

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

HASSAN HALWANI,	:	CIVIL ACTION
Plaintiff,	:	
	:	NO. 99-1450
v.	:	
	:	
RICHARD GALLI, JR.,	:	
ROBERT SMYTHE and	:	
THE BOROUGH OF DARBY,	:	
Defendants.	:	

MEMORANDUM

BUCKWALTER, J.

July 13, 2000

Presently before the Court in this 42 U.S.C. Section 1983 action is Defendants Robert Smythe (“Smythe”) and Borough of Darby’s (“Darby”) (collectively “Defendants”) Motion for Summary Judgment and Plaintiff Hassan Halwani’s Response thereto. For the reasons stated below, Defendants’ Motion will be granted.

I. BACKGROUND

Early in the morning of April 25, 1998, Sergeant Richard Galli (“Galli”)¹ entered Halwani’s place of business (a 7-11 convenience store) located in the Borough of Darby.

1. Sergeant Galli is not a party to the Motion at issue at this stage in the litigation, as Default Judgment was entered against him due to his failure to respond to Halwani’s Complaint. Galli’s conduct and role in the instant cause of action, however, is highly relevant and will be analyzed thoroughly.

Dressed in full uniform, Galli threatened Halwani's life and further threatened to bring charges of fraud and illegality against him.²

Halwani proceeded to telephone 911 and in response, two Darby Police Officers arrived at the store. These officers viewed the videotape but failed to take any police action despite the fact that Halwani was visibly upset and nervous over the incident. Halwani asserts that an investigation was not conducted and an incident report was not prepared. The officers admitted that they did not contact Galli following this incident.

The following morning, Halwani again attempted to make an official complaint against Galli. A videotape of the incident was delivered to the Darby Police Station and Plaintiff was told by Smythe that he would be contacted later in the morning, although no report was taken. Halwani was never contacted by Smythe or anyone else in the department. Halwani

2. A videotape of the exchange that took place between Galli and Halwani was transcribed as follows:

Sunday, April 26, 1988

12:00:34 Richard Galli arrives in dark colored unmarked Darby Police car.
12:00:44 AM Richard Galli enters store in full uniform.
Galli Do you have something to say to me?
Halwani About what?
Galli What! You're a fucking jerk off. And you fuck with me one more time and I'm gonna knock your fucking head off. You understand me? You call my house one more fucking time after fucking eight o'clock at night . . . I'm gonna knock your head off . . . you got me?
Halwani Finished?
Galli Yeah, I'm finished. And don't tell me it wasn't you. I know it was you.
Halwani
(to Dawson) Do you have this on record?
Galli I hope you got it all on record. Right. Cause guess what I'll call the Better Business Bureau on you tomorrow, I'll call Child Labor on you, and I'll get you for insurance fraud. Now fuck with me some more.
Halwani (unintelligible) and get me my money because . . .
Galli Fuck you! Fuck you try and collect it.
Halwani OH H H H. Right now Rick. (Sam walks out of the picture).
Galli Try and collect it! Try and collect it.
12:01:06 Galli leaves store and goes back to unmarked police car.

contends that he was not being taken seriously and was disturbed by the official indifference to Galli's threats.

Halwani proceeded to notify the Delaware County District Attorney's Office and upon consideration of Halwani's complaint, Mr. Thomas Worrilow investigated the incident and ultimately charged Galli with violations of Pennsylvania criminal law.

Halwani contends that the liability of Smythe and Darby is predicated in their total disregard of the continuous conduct of Galli. While Halwani provides plenty of evidence in the record that supports his conclusion that Galli was the subject of several complaints while serving in the capacity of Police Officer with the Borough of Darby, the issue that this Court must first resolve is whether or not, at the time of the incident at Halwani's 7-11, Galli was acting under color of state law.

II. DISCUSSION

To maintain a cause of action under § 1983, a plaintiff must establish: (1) the alleged conduct was committed by a person acting under color of state law; and (2) the conduct deprived the plaintiff of rights, privileges and immunities secured by the Constitution or laws of the United States. See e.g., Hicks v. Feeney, 770 F.2d 375, 377 (3rd Cir. 1985). Section 1983 is not a source of substantive rights; it only provides "a method for vindicating federal rights elsewhere conferred." Graham v. Connor, 490 U.S. 386, 393-94 (1989). Consequently, Section 1983 does not provide "a right to be free of injury wherever the State may be characterized as the tortfeasor," instead, the plaintiff must show a deprivation of a federally protected right. Paul v.

Davis, 424 U.S. 693 (1976). As Defendants contend that Galli was not acting under color of state law when he was inside of Halwani's 7-11, the Court will examine this issue first.

A. Galli--Acting Under Color of State Law

Throughout Halwani's Reply Memorandum, it is argued that Galli was acting under color of state law, and as a result, Smythe and Darby are to be held liable for Galli's actions in the 7-11. For example, Halwani claims that although Smythe was aware of Galli's violent propensities, Smythe ignored each and every complaint and as a result, Halwani's rights were violated in his store. However, it is clear that if I find that Galli was not acting under color of state law when he threatened Halwani, no Section 1983 liability exists, as Galli was acting as an individual, and not an officer of the Darby Police Department.

This issue has been addressed several times within this Circuit. In 1994, the United States Court of Appeals found that an off-duty police officer who used his nightstick in a fight was not a state actor for purposes of Section 1983. Barna v. City of Perth Amboy, 42 F.3d 809, 816 (3d Cir. 1994) The Third Circuit reasoned that the officer had committed "purely private acts which [were] not furthered by any actual or purported state authority" Id.

Courts have found that a police officer may be acting under color of state law when they "purport" to be acting with police authority. [But, see Nonnemaker v. Ransom, 1999 WL 387084, *3-4, No.Civ. 99-912 (E.D.Pa. May 26, 1999), where an off-duty police officer was not acting under color of state law, notwithstanding the fact that he allegedly identified himself as an "off-duty officer" and told the plaintiff to "surrender his gun," as these actions were not considered to be "police actions," but rather, actions of a private person]; see also Griffin v. Maryland, 378 U.S. 130, 135 (1964). Essentially, the rule has become one in which an off-duty

police officer is found to be a state actor when and if the action under review is consistent with the actions taken by a police officer. Id.; see also Barna, 42 F.3d at 816 (police action may include the following actions: “flashing a badge, identifying oneself as a police officer, placing an individual under arrest, or intervening in a dispute involving others pursuant to a duty imposed by police department regulations.”).

The cases above all deal with out-of-uniform, off-duty police officers, while Galli was on duty and in uniform. Nevertheless, defendants argue that he was acting in the capacity of a private individual with whom Halwani formed a private relationship. Perhaps most compelling, defendants cite the decision in Johnson v. Hackett, 284 F.Supp. 933, 937 (E.D.Pa. 1968), wherein the court found that “[a]cts committed by a police officer even while on duty and in uniform are not under color of state law unless they are in some way ‘related to the performance of police duties.’” Therefore, it seems clear that it is not sufficient to consider simply whether or not the police officer is wearing a uniform, or whether he or she is on-duty, but rather what type of action was taken (i.e., police action or private action). See Screws v. United States, 325 U.S. 91, 111 (1945)(“It is clear that under ‘color’ of law means under ‘pretense’ of law. Thus acts of officers in the ambit of their personal pursuits are plainly excluded”); see also Bonenberger v. Plymouth Township, et al., Civ.A.No. 96-403, 1996 WL 729034, *2 (E.D.Pa. Dec. 18, 1996)(“absent any meaningful indicia of state authority, actions taken by someone who happens to be a police officer are not necessarily attributable to the state”).

From the record, defendants argue it is clear that Galli did not utilize state authority while he was inside of Halwani’s store. Halwani’s deposition provides the following:

Q: At any point, did he [Galli] ever pull his gun out while he was in the store?

A: No, ma'am.

Q: Did he ever advise you that you were ever under arrest?

A: No, ma'am.

Q: Did he ever advise you he was going to issue any type of citations against you?

A: No, ma'am.

In Barna, the Third Circuit referenced a Fifth Circuit decision holding that an alleged assault--by an off-duty police officer-- was not under color of state law where the altercation arose out of a personal dispute and the officer did not arrest or threaten to arrest the plaintiff. See Delcambre v. Delcambre, 635 F.2d 407, 408 (5th Cir.1981). This case is not unlike that of Delcambre, in that, Galli did not threaten to arrest Halwani. Furthermore, the record shows clearly that the altercation at issue in this case was one of a personal nature. Looking at the facts in their entirety, it seems obvious that the interlude between Halwani and Galli was an argument between two friends. Halwani was acquainted with Galli since the time that the 7-11 was purchased in 1995 (the altercation took place on April 26, 1998). Halwani admits previously having gone to Galli's house and traveling to Atlantic City with him on at least one occasion. The record provides that Halwani's girlfriend used Galli's address for a brief period of time for her automobile insurance. Furthermore, during the encounter at the 7-11, Halwani addressed Galli, not by any official title, but by his first name, "Rick."

Based on the undisputed facts (as stated in the record) and the caselaw applicable thereto, it is the opinion of this Court that Galli was not acting under color of state law in the 7-11.

B. Claims Against Defendant Chief Smythe

Halwani also names Darby Police Chief Smythe as a defendant in both his individual and his official capacity. Preliminarily, it is important to note that The United States Supreme Court has held that public officials acting in their official capacities do not constitute “persons” under Section 1983. Will v. Michigan Department of State Police, 491 U.S. 58, 71 (1989)(“A suit against a state official in his or her official capacity . . . is no different from a suit against the state itself”). Therefore, official capacity suits “generally represent only another way of pleading an action against an entity of which an officer is an agent.” Kentucky v. Graham, 473 U.S. 159, 105 S.Ct., 3105 (1985)(citing Monell, 426 U.S. at 690). In light of said caselaw, Halwani’s official capacity suit against Smythe must fail, as this claim shall be treated as one against the Borough of Darby.

The Eleventh Amendment does not bar any claims brought under Section 1983 against state officials in their individual capacities for actions taken under the color of state law. See Hafer v. Melo, 502 U.S. 21, 30-31 (1991). For liability to attach at the individual level, the state official must have been personally involved in the challenged conduct or knowingly acquiesced in it-- liability cannot be predicated on principles of respondeat superior alone. See Paratt v. Taylor, 451 U.S. 527, 537 n.3 (1981); accord Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir.1988)(“Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence . . . made with appropriate particularity.”).

While supervisory liability under Section 1983 may exist for a failure to train or supervise if the actions constitute a deliberate indifference to the plaintiff’s rights and are the proximate cause of plaintiff’s injuries, see City of Canton v. Harris, 489 U.S. 378 (1989), since

Galli was not a state actor while inside of the 7-11, any sort of failure to train or supervise claim fails.³

C. Municipal Liability

Section 1983 claims against a municipality or its agency must allege: (1) the existence of a custom or policy of a municipality which is of such standing to have the force of law, and (2) that one of the municipality's employees violated the plaintiff's civil rights while acting pursuant to that policy or custom. See Monell v. Department of Soc. Servs., 436 U.S. 658 (1978). Thus, a municipality may be held liable for acts that it has ordered, or by virtue of actions taken by its own officials who have "final authority to establish municipal policy with respect to the action ordered." Pembauer v. City of Cincinnati, 475 U.S. 469, 480-81 (1986).

Although a municipality may not be successfully sued under Section 1983 on a theory of respondeat superior for injuries caused solely by the acts or omissions of its agents or employees, a municipality may be held liable under this section for the implementation of an official policy or unofficial custom which results in the deprivation of a plaintiff's constitutional rights. See Monell v. New York City Dep't of Social Services, 436 U.S. 658, 690-91 (1978); Estate of Bailey v. County of York, 768 F.2d 503, 506 (3rd Cir.1985); Agresta v. City of Philadelphia, 694 F.Supp. 117, 122 (E.D.Pa.1988). However, "[i]t does not follow from these principles that the mere description of an act as a 'policy' or 'procedure' meets the threshold for a

3. Halwani's pleadings suggest that his claim against Smythe is raised as it pertains to his failure to train other officers who were present at the 7-11 during the incident at issue. Although not necessary, said officers are not named in the caption, and as evidenced by the Complaint, Halwani's Reply to Defendants' Motion for Summary Judgment, and the exhibits attached thereto, Halwani's cause of action against Smythe stems from Smythe's alleged indifference to the altercation at the 7-11. Halwani explicitly states that the liability of Smythe is predicated in his "total disregard of the continuous conduct of Sergeant Galli." In light of this and Halwani's inability to provide evidence that Smythe failed to train the said officers, or that it was the police department's policy to ignore such altercations, Smythe is relieved of such liability.

Section 1983 claim." Estate of Bailey, 768 F.2d at 506. Moreover, Section 1983 liability will not attach to the municipality unless its employee is first found to be liable for a violation of Section 1983. Mimms-Huntley v. City of Philadelphia, No.Civ.A 93-2164, 1993 WL 428946, *3 (E.D.Pa. October 13, 1993)(citing Williams v. West Chester, 891 F.2d 458, 467 (3d Cir.1989)).

Halwani claims that municipal liability attaches to the Borough of Darby, in that, he can demonstrate that the conduct of Galli was persistent from as early as 1986 and continued unabated up until the time that the events of this case took place. He contends that the Darby Police Department has ignored Galli's conduct on the night in question in the same way that his conduct has been ignored for years. I have found that Galli was not acting under color of state law -- as he was dealing with a personal matter and not a police matter -- and therefore, the Borough of Darby is not responsible for such actions.

III. CONCLUSION

Finally, scant attention is given to the second prong of a § 1983 action; that is, that the conduct of Galli deprived plaintiff of rights, privileges and immunities secured by the Constitution or laws of the United States. In his brief in response to defendants' motion for summary judgment, plaintiff does not articulate what constitutional right of his was violated by the episode set forth in Exhibit E. From his complaint, he appears to be arguing that his Fourteenth Amendment due process rights were violated as a result of Galli's conduct and the other defendants' failure to respond to it. Galli's conduct, even if he were a state actor, may have been either tortious or criminal, or both, but was not a constitutional violation in and of itself. What procedural due process plaintiff is alleging he was denied is unclear. It is clear that his

complaint was investigated by the Delaware County District Attorney's Office, where plaintiff went the morning following the Saturday incident, and charges were brought against Galli.

An appropriate order follows.

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ROBERT SMYTHE and	:	
THE BOROUGH OF DARBY,	:	
Defendants.	:	

ORDER

AND NOW, this 13th day of July, 2000, upon consideration of Defendants Robert Smythe and the Borough of Darby's Motion for Summary Judgment, and Plaintiff Hassan Halwani's Response thereto, it is hereby ORDERED and DECREED that said Motion is GRANTED.

It is further ORDERED and DECREED that judgment is entered in favor of Defendant Robert Smythe and the Borough of Darby, and Plaintiff's Hassan Halwani's Complaint is DISMISSED with prejudice.

Since default judgment has been previously entered against Robert Galli, Jr., the only remaining defendant, the Clerk of Court is directed to mark this case CLOSED.

BY THE COURT:

RONALD L. BUCKWALTER, J.