

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

THERESA HOOVER : CIVIL ACTION
 :
 v. :
 :
 JEFFREY A. BEARD, et al. : NO. 03-1529

MEMORANDUM AND ORDER

McLaughlin, J.

July 20, 2006

The plaintiff, a nurse at SCI-Graterford, has sued various Pennsylvania Department of Corrections officials, prison supervisors, and corrections officers, under a state-created danger theory for an assault on her by an inmate at the prison. The Court will grant summary judgment to the defendants.¹

I. Facts

The facts, in the light most favorable to the plaintiff, are as follows.² The plaintiff began working as a

¹ This case was previously before the late Honorable Charles R. Weiner. Judge Weiner had denied the defendants' motion for summary judgment, and denied the defendants' timely filed motion for reconsideration, pending the resolution of a similar case before the United States Court of Appeals for the Third Circuit. This case was transferred to this Court on November 23, 2005. On April 21, 2006, following a telephone conference with counsel, the Court permitted the defendants to file the instant amended motion for reconsideration.

² On a motion for summary judgment, a court must view the evidence and draw reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. See, e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

registered nurse at SCI-Graterford in 2000. One inmate, Irwin Brentley, started directing sexually inappropriate comments toward her in August 2001. (Pl.'s Ex. D (Interview of Hoover) at 12; Pl.'s Ex. A (Dep. of Hoover) at 14).

On September 6, 2001, the plaintiff approached Brentley's cell to give him his medications. She noticed that he was masturbating. She turned away and held out the medications for him to take through the cell. Brentley grabbed her hand and attempted to pull it further into the cell. The plaintiff felt that Brentley's hand was wet. She pulled her hand back and told him that she was going to report him. Following the day captain's instructions, the plaintiff wrote Brentley up for a misconduct. As a result, he was moved to "L" block, in the restricted housing unit ("RHU"), and issued 180 days of disciplinary time. (Pl.'s Ex. A (Dep. of Hoover) at 14-18, 20-21; Pl.'s Ex. C (Memo re Assault)).

Brentley continued to make inappropriate comments to the plaintiff. One day in October, he called her over to his cell and asked her to look at photographs of his children. He told her that he wanted to see his children at Christmas and told her to recant her misconduct report on the September incident.

Summary judgment is proper if the pleadings and other evidence on the record "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." Fed. R. Civ. P. 56(c).

The plaintiff reported this incident to Captain Guy Smith, who was in charge of internal security at the prison. Captain Smith told her that he would put in a request for Brentley to be separated from her and moved upstate. (Pl.'s Ex. A (Dep. of Hoover) at 19, 21-22; Pl.'s Ex. D (Interview of Hoover) at 13).

On November 19, Brentley said to the plaintiff, "that's okay Nurse Hoover, you may have got yours, but I'm gonna get my dogs out on you." The sergeant escorting Ms. Hoover at the time reported this incident to Captain Smith. Captain Smith told the plaintiff to write Brentley up for another misconduct. As a result of the second misconduct report, Brentley was moved to "J" block, also part of the RHU, and issued another 90 days of disciplinary time. Inmates in "J" block are not allowed to be out of their cells when a nurse is present, unless they are escorted by two corrections officers. (Pl.'s Ex. A (Dep. of Hoover) at 25-26; Pl.'s Ex. C (Memo re Assault)).

The prison submitted a request for a separation order between the plaintiff and Brentley on November 21.³ The order was approved and entered into the Department of Corrections mainframe on November 26. The separation order lists Brentley's

³ The Department of Corrections Separation Policy requires that all separation requests be approved by the Bureau of Inmate Services. In addition, if an inmate is in disciplinary custody at the time the request is approved, as was Brentley, the separation requires special permission from the Regional Deputy Secretary. (Pl.'s Ex. C (Memo re Assault); Defs.' Ex. 3 (Dep. of G. Smith), ex. 1).

name and inmate number, then states "SEPARATE FROM . . . HOOVER, THERESA . . . REASON FOR SEPARATION: INMATE BRENTLEY HAS SEXUALLY HARASSED RN II THERESA HOOVER." (Pl.'s Ex. C (Memo re Assault); Pl.'s Ex. E (Separation Request/Order)).

Throughout this period, the plaintiff was assigned to deliver medications to the RHU every other weekend. This assignment was made by Jean Wooster, the plaintiff's supervisor, and approved by Julie Knauer, the prison's Health Care Administrator, who oversaw the nursing staff. The plaintiff never asked to be taken off that assignment. (Pl.'s Ex. A (Dep. of Hoover) at 26-27).

Both Captain Smith and Ms. Knauer were aware of the problems between the plaintiff and Brentley, and that a separation had been requested. Neither knew that the request had been approved, however, until after Brentley assaulted the plaintiff on December 16. (Pl.'s Ex. F (Dep. of G. Smith) at 41; Pl.'s Ex. B (Dep. of J. Knauer) at 15, 18).

On December 16, the plaintiff was scheduled to work her regular shift and an overtime shift in the general population blocks. Toward the end of the plaintiff's first shift, the nurse that was assigned to work in the RHU during the second shift called out sick. The plaintiff's supervisor at that time, Barbara March, was unsure whom to reassign to the RHU. The plaintiff suggested that she call Ms. Knauer. The plaintiff told

Ms. March that she would do whatever Ms. Knauer decided. Ms. Knauer told Ms. March to assign the plaintiff to the RHU. The plaintiff complied because she believed that she did not have a choice regarding overtime assignments and because she understood Ms. Knauer's decision to be a direct order. (Pl.'s Ex. A (Dep. of Hoover) at 27-31).

The plaintiff entered the RHU at approximately 4:00 p.m., escorted by Corrections Officer Hidalgo. She noticed Brentley sitting on a table in the library, staring out at her. She proceeded with her rounds. A few moments later, Corrections Officers Moro and Palute began placing handcuffs on Brentley to transport him back to his cell. Brentley complained that the handcuffs were too tight and Officer Moro rechecked them. As Officer Moro was securing the door after letting Brentley out, Brentley ran down to hall towards the plaintiff. He had loosened one of his hands from the handcuffs. Brentley struck the plaintiff in the face, and knocked her to the ground. Brentley struck her several more times before the corrections officers were able to pull him off. The plaintiff suffered a laceration to her right ear that required nine stitches, a laceration on her left elbow that required three stitches, contusions on her jaw and left hip, and a black eye. (Pl.'s Ex. C (Memo re Assault)).

II. Analysis

The plaintiff has asserted the following claims: count I, § 1983 Fourth and Fourteenth Amendment claims based on a state-created danger theory, against all defendants; count II, § 1983 Fourth and Fourteenth Amendment claims based on policy/custom/practice, against Secretary Beard, Regional Deputy Secretary Erhard and Superintendent Vaughn; count III, § 1983 conspiracy, against all defendants; count IV, intentional infliction of emotional distress, against all defendants except Corrections Officers Palute,⁴ Moro, and Doe; and count V, § 1983 Fourth and Fourteenth Amendment claims based on bystander liability, against Corrections Officers Palute, Moro, and Doe.

At oral argument on July 14, 2006, the plaintiff conceded that her claim for intentional infliction of emotional distress in count IV is barred by sovereign immunity, and that she cannot state any claims based on the Fourth Amendment, because she was never "seized." The Court will grant summary judgment for the defendants on counts I, II, and III because the evidence on the record does not support a claim for state created-danger. The Court will grant summary judgment for the defendant corrections officers on count V because the record shows that they did intervene in the assault.

⁴ Incorrectly named as "Paletee."

A. Counts I, II, and III - State-Created Danger

Counts I, II, and III turn on whether the plaintiff can assert claims for Fourteenth Amendment due process violations under a state-created danger theory. If the plaintiff cannot establish a constitutional violation in count I, she will not be able to establish the supervisory liability claim in count II, or the conspiracy claim in count III.

The United States Court of Appeals for the Third Circuit recently summarized the elements of a state-created danger claim:

- (1) the harm ultimately caused was foreseeable and fairly direct;
- (2) a state actor acted with a degree of culpability that shocks the conscience;
- (3) a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general; and
- (4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.

Bright v. Westmoreland County, 443 F.3d 276, 281 (3d Cir. 2006) (internal citations omitted). The Court of Appeals emphasized that, under the fourth element, "liability under the state-created danger theory is predicated upon the states' affirmative acts which work to the plaintiffs' detriments in terms of

exposure to danger.” Id. at 282 (emphasis in original, internal citations omitted).

In Bright, a man convicted of corrupting the morals of a twelve-year old girl killed her eight-year old sister, apparently in retaliation for the family’s efforts to keep him away from the twelve-year old. The girls’ father sued various state and county officials, arguing that they had put his younger daughter in danger by failing to put the perpetrator back in jail despite knowledge that he had repeatedly violated the terms of his probation by contacting the older daughter. Id. at 278-279.

Specifically, the plaintiff in Bright alleged that the state actors had: (1) inexplicably delayed in revoking the perpetrator’s probation; (2) assured him that the perpetrator would be taken into custody, an assurance he relied upon in failing to take his own steps to protect his younger daughter; and (3) failed to follow up promptly after confronting the perpetrator for violating probation, thereby “emboldening” him to commit additional offenses. Id. at 283. The court found that the plaintiff had failed to establish that the state actors had committed any affirmative acts.

With respect to the plaintiff’s first and third arguments, the court held that liability could not be based on the state’s delay, i.e., failure to act. The court rejected the plaintiff’s arguments that the state actors committed affirmative

acts when they witnessed the probation violation, confronted the perpetrator, and initiated the probation revocation process:

"[t]he reality of the situation described in the complaint is that what is alleged to have created a danger was the failure of the defendants to utilize their state authority, not their utilization of it." Id. at 284-285.

With respect to the plaintiff's second argument, the court applied the Supreme Court's holding in DeShaney v. Winnebago Cty. Soc. Servs. Dept., 489 U.S. 189, 200 (1989) that no "affirmative duty to protect arises . . . from the State's . . . expressions of intent to help" an individual at risk. Bright, 443 F.3d at 284 (emphasis supplied by Bright). The court held that the state could not be held liable where it did not restrict the plaintiff's freedom to act on his family's own behalf.

In this case, the plaintiff argues that the defendants acted affirmatively by: (1) assuring her that they were going to request a separation/transfer for her; (2) not following up to see if the request was made and approved; (3) not advising all necessary staff about the request; and (4) ordering her to work in the RHU on December 16 despite the request.

Under Bright, the defendants' delay and failure to act do not constitute "affirmative acts" that give rise to liability. Furthermore, there is no evidence on the record that the defendants' promise to request a separation/transfer restricted

the plaintiff's freedom to act on her own behalf. Therefore, under DeShaney, the defendants' promise to help cannot give rise to a state-created danger claim.

Viewing the evidence in the light most favorable to the plaintiff, however, the Court finds that Ms. Knauer's decision to order the plaintiff to work in the RHU on December 16 was an affirmative act that rendered the plaintiff more vulnerable to danger. If Ms. Knauer had not given that order, the plaintiff presumably would have worked in the general population units as scheduled, and never interacted with Brentley that day.

There is no evidence on the record that any of the other defendants participated in or approved of Ms. Knauer's decision to make the plaintiff work in the RHU on December 16. The Court, therefore, will grant summary judgment to all the defendants, except Nurse Knauer, on the ground that they did not commit an affirmative act.

As to Ms. Knauer, the Court will consider whether she acted "with a degree of culpability that shocks the conscience," the second element of a state-created danger claim. The standard of culpability required for "shocking the conscience" varies depending on the situation. When a state actor must act with urgency - as in cases involving emergency medical personnel - the relevant standard is the state actor's conscious disregard of a substantial risk that the victim will be harmed by his actions.

Rivas v. City of Passaic, 365 F.3d 181, 196 (3d Cir. 2004). When a state actor has ample time for reflection - as in cases regarding deliberate indifference to prisoners' serious medical needs - the relevant standard is deliberate indifference. Scheiber v. City of Phila., 320 F.3d 409, 418 (3d Cir. 2003). When the state actor "must act with some urgency and does not have the luxury of proceeding in a deliberate manner," the standard is somewhere in between. See Rivas, 365 F.3d at 195 (emphasis in original, citing Miller v. City of Phila., 174 F.3d 368 (3d Cir. 1999)). In Miller, which involved a social worker's attempts to remove a child from his parents' custody, the United States Court of Appeals for the Third Circuit held that "the 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.'" 174 F.3d at 375-376.

The Court will apply the Miller standard here. The Court finds that Ms. Knauer had to make her decision with some urgency, as the regularly assigned nurse had called out sick and the medicines had to be distributed in the RHU that afternoon.

The record shows that Ms. Knauer knew about the plaintiff's separation request and problems with Brentley. The record also shows, however, that: (1) the prison always tried to have a registered nurse assigned to the RHU; (2) Ms. Knauer knew

that the plaintiff, a registered nurse, had previously worked in the RHU without complaint; and (3) inmates in the RHU were not allowed to be outside their cells unless they were handcuffed and escorted by two corrections officers. The plaintiff has not put forth any evidence that she informed Ms. Knauer or anyone else that she did not want to work in the RHU because Brentley was residing there. Even interpreting the evidence in the light most favorable to the plaintiff, it does not show that Ms. Knauer acted with gross negligence or arbitrariness. The Court, therefore, will grant summary judgment to Nurse Knauer on this ground.

B. Count V - Bystander Liability

Count V of the complaint alleges that Corrections Officers Palute, Moro, and Doe encouraged Brentley and/or failed to intervene when he assaulted the plaintiff. To the extent that count V is based on a state-created danger theory, the officers are entitled to summary judgment, because the record does not show that they committed any affirmative acts.

To the extent that count V is based on a theory that prison officials have a duty to intervene whenever they witness an assault, the officers are entitled to summary judgment because there is no evidence on the record that they failed to intervene. In Smith v. Mensinger, 293 F.3d 641, 650 (3d Cir. 2002), the

United States Court of Appeals for the Third Circuit held that a corrections officer has an Eighth Amendment duty to intervene against an assault on an inmate, if the officer has a reasonable opportunity to do so. The Court is skeptical that a corrections officer's constitutional duty to intervene extends to assaults on non-inmates. Even if the Court assumes that the officers had some duty to intervene, the record here shows that the officers did intervene and restrained Brentley within seconds of his first striking the plaintiff.

An appropriate Order follows.

