th Circuit has already held that Deputy Bostic stopping Gray to question her about her threat was reasonable. The Court then considered whether Deputy Bostic's handcuffing of Gray "was reasonably related to the scope of the circumstances which justified the interference in the first place." *Id.* The Court found, at this stage of the proceedings, that Deputy Bostic's handcuffing of Gray was not reasonably related to the scope of the circumstances that justified the initial investigatory stop. *Id.* However, in making

that finding, the Court stated there was no evidence Bostic was arresting Gray. Now, the evidence of the case clearly demonstrates that Bostic was arresting Gray pursuant to the “zero tolerance” policy in effect at her school and because, in his mind, she had broken the criminal laws of the State of Alabama.

Further, Bostic testified that he was unsure of Gray’s intentions and demeanor and, handcuffed her to protect her own safety and his safety. He also was protecting her from committing or attempting to commit another crime.

Plaintiff has failed to establish by a preponderance of the evidence that Defendant Bostic did not have a reasonable belief that he was arresting Plaintiff or that she might present a potential threat to safety. Accordingly, at this stage of the proceedings, Bostic is entitled to qualified immunity because Plaintiff has not carried her burden.

Although the 11th Circuit considered the subjective intentions of Defendant in its opinion, such a consideration is not a part of the qualified immunity analysis. This Court must view Defendant’s behavior objectively and consider neither Plaintiff’s allegations that Defendant acted punitively nor Defendant’s allegations that he acted with good intentions. See, e.g., *Graham v. Conner*, 470 U.S. 386, 397 (1989); *Arkansas v. Sullivan*, 532 U.S. 769 (2001); *Davenpeck v. Alford*, 543 U.S. 146 (2004).

6. Plaintiff has failed to establish that making a warrantless arrest for a threatened breach of the peace or other misdemeanor and then unarresting the suspect violates a clearly established constitutional right. Plaintiff has failed to demonstrate by a preponderance of the evidence that she has a clearly established right to be arrested and *stay* arrested. Plaintiff has not proved by a preponderance of the evidence that she has a clearly established constitutional right which protects her against a law officer changing his mind about completing her arrest with a formal “booking” at a detention facility. Therefore, Defendant is entitled to qualified immunity.

7. Plaintiff has failed to establish by a preponderance of the evidence that she has a clearly established right that protects her from being lawfully arrested or seized if the arresting officer has a “purely punitive purpose”. An arresting officer’s state of mind is irrelevant to the existence of probable cause and probable cause validates a seizure under the Fourth Amendment. *Davenpeck, supra*.

8. The evidence of the case conclusively demonstrates that the Defendant did not cause anything more than de minimis physical injury to the Plaintiff. In fact, there was no physical injury to the plaintiff. Therefore, the evidence removes this case from the line of “obvious clarity” cases discussed in *United States v. Lanier*, 520 U.S. 259 (1997).

9. The Plaintiffs have failed to adduce sufficient evidence of the existence

or amount of damages. The Plaintiffs have offered no expert testimony to support any of their claimed damages.

10. The Plaintiffs are not entitled to recover punitive damages.

11. The Plaintiffs have failed to prove by a preponderance of the evidence that any of their constitutional rights have been violated.

RESPECTFULLY SUBMITTED this the __ day of January, 2007.

/s/ Travis R. Wisdom

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CERTIFICATE OF SERVICE

I hereby certify that on January __, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties, and I hereby certify that, to the best of my knowledge and belief, there are no non-CM/ECF participants to whom the foregoing is due to be mailed by way of the United States Postal Service.

/s/ Travis R. Wisdom