

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

DANIELLE DiSALVIO : CIVIL ACTION
 :
 v. :
 :
 LOWER MERION SCHOOL DISTRICT, :
 et al. : No. 00-5463

MEMORANDUM & ORDER

J.M. KELLY, J.

APRIL 25, 2002

At the conclusion of Plaintiff's case in chief, the Defendants moved for Judgment as a Matter of Law ("JMOL"), pursuant to Federal Rule of Civil Procedure 50. All Defendants argue that the claim of a constitutional violation by Plaintiff, Danielle DiSalvio ("DiSalvio"), must be subsumed by Title IX. Defendant Thomas Russell ("Russell") argues that the testimony of DiSalvio is so inconsistent that no reasonable juror could accept the allegations. Russell and the school district individual defendants, Lindsey Matskow, Dr. Joseph D'Bartolomeo, Dr. David Magill, Joan Litman, John McAllister, Jen Mucker, Adam Collacci, Nick Satani, and Hal Smith ("school district individual Defendants"), further argue that there is no evidence that the conduct of the individual Defendants rises to a conscience-shocking level required for a finding of a constitutional violation under § 1983. They also argue that on the state law claims, there is no evidence of willful misconduct. Finally, the individual Defendants argue that there is insufficient evidence of a bad motive or reckless indifference to the interests of

others to allow the jury to consider punitive damages.

SEA CLAMMERS DOCTRINE

The Defendants renew their argument, rejected by the Court in response to Defendants' Motion to Dismiss in this matter, that Title IX preempts DiSalvio's § 1983 claim because of Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981). Defendants have not presented the Court with any basis to now reject its prior holding that by choosing to proceed under § 1983 rather than Title IX, DiSalvio's claim is not barred by the Sea Clammers doctrine. See Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 726 (3d Cir. 1989).

JUDGMENT AS A MATTER OF LAW (JMOL)

As an initial matter, the official capacity suits against each individual Defendant under § 1983, to the extent they remain, are dismissed since the school itself is being sued under § 1983 for essentially the same thing and an official capacity suit against the officers is the same as a suit against the entity. Aitchison v. Raffiani, 708 F.2d 96, 100 (3d Cir. 1983). The Court now turns to the Defendants' Rule 50 Motion.

STANDARD OF REVIEW

JMOL, pursuant to Federal Rule of Civil Procedure 50, is appropriate only where, as a matter of law, there is not by sufficient evidence to allow a reasonable juror to arrive at a contrary verdict. See Link v. Mercedes-Benz, 788 F.2d 918, 921

(3d Cir. 1986). In making the determination to grant JMOL, the court must find that as a matter of law, "the record is critically deficient of the minimum quantity of evidence from which the jury might reasonably afford relief." Simone v. Golden Nugget Hotel & Casino, 844 F.2d 1031, 1034 (3d Cir. 1988). The party opposing JMOL is entitled to the benefit of all reasonable inferences that can be drawn from the evidence in order to determine whether there is any rational basis for the verdict. See Bhaya v. Westinghouse Elec. Co., 832 F.2d 258, 259 (3d Cir. 1987). JMOL is only appropriate when there is no evidence or reasonable inference that can be drawn supporting the verdict. See SCNO Barge Lines, Inc. v. Anderson Clayton & Co., 745 F.2d 1188, 1192-93 (8th Cir. 1984).

DISCUSSION

1. Section 1983 individual capacity suits

Section 1983 "[i]ndividual capacity suits may be brought against government officials who acted under color of state law." Melo v. Hafer, 912 F.2d 628, 637 (3d Cir. 1990), aff'd, 502 U.S. 21 (1991). The violation of the right to bodily integrity, arising out of alleged incidents of sexual harassment of a student by a school official or employee, is a recognized substantive due process claim under the Fourteenth Amendment. Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 726 (3d Cir. 1989).

A constitutional violation occurs when a wrongdoer's actions are "so ill-conceived or malicious that it shocks the conscience." Miller v. City of Philadelphia, 174 F.3d 368, 375 (3d Cir. 1999). "[T]he standard of culpability for substantive due process purposes must exceed both negligence and deliberate indifference, and reach a level of gross negligence or arbitrariness that indeed 'shocks the conscience.'" Id. "Critically, under this standard, officials will not be held liable for actions that are merely negligent." Id. Whether the act or failure to act reaches the conscience-shocking level depends on the circumstances of each case. Id.

Thomas Russell

The Court finds, upon consideration of the evidence presented by Plaintiff, that there is sufficient evidence for a reasonable jury to conclude that Russell engaged in inappropriate behavior rising to a conscience-shocking level. Inappropriate sexual behavior is especially reprehensible when it occurs in a school setting and involves a young student such as Plaintiff. While there are some inconsistencies in the Plaintiff's own testimony and Defendants are likely to present contradictory evidence, it is up to the jury to determine the facts, through the weight of the evidence and the credibility of the witnesses. As such, it would be inappropriate for the Court to decide as a matter of law whether Russell's behavior towards Plaintiff rises

to a conscience-shocking level.

Lindsey Matskow, Dr. Joseph D'Bartolomeo, Dr. David Magill, Joan Litman, John McAllister, Jen Mucker, Nick Satani

Apart from Russell, Plaintiff has further alleged that certain other individual school officials and employees violated Plaintiff's constitutional rights. Specifically, Plaintiff claims these individuals failed to train Russell on sexual harassment, failed to properly supervise Russell, failed to report the alleged incidents involving Russell and Plaintiff to a higher level school official or the police, and failed to properly investigate the incidents. The issue before the Court is whether Plaintiff has presented sufficient evidence for a reasonable jury to decide that an individual Defendant's conduct in this matter rises to a conscience-shocking level.

The Court finds, upon consideration of the evidence presented by the Plaintiff at trial, that as to the following individuals, Plaintiff has not presented sufficient evidence that would lead a reasonable jury to conclude that these individuals' actions or inactions rise to the level of gross negligence or arbitrariness that shocks the conscience: Lindsey Matskow, the assistant principal; Dr. Joseph D'Bartolomeo, the principal of Harriton High School at the time of the incidents; Dr. David Magill, the Lower Marion School District Superintendent; Joan Litman, the guidance counselor; John McAllister, the Assistant

football coach; Jen Mucker, the trainer; and Nick Satani, the Harriton High School Athletic Director. While Plaintiff has presented evidence that these individuals may have been negligent in their handling of the situation involving Russell and Plaintiff, Plaintiff has presented no evidence that these individuals did anything or failed to do something that would shock the conscience. Judgment, therefore, will be entered in favor of these individuals as a matter of law as to Plaintiff's § 1983 claim.

Adam Collacci and Hal Smith

There remains, however, Defendants Adam Collacci, an assistant football coach who was also one of Plaintiff's teachers, and Hal Smith, the head football coach. The Court finds that Plaintiff has presented sufficient evidence that could lead a reasonable jury to conclude their conduct in this matter rises to a conscience-shocking level. There has been testimony that Plaintiff reported each of the four incidents involving Russell to Collacci, from the first incident which occurred sometime in mid-August to the last incident on October 1st. According to the evidence presented by Plaintiff, Collacci took no action until October 1st, when another student, Melissa Grasso, complained of being hit on the buttocks with a newspaper by Russell. Considering the number of times Plaintiff claims she told Collacci, the failure of Collacci to take action in the face

of such serious allegations could rise to a conscience-shocking level.

As for Hal Smith, the head football coach, the Plaintiff has presented evidence that Smith came over to her house on the Sunday after the last incident with Russell and tried to dissuade her from further complaining about the matter because he could not, as a father of two children, afford to be fired from his job. A reasonable jury could decide, after the presentation of all evidence, that Smith's attempt to prey on Plaintiff's sympathies, if true, rises to a conscience-shocking level. Therefore, it would be inappropriate for this Court to decide the liability of Hal Smith as a matter of law.

Summary of section 1983 individual liability

In sum, with the exception of Thomas Russell, Adam Collacci and Hal Smith, judgment as a matter of law will be entered in favor of all other individual Defendants as to Plaintiff's § 1983 claim.

2. Official Immunity - State Law Negligence Claims

DiSalvio further asserts negligence, negligent supervision and retention, negligent hiring, and negligent infliction of emotional distress (NIED) against the school district individual Defendants. All of these Defendants argue that on DiSalvio's claims of state law negligence, she has failed to present sufficient evidence for the jury to find that their conduct was

willful misconduct. In essence, these Defendants claim that they are entitled to official immunity.

Under the Political Subdivisions Tort Claims Act, individual officers are immune to the same extent that their employing entity is immune. 42 Pa. Cons. Stat. Ann. § 8545. Hence, through the confluence of § 8545 (official liability) and § 8541, which grants broad immunity to local agencies, local officials enjoy expansive state-law immunity from actions taken by them in the course of their official duties. Section 8550, however, exempts claims based upon "willful misconduct" from the statute's grant of immunity. Hence, it must be decided whether plaintiff has presented evidence that the officials committed "willful misconduct" as contemplated by the statute.

"Willful misconduct" had been defined by the Commonwealth Court as "conduct whereby the actor desired to bring about the result that followed or at least was aware that it was substantially certain to follow, so that such desire can be implied." King v. Breach, 540 A.2d 976, 981 (1988). On the state law torts, therefore, it must first be determined if the Defendants' conduct was willful misconduct and only if there was willful misconduct related to the tort, may the jury determine if the tort took place. Thus, there must be evidence that each Defendant intended or was aware that Russell would inappropriately touch a student, such as DiSalvio, and cause an

injury, such as a relapse of her bulimia.

Nick Satani

Based upon the evidence presented in Plaintiff's case, the only Defendant who had any responsibility for hiring Russell was Satani, in his capacity as Athletic Director. There is, however, no evidence that Satani intended or was aware that Russell would inappropriately touch a student and cause damages. Plaintiff's expert, Dr. Dragan, testified that Russell's personnel file was empty. Plaintiff's attorney, however, stated during oral argument that there were, in fact, documents in Russell's employment file, just not documents they would have expected. As such, the Court would instruct the jury that no inference can be drawn from Dragan's statement that the file was empty. Therefore, there can be no inference drawn that there was willful misconduct by Satani in hiring Russell.

As for the other negligence claims, there is no evidence that Satani acted with willful misconduct. Accordingly, a verdict will be directed in his favor on the state law negligence claims.

Lindsey Matskow

As an Assistant Principal, Matskow had responsibilities for the operation of the school and training and supervision of the staff. There is, however, no indication that as a result of her acts or failure to act, Russell would inappropriately touch a

student and cause damages. Therefore, in the absence of willful misconduct, a verdict will be directed in Matskow's favor on all state law negligence claims.

Dr. Joseph D'Bartolomeo & Dr. David Magill

The evidence is that Dr. D'Bartolomeo, as principal, and Dr. Magill, as Superintendent, knew nothing of any of the alleged incidents until October 4th. Once they were notified of the allegations against Russell, they immediately acted to remove Russell from student interaction and promptly conducted an investigation. As such, there is no evidence that they intended or reasonably knew that Russell would inappropriately touch a student and cause damages. Accordingly, a verdict will be entered in their favor on all negligence claims.

Joan Litman

As a guidance counselor, Litman had a relationship with DiSalvio and a responsibility towards her education. There is no evidence that she had any responsibility for the supervision or retention of Russell. While there is evidence that DiSalvio told Litman of instances of Russell's inappropriate contact, there is no evidence that she intended or knew that Russell would inappropriately touch a student and cause damages. Absent willful misconduct, a verdict will be entered in Litman's favor on all negligence claims.

John McAllister

As an assistant football coach, McAllister was a peer of Russell. There is no evidence that he had any responsibility to supervise or retain Russell. There is no evidence that he intended or knew that Russell would inappropriately touch a student and cause damages. Finding no evidence of willful misconduct, a verdict will be entered in McAllister's favor on all negligence claims.

Jen Mucker

As athletic trainer, Mucker was DiSalvio's supervisor in her duties as Manager of the football team. As such, one of her responsibilities was to serve as a liaison between a team manager, like DiSalvio, and the school district. As there is evidence that she saw or learned of inappropriate touching by Russell and was aware or should have been aware that DiSalvio would be subject to emotional problems, it can be said that she should have known that Russell would inappropriately touch a student and cause damages. Therefore the NIED and negligence claims against Mucker remain. There is, however, no evidence that she had any responsibility for the supervision, retention or hiring of Russell. Therefore, except for the NIED and general negligence claims, a verdict will be entered in Mucker's favor on the negligence claims related to supervision, retention and hiring.

Adam Collacci

As DiSalvio's team leader, Collacci could be said to have an extremely close relationship with her. There is evidence that she told him of the incidents with Russell, but that he failed to report the incidents to administrators. Given the close relationship between Collacci and DiSalvio and the evidence that Collacci did not report DiSalvio's complaints, an inference can be drawn that he should have known that Russell would inappropriately touch a student and cause damages. Therefore the NIED and negligence claims remain against Collacci. There is, however, no evidence that he had any responsibility for the supervision, retention, or hiring of Russell. Therefore, except for the NIED and general negligence claims, a verdict will be entered in Collacci's favor on the negligence claims related to supervision, retention and

Hal Smith

There is uncontroverted evidence that Coach Smith went to DiSalvio's residence and discussed her allegations against Russell. There is further evidence that Smith told DiSalvio that he feared for his job and his ability to care for his children if there was a sexual harassment charge against the football program. As such, an inference can be drawn that Smith knew that Russell would inappropriately touch a student and cause damages. Therefore, the NIED and negligence claims remain against Smith. There is, however, no evidence that he had any responsibility for

the retention of Russell. To the extent that he was responsible for supervising Russell, it cannot be said that his supervision amounted to wilful misconduct.

3. Intentional Infliction of Emotional Distress

To state a claim for intentional infliction of emotional distress ("IIED"), the plaintiff must show four elements: 1) the conduct must be extreme and outrageous; 2) the conduct must be intentional or reckless; 3) the conduct must cause emotional distress; and 4) the distress must be severe. See Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265, 1273-1274 (3d Cir. 1979). The issue before the Court is whether Defendants' conduct was extreme and outrageous. To meet this element, DiSalvio must show conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." Buczek v. First National Bank of Mifflintown, 531 A.2d 1122, 1125 (Pa. Super. Ct. 1987).

If accepted by the jury, the conduct alleged by DiSalvio against Russell could be found by the jury to be outrageous. Likewise, Smith's alleged appeal to DiSalvio's friendship and concern over his job and his children's welfare could be considered outrageous. No reasonable juror, however, could find that the acts of the other Defendants rose to the necessary level of outrageousness.

PUNITIVE DAMAGES

The remaining constitutional claims against individual defendants under § 1983 require a showing of outrageousness; the remaining negligence claims require a showing of willful misconduct; and the IIED claim requires a showing of outrageous behavior. To the extent that these claims remain in the case, it can be inferred that those Defendants acted with a bad motive or reckless indifference to the interests of others, such that punitive damages may be appropriate.

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O R D E R

AND NOW, this 25th day of April, 2002, in consideration of the Motion for Judgment as a Matter of Law filed by Defendants, Thomas Russell, Lindsey Matskow, Dr. Joseph D'Bartolomeo, Dr. David Magill, Joan Litman, John McAllister, Jen Mucker, Adam Collacci, Nick Satani and Hal Smith, and the response of the Plaintiff, Danielle DiSalvio, at oral argument, and the evidence presented by Plaintiff at trial, it is **ORDERED**:

1. Plaintiff Danielle DiSalvio's Section 1983 official capacity suit against all individual Defendants, including Thomas Russell, Lindsey Matskow, Dr. Joseph D'Bartolomeo, Dr. David Magill, Joan Litman, John McAllister, Jen Mucker, Adam Collacci, Nick Satani and Hal Smith is **DISMISSED**.

2. Defendants' Motion for Judgment as a Matter of Law under Federal Rule of Civil Procedure 50 as to Plaintiff's claims against the individual Defendants is **GRANTED** in part and **DENIED** in part.

A. Judgment is **ENTERED** in favor of Defendants, Lindsey Matskow, Dr. Joseph D'Bartolomeo, Dr. David Magill, Joan

Litman, John McAllister, Jen Mucker, and Nick Satani, and against Plaintiff, Danielle DiSalvio, as to the section 1983 individual liability claim against the Defendants.

1. Plaintiff's section 1983 individual liability claims against Defendants, Thomas Russell, Adam Collacci and Hal Smith remains.

B. Judgment is **ENTERED** in favor of Defendants, Lindsey Matskow, Dr. Joseph D'Bartolomeo, Dr. David Magill, Joan Litman, John McAllister, and Nick Satani, and against Plaintiff, Danielle DiSalvio, as to the Plaintiff's negligence claim.

1. The negligence claim remains as to Defendants, Jen Mucker, Adam Collacci, and Hal Smith.

C. Judgment is **ENTERED** in favor of Defendants, Lindsey Matskow, Dr. Joseph D'Bartolomeo, Dr. David Magill, Joan Litman, John McAllister, and Nick Satani, and against Plaintiff, Danielle DiSalvio, as to the Plaintiff's negligent infliction of emotional distress claim.

1. The negligent infliction of emotional distress claim remains as to Defendants, Jen Mucker, Adam Collacci, and Hal Smith.

D. Judgment is **ENTERED** in favor of individual Defendants, Lindsey Matskow, Dr. Joseph D'Bartolomeo, Dr. David Magill, Joan Litman, John McAllister, Jen Mucker, Adam

Collacci, Nick Satani and Hal Smith against Plaintiff, Danielle DiSalvio, as to the Plaintiff's negligent supervision and retention and negligent hiring claims.

E. Judgment is **ENTERED** in favor of Defendants, Lindsey Matskow, Dr. Joseph D'Bartolomeo, Dr. David Magill, Joan Litman, John McAllister, Jen Mucker, Adam Collacci and Nick Satani and against Plaintiff, Danielle DiSalvio, as to the Plaintiff's intentional infliction of emotional distress claim.

1. The intentional infliction of emotional distress claim remains against Defendants, Thomas Russell and Hal Smith.

BY THE COURT:

James McGirr Kelly, J.