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S.F.'s 'Fajitagate' case argued in federal court 9th Circuit mulls city's liability in off-duty officers' actions

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BERKELEY — Lawyers sparred before a federal appeals court Wednesday over whether San Francisco and its police department can be held liable for off-duty officers' actions in the notorious "Fajitagate" incident that shook the city for years.

Lawyers for plaintiffs Adam Snyder and Jade Santoro argued that the police department had an informal but well-understood policy of letting slide any officers who got into trouble with the law while off-duty.

By creating this culture in which officers felt emboldened to do as they pleased, and by failing to adequately discipline one of the three officers in this case for repeated accusations of excessive force while on duty, the city set the stage for the

Nov. 20, 2002, drunken street brawl in which officers Alex Fagan Jr., David Lee and Matt Tonsing roughed up Snyder and Santoro for failing to surrender a take-out bag of steak fajitas, plaintiffs' attorneys John Scott and Dennis Cunningham claimed.

"What happened off duty was virtually identical to what happened on duty," Scott argued, claiming the record shows Fagan had a history of belligerence and excessive force on the job. "This was his M.O., and it went unchecked. Shouldn't a jury decide in this case if there's a causal relationship?"

But Deputy City Attorney David Newdorf told a three-judge panel of the 9th U.S. Circuit Court of Appeals — sitting in special session Wednesday at the University

of California, Berkeley, School of Law — that the city and department neither participated in nor had policies encouraging whatever harm the three officers caused the plaintiffs.

"Your honor, if I go out tonight and give some bad legal advice, the city is not liable for malpractice, and that's the same case we have here," he argued.

Fajitagate rocked the city in part because Fagan is the son of former Assistant Police Chief Alex Fagan Sr., and accusations quickly surfaced that Fagan Jr., Lee and Tonsing had received deferential treatment from officers responding to the brawl.

Then-District Attorney Terence Hallinan indicted then-Chief Earl Sanders and nine other officers in February 2003 on charges they'd

obstructed justice in covering up the three officers' act. The charges were dropped two months later, and Sanders and other officers later took legal action to further clear their names.

Fagan Jr., Lee and Tonsing were charged in connection with the brawl but were acquitted in jury trials. However, a civil jury in June 2006 found Fagan and Tonsing liable for the beating, awarding \$41,000 to Snyder and Santoro.

The case argued Wednesday is a separate federal civil rights case filed not against the officers but against their employers. U.S. District Judge Jeffrey White dismissed the case in April 2006, ruling plaintiffs could not bring a federal civil rights claim over private, off-duty conduct of

police officers. The plaintiffs appealed, leading to Wednesday's arguments.

Cunningham argued Wednesday that officers with an on-duty record like Fagan Jr.'s — 16 excessive-force complaints in 13 months on the job — should be fired; if they're not, their employers must be held responsible when those on-duty transgressions are duplicated off-duty. "There has got to be accountability," he said.

But Newdorf said the city and department can't be accountable when "that kind of conduct bears no resemblance to the use of force authorized on the job." The three off-duty officers weren't armed and didn't display badges or otherwise identify themselves as police in an attempt to abuse that authority, he noted, and nothing in Fagan Jr.'s record indicated he was prone to being "engaged in random violence on the street." A decision is expected within several months.