

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HARRY FAUST, JR. : CIVIL ACTION
 :
v. :
 :
OFFICER J. ADAM POWELL ET AL. : No. 99-4080

MEMORANDUM

Ludwig, J.

February 17, 2000

In this action under 42 U.S.C. §§ 1983, 1988, defendant Middletown Township (Pa.) moves for partial summary judgment.¹ Fed. R. Civ. P. 56. Jurisdiction is federal question. 28 U.S.C. §§ 1331, 1343.

The complaint filed on behalf of plaintiff Harry Faust, Jr. is against police officers J. Adam Powell and Glenn Patrick McPhearson, Middletown Township, and Middletown Township Police Department.² It alleges that on August 13, 1997, plaintiff was taken into custody and was “beaten, assaulted, and

¹ Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The movant has the burden of showing that there is no triable issue. The opposing party must point to specific, affirmative evidence in the record — and not simply rely on allegations or denials in the pleadings — in order to defeat a properly supported motion. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed.2d 265 (1986); Knabe v. Boury Corp. 114 F.3d 407, 410 n.4 (3d Cir. 1997).

² Claims against Middletown Township Police Department were dismissed because it is not a legal entity. Order, Feb. 8, 2000. Count four for punitive damages against Middletown Township was also dismissed. See City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271, 101 S. Ct. 2748, 2762 (1981) (“[W]e hold that a municipality is immune from punitive damages under 42 U.S.C. § 1983.”).

subjected to the unreasonable use of force” by defendant officers.³ Compl. ¶¶ 7–8. Middletown Township’s summary judgment motion is predicated on the lack of evidence of a municipal “policy, ordinance or custom” or steps taken “by an official high enough in government so that his actions can fairly be said to represent a government decision.” Def.’s mem. at 4–5.

The familiar rule is that a municipality is not subject to § 1983 liability unless the tort in question was, in effect, the act of that entity. Proof may consist of the municipality’s policies, practices, customs, regulations or enactments. City of Canton v. Harris, 489 U.S. 378, 385, 109 S. Ct. 1197, 1203, 103 L. Ed.2d 412 (1989) (citing Monell v. New York City Dept. of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed.2d 611 (1978)); Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir.1990). The conduct of a policymaker may itself be actionable. Pembaur v. City of Cincinnati, 475 U.S. 469, 480, 106 S. Ct. 1292, 1298, 89 L.Ed.2d 452 (1986)(“[M]unicipal liability may be imposed for a single decision by municipal policymakers.”); Mark v. Borough of Hatboro, 51 F.3d 1137, 1154 n.14 (3d Cir. 1995). A failure to train employees may be sufficient, but only if that “failure amounts to deliberate indifference to the rights

³ Plaintiff has not developed the facts beyond this averment. Defendant’s version of the facts, set forth in its memorandum in support of its motion for summary judgment, is that after a car stop, plaintiff failed several field sobriety tests. He was taken into custody and some hours later, “assaulted Officer Powell after handcuffs were removed from him. Plaintiff jumped at Officer Powell and grabbed his hair. Additional officers were required to restrain him and during this time, OC spray was used to subdue Plaintiff.” Def.’s mem. at 2. This factual dispute does not bear on the issue of whether Middletown Township is entitled to summary judgment.

of persons with whom the police come into contact." Montgomery v. De Simone, 159 F.3d 120, 126-27 (3d Cir. 1998)(citing City of Canton v. Harris, 489 U.S. at 388). Respondeat superior is not applicable, but the acquiescence of a supervisor may be enough if it imports agreement or concurrence. There must be "both contemporaneous knowledge of the offending incident or knowledge of a prior pattern of similar incidents and circumstances under which the supervisor's actions or inaction could be found to have communicated a message of approval to the offending subordinate." Id., citing Bonenberger v. Plymouth Township, 132 F.3d 20, 25 (3d Cir. 1997).

Here, plaintiff argues that Middletown Township 1) did not conduct proper background searches; 2) failed to monitor or supervise officers to determine if any showed "violent tendencies"; 3) did not "investigate instances of police misconduct"; 4) did not discipline officers who behaved inappropriately; 5) concealed information of police abuse; 6) inadequately trained officers McPhearson and Powell; 7) failed to terminate violent officers; and 8) refused to "act in a manner that would protect individuals from the unconstitutional violent . . . behavior of police officers." Compl. ¶ 16.

Plaintiff, however, has not satisfied his oppositional summary judgment burden.⁴ The only matter that he has presented is in the form of an

⁴ "When a motion for summary judgment is made and supported as provided in this rule, as adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth
(continued...)

expert report of a former New Jersey state trooper who is now a private investigator. Referring, in part, to the depositions of defendants Powell and McPhearson and the Middletown Township Police Chief, the report concludes:

[T]he outrageous actions of Officer Powell, and the punching of Faust by Officer McPhearson, are part and parcel of a decision made by the Middletown Township and its Police Department, who failed to adequately train and instruct its officers in the proper use of force. . . . This incredibly wrong reasoning and decision [to kick/knee plaintiff] can only be the product of an environment where the training and oversight is so lax as being the cause of Officer Powell's action.

. . .

It is also my opinion that there is evidence of deliberate indifference in this case by management and the sole policy maker, Chief McKenna, by failing to investigate complaints of excessive force and violations of the established policy of the agency.

Pl.'s mem., ex. A. at 9.

Nevertheless, no documents or depositions have been submitted, or any other substantiating material. In addition, the report does not cite any prior incidents of excessive force involving Middletown Township police officers or defendant officers Powell or McPhearson to support the sweeping statement that there is "deliberate indifference" to the use of excessive force. Instead, the report calls attention to a "use of force" policy adopted by Middletown Township that evinces a policy against the use of excessive force. *Id.* at 6. The alleged violations of such a policy cannot, without more, be said to be a basis for Monell liability,

⁴(...continued)
specific facts showing there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

and nothing else has been offered factually to raise a triable issue on which plaintiff could prevail against the township.

An order accompanies this memorandum.

Edmund V. Ludwig, J.

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ORDER

AND NOW, this 17th day of February, 2000, upon motion, summary judgment is granted as to defendant Middletown Township. Fed. R. Civ. P. 56.

Edmund V. Ludwig, J.