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

DENISE MASLOW, LINDA WELLER, MARY DOE, NANCY DOE, and L.H.,	**:**	**No. 01-CV-3636**
Plaintiffs	**:**	
	:	**CONSOLIDATED CASES**
v.	**:**	**No. 00-CV-5660**
	:	**No. 00-CV-5805**
MICHAEL K. EVANS, PAUL J. EVANKO,	**:**	**No. 01-CV-1538**
THOMAS COURY, HAWTHORNE	**:**	**No. 01-CV-2166**
CONLEY, ROBERT G. WERTS,	**:**	**No. 01-CV-3636**
THOMAS J. LACROSSE, ROBERT B.	**:**	
TITLER, DAVID B. KREISER, DENNIS		**:**
HUNSICKER, KEVIN T. KRUPIEWSKI	**:**	
and GARY FASY,	**:**	
Defendants	**:**	

MEMORANDUM OPINION AND ORDER

RUFE, J. **June 25, 2004**

Presently before the Court is the Renewed Motion for Summary Judgment of Pennsylvania State Police ("PSP") Commissioner Paul J. Evanko, Deputy Commissioner Thomas Coury, and Major Hawthorne Conley (collectively "Moving Defendants"). For the following reasons, the Court grants in part and denies in part the Renewed Motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

The relevant factual and procedural history are set forth at length in the Court's November 7, 2003 Memorandum Opinion and Order, which is incorporated herein by reference.[1] In that Memorandum Opinion, the Court denied without prejudice Moving Defendants' Motion for Summary Judgment and simultaneously granted Plaintiffs leave to supplement the record with Bureau of Professional Responsibility ("BPR") General Investigation Reports that allegedly

[1] Maslow v. Evans, No. 01-CV-3636, 2003 U.S. Dist. LEXIS 20316, 2003 WL 22594577 (E.D. Pa. Nov. 7, 2003).

established that high-ranking PSP officials tolerated and condoned a pattern of sexual misconduct within the PSP.

On December 4, 2003, Moving Defendants filed the instant Renewed Motion for Summary Judgment in which they assert that Plaintiffs still cannot establish "deliberate indifference" with respect to Evanko, Coury, and Conley and that even if there are genuine issues of material fact with respect to the "deliberate indifference" issue, they nevertheless are entitled to qualified immunity. In their Joint Response to the Motion, Plaintiffs Denise Maslow, Linda Weller, and Mary Doe counter that the volume of sexual misconduct complaints between 1995 and 2001 and Moving Defendants' receipt of information contained in the various BPR reports demonstrate that Moving Defendants knew that there was a pattern of sexual misconduct within the PSP and were deliberately indifferent to the risk such misconduct presents to the public. Plaintiffs further note that despite 104 BPR investigations alleging sexual misconduct, only two PSP members were dismissed from the force over that six-year period.

A. The BPR General Investigation Reports

In accordance with the November 7, 2003 Memorandum Opinion and Order, Plaintiffs have submitted 104 BPR General Investigation Reports, each of which purportedly relates to allegations of sexual misconduct by PSP members between 1995 and 2001. Plaintiffs contend that the sheer volume of reports illustrate the systemic failure of the PSP to adequately address the problem during Moving Defendants' tenures.

The General Investigation Reports describe, inter alia, incidents where PSP members allegedly:

(1) had sexual intercourse in a patrol car while on duty (BPR Report

No. 8790, dated Feb. 27, 1995);

(2) fondled the breasts or buttocks of a co-worker and had forcible oral sex and intercourse with her (BPR Report No. 8714, dated Mar. 5, 1995);

(3) offered to "fix" a traffic ticket in exchange for nude entertainment at a bachelor party (BPR Report No. 9321, dated Feb. 27, 1996);

(4) grabbed a female subordinate's buttocks and made unwanted sexual advances (BPR Report No. 9535, dated Sept. 5, 1996);

(5) hid a female cadet's clothing while she was in the shower and thereafter photographed her in the nude (BPR Report No. 9722, Oct. 25, 1996);

(6) sexually assaulted and molested a suspect while she was in custody (BPR Report No. 9652, dated Apr. 14, 1998);

(7) offered not to issue a speeding ticket in exchange for oral sex (BPR Report No. 10528, dated June 22, 1998);

(8) improperly touched a female passenger's inner thigh while she was being transported in a PSP patrol car (BPR Report No. 10667, dated Feb. 28, 1999); and

(9) viewed pornographic materials on a work computer (BPR Report No. 99-248, dated May 13, 1999).

B. Applicable Regulations

PSP Directive AR4-25 sets the protocol for review of all General Investigation Reports:

G. Submission of Internal Investigation Reports for Full Investigations

1. All applicable General Investigation Reports shall be forwarded directly, in duplicate, to the Director, Bureau of Professional Responsibility, by the assigned investigator.

2. After reviewing the report for investigative content, the Director,

Bureau of Professional Responsibility, shall either forward it to the Deputy Commissioner of Administration for further processing or return it to the investigator for additional investigation. A copy of the investigative reports on incidents involving legal intervention, shooting, use of physical force, or complaints of physical abuse, discrimination, or sexual harassment shall be forwarded to the Office of Chief Counsel at the time the report is forwarded to the Deputy Commissioner of Administration.

3. The Deputy Commissioner of Administration or designee shall forward the investigative report to the appropriate Area Commander/Bureau Director, who shall review it and forward it to the Troop Commander/Division Director. In cases which appear to warrant the issuance of a DAR [Disciplinary Action Report], the Area Commander/Bureau Director shall ensure consultation with the Troop Commander/Division Director prior to an administrative decision being made. An administrative decision shall be formulated by the Troop Commander/Division Director and communicated to the subject(s) of the investigation in a timely manner.

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4. The investigative report shall be returned, through channels, to the Deputy Commissioner of Administration, by the Appropriate Troop Commander/Division Director, after they have completed their supplemental report of the General Investigation Report and detailed their administrative decision. . . .

5. The Deputy Commissioner of Administration shall forward all reports to the Director, Bureau of Professional Responsibility, for further action or filing.

6. The central location for the collection and maintenance of all administrative investigations shall be the Bureau of Professional Responsibility, Internal Affairs Division. All personnel investigations are of a confidential nature and may be reviewed only upon the authorization of the Commissioner/designee.

7. General Investigation Reports and limited investigation reports shall be purged after ten years, or two years after the member/employee separates, unless litigation warrants retention.[2]

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[2] Pennsylvania State Police Administration Regulation 4-25, § 25.10(G) (Sept. 2, 1993).

Thus, according to this directive, the reports first are sent to Defendant Conley, Director of the BPR.[3] Unless the BPR Director decides to re-open the investigation, the reports are forwarded to Defendant Coury, Deputy Commissioner of Administration.

II. SUMMARY JUDGMENT STANDARD

The underlying purpose of summary judgment is to avoid a pointless trial when such a trial is unnecessary and would only cause delay and expense.[4] Under Federal Rule of Civil Procedure 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In deciding a motion for summary judgment, all facts must be viewed and all reasonable inferences must be drawn in favor of the non-moving party.[5]

III. DISCUSSION

To establish supervisory liability, a plaintiff must prove that the defendant acted with "deliberate indifference" to the rights of the plaintiff.[6] The plaintiff must "identify specific acts or omissions of the supervisor that evidence deliberate indifference and persuade the court that there

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[3] Id.

[4] Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976).

[5] Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

[6] Carter v. City of Philadelphia, 181 F.3d 339, 357 (3d Cir. 1999) (citing City of Canton v. Harris, 489 U.S. 378, 388 (1989)); Sample v. Diecks, 885 F.2d 1099, 1118 (3d Cir. 1989) (to be held liable for subordinate's constitutional violations, a supervisor must have "exhibited deliberate indifference to the plight of the person deprived").

is a "relationship between the 'identified deficiency' and the 'ultimate injury.'"[7] A plaintiff can establish this causal relationship by demonstrating that a supervisor's inadequate supervision in areas such as "monitoring adherence to performance standards" and "responding to unacceptable performance . . . through individual discipline" is the "moving force" behind the subordinate's constitutional tort.[8] The Third Circuit has ruled that a plaintiff asserting a failure to supervise claim cannot simply identify a specific supervisory practice that the defendant has failed to employ. Rather, a plaintiff must also allege both (1) contemporaneous knowledge of the offending incident or knowledge of a prior pattern of similar incidents, and (2) circumstances under which the supervisor's inaction could be found to have communicated a message of approval.[9] This standard requires "actual knowledge and acquiescence," which "can be inferred from circumstances other than actual sight."[10]

Plaintiffs contend that Moving Defendants had a policy or custom of deliberate indifference to the known risk of sexually predatory conduct against females and tacitly approved such misconduct by failing to address the widespread problems associated with it. Additionally, Plaintiffs assert that as a matter of law the risk of harm was so great and so obvious that the failure of supervisory officials to adequately respond demonstrates their knowledge of the risk and their

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[7] Brown v. Muhlenberg Township, 269 F.3d 205, 216 (3d Cir. 2001) (quoting Sample, 885 F.2d at 1118).

[8] Sample, 885 F.2d at 1117-18 (quoting City of Canton, 489 U.S. at 389)); Harris v. City of Pagedale, 821 F.2d 499, 508 (8th Cir. 1987).

[9] C.H. v. Oliva, 226 F.3d 198, 202 (3d Cir. 2000) (en banc); see also Montgomery v. De Simone, 159 F.3d 120, 126-27 (3d Cir. 1998) (holding that a supervisor may be liable for failing to properly train or discipline if the supervisor knew of a pattern of similar instances and circumstances and acted in a manner that could be reasonably interpreted as communicating a message of approval).

[10] Baker v. Monroe Township, 50 F.3d 1186, 1194 (3d Cir. 1995).

indifference to it.

A. Colonel Paul Evanko

From February 1995 through March 2003, Colonel Paul Evanko was the Commissioner of the PSP. As Commissioner, Evanko was responsible for formulating and implementing PSP policies and programs, and for superivising the PSP. Evanko received bi-weekly reports on significant allegations of misconduct from the Director of the BPR. These reports contained synopses of the allegations and the troop involved.[11] The bi-weekly reports, however, are purged every two years.[12]

Evanko first learned of any sexual misconduct allegations against Michael Evans when he read a bi-weekly report in October 1999.[13] Evanko then contacted Coury to make sure the PSP was "on top of the case."[14] Evanko did not know that prior to October 1999 there had been two other BPR investigations into Evans' misconduct, namely the A.B. and nude photo incidents.[15] Because of the PSP's record retention policy, the reports for those periods had been discarded years ago. As a result, Plaintiffs have failed to present any evidence that Evanko possessed contemporaneous knowledge of the sexual misconduct of Evans or that Evanko had any knowledge of any allegations of sexual misconduct against Evans prior to October 1999.

There also is insufficient evidence on this record from which the jury could conclude

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[11] Evanko Dep. at 13-15.

[12] Id. at 25-26.

[13] Id. at 13-14.

[14] Id. at 19.

[15] Id. at 22.

that Evanko knew of a pattern of sexual misconduct within the PSP. There is no evidence that Evanko reviewed the General Investigation Reports relating to sexual misconduct or that the bi-weekly synopses he received put him on notice of a pattern of sexual improprieties. Rather, the record suggests that Evanko relied upon his subordinates to perform their jobs in an appropriate manner and to review all General Investigation Reports. Because Plaintiffs have not presented evidence that Evanko possessed knowledge of the alleged pattern of sexual misconduct, Plaintiffs are unable to show that Evanko tacitly approved said misconduct or that he was deliberately indifferent to Plaintiffs' rights. Thus, summary judgment will be entered in favor of Evanko and against Plaintiffs.

B. Lieutenant Colonel Thomas Coury

Lieutenant Colonel Thomas Coury was the Deputy Commissioner of Administration from February 1995 through August 2000. As Deputy Commissioner, Coury oversaw the operations of the PSP Disciplinary Office, the BPR, and the Internal Affairs Division.[16] Although administrative regulations required that all General Investigation Reports were to be forwarded to and reviewed by Coury, Coury did not review all of the General Investigation Reports.[17]

Coury asserts that because of the large number of complaints involving both sexual and non-sexual misconduct that he was required to review, it is not reasonable to infer that he reviewed all General Investigation Reports. Moreover, Coury argues that even if he deliberately disregarded his duty to review the General Investigation Reports, that alone does not amount to the type of indifference to the constitutional rights of female citizens that Plaintiffs must prove.

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[16] Coury Dep at 16.

[17] Id. at 104-109.

Taking the facts in the light most favorable to Plaintiffs, as the Court must on summary judgment, Plaintiffs have presented sufficient evidence to allow the trier of fact to determine that there was a pattern of sexual misconduct and that Coury failed to take measures to ensure that guilty PSP members, including Evans, were properly disciplined. Notwithstanding the large number of complaints regarding on-duty sexual misconduct--complaints that Coury was responsible for reviewing under PSP administrative regulations--Coury allegedly failed to address or adequately respond to the alleged pattern of sexual misconduct within the PSP. His failure to respond may be viewed by the trier of fact as evidence of his willingness to overlook sexual misconduct within the PSP.[18] Thus, viewing the facts in the light most favorable to the non-moving party, there are genuine issues of material fact that preclude the entry of summary judgment in favor of Coury. Accordingly, the Motion is denied as to Plaintiffs' claims against Coury.

C. Major Hawthorne Conley

Conley was BPR Director from October 1998 through August 2000.[19] As BPR Director, Conley was ultimately responsible for internal investigations of trooper misconduct and was required to review the investigative content of *all* Internal Affairs Division and General Investigation Reports and to forward them to the Deputy Commissioner of Administration.[20] Upon reviewing the reports, Conley had the authority to return a report that required further investigation.[21]

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[18] See Sample, 885 F.2d at 1118 ("[D]eliberate indifference to a known risk will ordinarily be demonstrated by evidence that the supervisory official failed to respond appropriately in the face of an awareness of a pattern of such injuries.")

[19] Conley Dep. at 14.

[20] Id. at 16-17.

[21] Id. at 18-19.

Conley was also responsible for preparing bi-weekly summaries of all complaints and internal affairs matters for Commissioner Evanko.[22] As BPR Director, he also was responsible for overseeing background checks on PSP applicants.[23]

Despite the fact that administrative regulations required him to review the BPR General Investigation Reports, Conley's practice was to review synopses only.[24] Conley generally delegated the duty to review the reports to the Director of Internal Affairs Division.[25] Although Conley's tenure was somewhat shorter than Evanko and Coury's, there were at least thirty-seven complaints of sexual misconduct against PSP members during his tenure. Of those thirty-seven complaints, four were withdrawn, twenty were deemed unfounded, and thirteen were sustained.

As does Coury, Conley asserts that even if he disregarded his duty to follow critical PSP procedures, this does not amount to deliberate indifference to the rights of Plaintiffs. The Court concludes that based upon the large number of sexually related allegations of misconduct against PSP members there is a genuine issue of material fact on the issues of whether there was a pattern of sexual misconduct within the PSP during Conley's tenure as BPR Director and whether Conley had knowledge of said pattern. Conley bore the burden of communicating relevant summaries of misconduct to Evanko, so that Evanko could act upon the various reports. The breakdown in communication can be traced to Conley as he clearly did not provide Evanko with relevant information.

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[22] Id.

[23] Id. at 25.

[24] Id. at 16-17.

[25] Id. at 88-91.

Based upon Conley's responsibilities under PSP administrative regulations, a reasonable jury could find that he reviewed the General Investigation Reports. A reasonable jury could also conclude, notwithstanding Coury's claim that he delegated his duties, that Coury otherwise knew of the allegations therein and failed to take appropriate action to stop the alleged pattern of misconduct, thereby communicating a message of tacit approval. Accordingly, the Motion is denied as to Plaintiffs' claims against Conley.

D. Qualified Immunity

Moving Defendants contend that even if there are genuine issues of material fact as to whether they acted with deliberate indifference, they are entitled to qualified immunity because of the lack of clarity in the law at the time of the incidents in question.

The defense of qualified immunity shields government officials who perform discretionary acts from civil liability so long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[26] It is a defendant's burden to establish that he or she is entitled to qualified immunity.[27] The privilege is not a mere defense; rather, it is an immunity from suit. Its purpose "is to protect public officials from liability in situations involving extraordinary circumstances and where the officials neither knew nor objectively should have known the appropriate legal standard."[28]

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[26] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[27] Beers-Capitol v. Whetzel, 256 F.3d 120, 142 n.15 (3d Cir. 2001) (citing Stoneking v. Bradford Area School District, 882 F.2d 720, 726 (3d Cir. 1989)).

[28] Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990).

The Court uses a two-part inquiry to analyze qualified immunity.[29] First, the Court must consider whether the facts alleged, taken in the light most favorable to Plaintiffs, show that Defendants' conduct violated a constitutional right.[30] "If the plaintiff fails to make out a constitutional violation, the qualified immunity inquiry is at an end; the officer is entitled to immunity."[31] Where, however, "a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established."[32]

The Court previously addressed these issues in its November 7, 2003 Memorandum Opinion, holding that Evans' conduct was sufficiently coercive, and so egregious and outrageous that it may be fairly said to shock one's conscience, thereby constituting a deprivation of Plaintiffs' right to bodily integrity. The Court specifically ruled that Maslow and Doe asserted Fourteenth Amendment violations, and that Weller advanced constitutional claims under both the Fourth and Fourteenth Amendments. That ruling applies with equal force today as the Court concludes that Plaintiffs Maslow, Doe, and Weller were entitled to be free from sexual molestation by a PSP trooper under the supervision of deliberately indifferent supervisors.

The Court must next address whether the right to bodily integrity was clearly established in 1999. A particular realm of conduct is not protected by qualified immunity merely because it has not been held unlawful before.[33] The Third Circuit has adopted a "broad view"

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[29] Saucier v. Katz, 533 U.S. 194, 200-01 (2001).

[30] See id. at 201.

[31] Bennett v. Murphy, 274 F.3d 133, 136 (3d Cir. 2001).

[32] Saucier, 533 U.S. at 201.

[33] See Brown, 269 F.3d at 211.

regarding whether a right is clearly established.[34] Precise factual correspondence between relevant precedents and the conduct at issue is unnecessary. "If the unlawfulness of the defendant's conduct would have been apparent to a reasonable official based on the current state of the law, it is not necessary that there be binding precedent from this circuit so advising." [35]

Here, Moving Defendants should have known that their failure to discipline was capable of implying acquiescence to sexual misconduct. A police officer's sexual molestation of a citizen is akin to a teacher's molestation of a student, and reasonable PSP officials would have understood the contours of a citizen's right to bodily integrity.[36] Even in the absence of precedent such as Stoneking,[37] a police officer's sexual molestation and improper sexual advances are entirely unacceptable, and a citizen's right to be free from molestation is clearly established. Accordingly, Coury and Conley are not entitled to qualified immunity.

IV. CONCLUSION

Plaintiffs have failed to present evidence from which a jury could reasonably conclude that Defendant Evanko possessed contemporaneous knowledge of the offending incidents involving Evans or knowledge of the alleged pattern of sexual misconduct. However, there are genuine issues of material fact with respect to: (1) whether there was a pattern of sexual

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[34] Burns v. County of Cambria, 971 F.2d 1015, 1024 (3d Cir. 1992).

[35] Brown, 269 F.3d at 212 n. 4; Stoneking v.Bradford Area School District, 882 F.2d 720, 726 (3d Cir. 1989) ("We expect officials to 'apply general, well-developed legal principles.'") (quoting People of Three Mile Island v. Nuclear Regulatory Comm'n, 747 F.2d 139, 144 (3d Cir. 1984)).

[36] See Stoneking, 882 F.2d at 727 (holding that a teacher's intrusion of a student's bodily integrity constitutes a constitutional violation).

[37] Brown, 269 F.3d at 212 n. 4. (noting that it is not necessary that there be "binding precedent" where unlawfulness of defendant's conduct is apparent). It should be noted that Stoneking was decided in 1989, nearly one decade prior to Evans' misconduct in this case.

misconduct within the PSP; (2) whether Defendants Coury and Conley had knowledge of this alleged pattern of sexual misconduct; and (3) whether they made attempts to correct the pattern through effective training, supervision, or discipline. In addition, Defendants Coury and Conley have failed to establish that they are entitled to qualified immunity. Accordingly, the Renewed Motion for Summary Judgment is granted in part and denied in part.

An appropriate Order follows.

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

DENISE MASLOW, LINDA WELLER,	**:**	**No. 01-CV-3636**
MARY DOE, NANCY DOE, and L.H.	**:**	
Plaintiffs	**:**	
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HUNSICKER, KEVIN T. KRUPIEWSKI	**:**	
and GARY FASY,	**:**	
Defendants	**:**	

ORDER

AND NOW, this 25th day of June, 2004, upon consideration of the Renewed Motion for Summary Judgment of Defendants Paul J. Evanko, Thomas Coury, and Hawthorne Conley [Doc. No. 96], Plaintiffs' response thereto, and Defendants' Reply Brief, it is hereby ORDERED that the Motion is GRANTED IN PART and DENIED IN PART as follows:

1. The Motion is GRANTED insofar as it relates to Defendant Paul J. Evanko. Judgment is hereby entered in favor of Defendant Paul J. Evanko and against Plaintiffs Denise Maslow, Linda Weller, and Nancy Doe.

2. The Motion is DENIED in all other respects.

BY THE COURT:

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CYNTHIA M. RUFE, J.