

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

JANET JACKSON : CIVIL ACTION
: :
v. : :
: :
THOMAS MILLS, POLICE CHIEF; : :
FRANK PERANTEAU, POLICE CHIEF; : :
JOSEPH ANTHONY MOORS, OFFICER; : :
ARNOLD PORTER, OFFICER; : :
LANCIERI, OFFICER; SARRY, : :
OFFICER; GAFFNEY, OFFICER; : :
CHARLES McGUIGAN, OFFICER; : :
JONATHAN TERMAN, OFFICER; : :
TOWNSHIP OF BRISTOL; AND : :
BOROUGH OF BRISTOL : NO. 96-3751

M E M O R A N D U M

WALDMAN, J.

September 3, 1997

I. BACKGROUND

Plaintiff asserts claims under 42 U.S.C. §§ 1981, 1983 and 1985 for alleged use of excessive force, false arrest, abuse of process, failure to protect, racial and ethnic discrimination and conspiracy to interfere with civil rights arising out of her arrest and prosecution for disorderly conduct and resisting arrest. Presently before the court are the motions for summary judgment of defendants Gaffney, McGuigan, Terman, Mills and Township of Bristol ("Township Defendants") and defendants Peranteau, Moors, Porter, Lancieri and Borough of Bristol ("Borough Defendants").¹

1. Plaintiff later added Township of Bristol Officers Rockwell and Fuhrmann as defendants in an amended complaint after learning through discovery of the identities of these officers who also participated in her arrest. The court will presume that the Township Defendants' motion encompasses Officers Rockwell and

(continued...)

II. LEGAL STANDARD

In considering a motion for summary judgment, the court must determine whether the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue of material fact, and whether the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 568 (3d Cir. 1986).

Only facts that may affect the outcome of a case under applicable law are "material." All reasonable inferences from the record must be drawn in favor of the non-movant. Anderson, 477 U.S. at 256. Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1531 (3d Cir. 1990) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)), cert. denied, 499 U.S. 921 (1991).

From the evidence of record as uncontroverted or construed in a light most favorable to plaintiff, the following appears.

1. (...continued)
Fuhrmann as well.

III. FACTS

On May 20, 1995 at approximately 1:00 a.m., plaintiff arrived at the Clinton Lewis Elks Club ("the Club") in Bristol Borough where she met her niece, Lisa Wheeler. Plaintiff is an African-American woman with a heavy build. As of May 20, 1995, one of the eleven Bristol Borough police officers was African-American. One of 65 Bristol Township police officers was African-American.

Shortly after entering the bar area of the Club, plaintiff saw a fight break out between two patrons, Kimberly Wilson and Tammy Square. After breaking up this fight, the people working at the Club turned the lights on and directed everyone to leave the building. By the time plaintiff exited the Club with her nephew, Derrick Bell, and Ms. Wheeler, the fight between Ms. Wilson and Ms. Square had ceased.

Plaintiff, Mr. Wilson and Ms. Wheeler began walking toward their car when Ms. Wilson approached them and said she had lost her keys. Plaintiff attempted to get Ms. Wilson to leave with them and told her they could get her keys at the police station.

Officer Lancieri responded to a call from the Club and was the first police officer to arrive on the scene shortly before 2:00 a.m. Nobody was fighting at this time, but there was a crowd of between 60 and 100 people milling around outside the Club. Many of them were yelling and screaming. The crowd was predominately African-American. The individual defendants are

Caucasian. Officer Lancieri called for more officers before exiting his vehicle. About thirty police officers from at least ten jurisdictions responded to the scene.

Shortly thereafter, Officer Moors and Sergeant Porter arrived on the scene. Sergeant Porter was the supervising officer in charge at the scene for the entire evening. Officer Moors saw Ms. Wilson yelling at a group of women and using obscene language. Several people, including plaintiff, were trying to calm Ms. Wilson down and get her away from the scene. Their backs were turned to Sergeant Porter and Officers Moors and Lancieri.

Sergeant Porter testified that he warned Ms. Wilson to calm down or she would be arrested. Plaintiff testified that Sergeant Porter did not say anything to Ms. Wilson. Sergeant Porter approached Ms. Wilson because "she was the problem." Plaintiff did not hear Ms. Wilson say anything to Sergeant Porter, but did hear Ms. Wilson shouting. Plaintiff told Sergeant Porter she and Ms. Wilson were leaving the scene and he nodded.²

Plaintiff then turned around and said to Ms. Wilson, "come on, the cops are here, they want everybody to go, let's go." Ms. Wilson turned to her right and shouted an obscenity. Sergeant Porter then told Ms. Wilson she was under arrest and grabbed her arm. Almost contemporaneously, plaintiff turned and

2. Sergeant Porter does not recall anyone telling him she was preparing to leave the scene.

was sprayed with Oleoresin Capsicum, or pepper spray ("OC spray"), by Sergeant Porter.³ Mr. Bell also got sprayed at the same time. Officer Lancieri was not carrying OC spray on the night of this incident.

Sergeant Porter had decided to arrest Ms. Wilson for disorderly conduct because after she had been given warnings and the crowd was under control, she continued to yell. After Sergeant Porter grabbed Ms. Wilson's arm, she pulled away, slapped his hand and pushed him. Terry Green then ran up and jumped on Sergeant Porter's back. Officer Moors then pulled Ms. Green off of Sergeant Porter's back and was hit from behind by an unidentified person and pushed on top of Ms. Green. Sergeant Porter continued to try to grab Ms. Wilson, spun around and saw Officer Moors on the ground with people on top of and around him. Sergeant Porter then went over to assist Officer Moors by pulling people off of him. Officer Lancieri also assisted Officer Moors.

Sergeant Porter then called for back up from other police departments. When Bristol Township officers arrived, Sergeant Porter instructed them to disperse the crowd. By this time, Sergeant Porter had already apprehended Ms. Green, arrested Ms. Wilson and placed her in his patrol car. By this point Sergeant Porter had witnessed Ms. Wilson commit the crimes of disorderly conduct, simple assault, aggravated assault and

3. Plaintiff did not see who sprayed her, but later determined it was Sergeant Porter from descriptions provided by Ms. Williams and Melanie Johnson.

resisting arrest, and Ms. Green commit the crimes of resisting arrest and disorderly conduct.

Almost contemporaneously, plaintiff was steadying herself by holding onto the roof rack on a nearby vehicle in which Melanie Johnson was seated. Officer Lancieri saw a couple of unidentified officers trying unsuccessfully to pull plaintiff's hands from the roof rack. Officer Lancieri did not see anything plaintiff did before this incident.

Officer McGuigan, the first Bristol Township officer to arrive on the scene, saw plaintiff being placed under arrest by Officers Gaffney and Rockwell. Officer McGuigan saw the officers struggling to handcuff plaintiff as she held onto the roof rack. Officer McGuigan assisted in plaintiff's arrest by holding her hands behind her back after Officers Gaffney and Rockwell had pulled them off the roof rack. He then went to assist in the apprehension of Kevin Wilson.

Officer McGuigan did not see any officers spray plaintiff with OC spray, but did notice some spray on her person.⁴ Officer McGuigan does not know what plaintiff did before she was placed under arrest.

Officer Fuhrmann arrived on the scene and saw Sergeant Porter struggling to handcuff plaintiff. Officer Fuhrmann assisted Sergeant Porter to handcuff her. Officer Fuhrmann did not see anyone use OC spray on plaintiff.

4. Melanie Johnson states in an unsworn letter that she saw Sergeant Porter spray plaintiff with OC spray.

When Bristol Township Officer Gaffney arrived on the scene, he saw Officer Moors struggling with plaintiff and Ms. Wilson. Plaintiff refused to be cuffed and was holding onto a nearby vehicle. Officer Gaffney then saw plaintiff sprayed with OC spray. Officer Gaffney then helped arrest plaintiff. From 20 to 30 seconds of observation he concluded that plaintiff could be arrested for disorderly conduct, although he did not criminally charge plaintiff.

When Officer Terman arrived on the scene he saw two unidentified Bristol Borough officers with plaintiff who appeared to be resisting arrest by holding onto a nearby vehicle. The officers were trying to put plaintiff's hands behind her back. Officer Terman did not know why these officers were arresting plaintiff. He approached her and told her "a couple times" to put her hands behind her back. When she failed to do so, Officer Terman sprayed her with OC spray. He thought she was resisting arrest and that the other officers were in immediate danger of physical injury. Officer Terman squirted the OC canister twice after which plaintiff went down and was cuffed.

Plaintiff testified that an unidentified officer hit her on the back of her hands, on her neck and in her face while she was holding onto the roof rack. Plaintiff also testified that this officer was spraying her in the process of trying to remove her hands from the roof rack.⁵ Plaintiff testified that

5. From the other evidence that only Officer Terman sprayed
(continued...)

after she was hit in the face, she let go of the roof rack and "they or him [sic]" grabbed her arms and put them behind her, "tripped" her and handcuffed her. Plaintiff testified that her front side hit the ground causing cuts and bruises on her body and face.

Melinda Twitty testified that a Bristol Borough police officer was holding plaintiff down on the ground. Plaintiff later identified him as Sergeant Porter based on Ms. Twitty's description.

Plaintiff testified that when she asked several unidentified officers to allow her to wipe the OC spray off herself, one officer said "this is a big black bitch we have to deal with here." Plaintiff testified that these officers then grabbed her under her arms, stood her up and placed her in a police car.

The arrest report of Officer Moors states that plaintiff and Albert Bethea interfered with the police, resisted arrest and were disorderly in public. He had not personally witnessed plaintiff engage in such activity but relied on information to this effect from Officers Gaffney and Terman.

After arriving at the Bristol Borough Police Station, plaintiff was offered water and towels as was everyone who had been sprayed with OC spray. Plaintiff testified that at the

5. (...continued)
plaintiff with OC at the time of her arrest, one could infer from this testimony, if believed, that he was the one who also hit her hands, neck and face.

Police Station Officer Moors said to her, Ms. Wilson and Ms. Green, all African-Americans, "[W]hy do all you people act like this? All you people need to be locked up and the key thrown away."

Plaintiff was charged with the misdemeanor offenses of obstructing administration of law or other governmental function⁶, resisting arrest⁷ and disorderly conduct.⁸ Officer

6. 18 Pa. C.S.A. § 5101 provides in pertinent part:

A person commits a misdemeanor of the second degree if he intentionally obstructs, impairs or perverts the administration of law . . . by force, violence, physical interference or obstacle, . . ., or any other unlawful act, except that this section does not apply to . . . refusal to submit to arrest, . . . or any other means of avoiding compliance with law without affirmative interference with governmental functions.

7. 18 Pa. C.S.A. § 5104 provides:

A person commits a misdemeanor of the second degree if, with the intent of preventing a public servant from effecting a lawful arrest or discharging any other duty, the person creates a substantial risk of bodily injury to the public servant or anyone else, or employs means justifying or requiring substantial force to overcome resistance.

8. 18 Pa. C.S.A. § 5503 provides in pertinent part:

(a) A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:

- (1) engages in fighting or threatening, or in violent or tumultuous behavior;
 - (2) makes unreasonable noise;
 - (3) uses obscene language, or makes an obscene gesture;
- or
- (4) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose

of the actor.

(continued...)

Moors was the affiant on plaintiff's criminal complaint and signed the arrest report. At her preliminary hearing on July 12, 1995, plaintiff pled not guilty to the misdemeanor charges against her. Plaintiff pled guilty to a summary offense disorderly conduct charge and the misdemeanor charges against her were dismissed. Plaintiff was sentenced to sixty days probation.

Sergeant Porter, Officer Moors and Officer Lancieri had all attended a Bristol Borough Police Department training course on the use of OC spray prior to the incident at issue. The OC training program included general guidelines and addressed the effects of OC and when and how to use OC. This training included instruction to use OC spray only when a threatening situation has escalated to a level where the officer's physical presence and verbal commands have been ineffective and prior to using deadly force.

Bristol Borough Police Chief Peranteau testified that OC spray is a more effective tool than a baton or mace, and is appropriately used when a person placed under arrest becomes unruly and cannot be restrained. Chief Peranteau also testified that if Sergeant Porter or Officer Moors had to use OC spray on

8. (...continued)

(b) An offense under this section is a misdemeanor of the third degree if the intent of the actor is to cause substantial harm or serious inconvenience, or if he persists in disorderly conduct after reasonable warning or request to desist. Otherwise disorderly conduct is a summary offense.

the night of the incident, "[i]t would be indicated in the arrest report."

There have been "several" citizen complaints concerning the alleged use of excessive force by Bristol Borough police officers. In the early 1980s, an African-American filed a complaint against Sergeant Porter for the alleged use of excessive force arising during an incident in which the complainant suffered a broken jaw.

Bristol Borough officers are responsible for purchasing their own OC spray and thus may not have "the same exact kind." The Bristol Borough Police Department did not have a written policy on the use of OC spray at the time of the incident.⁹ The Bristol Borough Police Department did not conduct any "special investigation" into the incident at issue. No Bristol Borough officer was disciplined as a result of this incident.

All Bristol Township officers are required to attend training on the use of OC spray before being permitted to use it. The Township officers were trained with the same OC Training Manual as the Borough officers. The Township Police Department purchases and distributes the OC spray used by its officers. The Bristol Township Police Department does not have written guidelines for the use of OC spray. Township officers are supposed to use the type of form completed after use of an electronic restraint to indicate that OC spray has been used. A

9. Chief Peranteau testified that such a policy was in the "second review stage" as of November 1996.

Township officer who fails to complete such a report could be reprimanded. In a report describing his apprehension of a male suspect, Officer Terman stated that he had used OC spray. He does not state that he used OC spray on plaintiff.

Bristol Township Police Chief Mills had no knowledge of the incident in question prior to the filing of this lawsuit and never saw any reports indicating that OC spray was used during the incident. The Township Police Department had not conducted any investigation into the incident.

Chief Mills had never received any prior complaint about the use of OC spray. Since becoming police chief, Mr. Mills had not received any complaints involving excessive force or false arrest. He was aware of one excessive force complaint which had been filed before he became chief.

In 1992, a citizen complained of being stopped by a Bristol Township patrol officer because of his race. The officer was cleared of any wrongdoing. In 1994, two citizens complained about the alleged use of excessive force by another officer. There is no indication of record of how these complaints were resolved. A citizen filed a lawsuit against two Township officers alleging excessive force, but there is no indication when this lawsuit was filed or what the outcome was.

IV. DISCUSSION

A. § 1983 Claims

1. Excessive Force and False Arrest¹⁰

10. Plaintiff also asserts a separate claim under § 1983 for "failure to protect and intervene." As defendants acknowledge,
(continued...)

To sustain a § 1983 claim, plaintiff must show that a defendant participated in violating her rights, directed others to violate them or knowingly acquiesced in a subordinate's violation of her rights. Baker v. Monroe Twp., 50 F.3d 1186, 1190-91 (3d Cir. 1995). A police officer who is present and fails to intervene to prevent other officers from violating a citizen's constitutional rights may also be liable under § 1983 if that officer had reason to know that excessive force was being used, a citizen has been arrested without probable cause or another constitutional violation was being committed and that officer had a realistic opportunity to intervene and prevent the harm from occurring. Yang, 37 F.3d at 285; Anderson, 17 F.3d at 556. See also Skevofilax v. Quigley, 586 F. Supp. 532, 543 (E.D. Pa. 1984).

Claims that law enforcement officers have used excessive force in the course of an arrest are properly analyzed under the Fourth Amendment "reasonableness" standard. Graham v. Connor, 490 U.S. 386, 395 (1989). The inquiry is "whether the officers' actions are 'objectively reasonable' in light of the

10. (...continued)

a police officer who fails or refuses to intervene to prevent the use of excessive force or an unlawful arrest may be held liable under § 1983. See Yang v. Hardin, 37 F.3d 282, 285 (7th Cir. 1994); Anderson v. Branen, 17 F.3d 552, 557 (2d Cir. 1994). They correctly note that failure to intervene is not a distinct claim but rather a theory under which an otherwise passive defendant may be jointly liable for the conduct of another. The court, however, will not dismiss Count IV outright because the allegations therein are relevant to and effectively part of plaintiff's excessive force and false arrest claims.

facts and circumstances confronting them, without regard to their underlying intent or motivation." Id. at 397. See also Groman v. Township of Manalapan, 47 F.3d 628, 634 (3d Cir. 1995). The court must consider "the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force necessary in a particular situation." Graham, 490 U.S. at 396-97. Police officers are privileged to commit a battery in executing a lawful arrest, but the privilege is lost by the use of excessive force. Groman, 47 F.3d at 634.

The inquiry in a § 1983 false arrest claim is not whether the person arrested in fact committed the offense, but whether the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a reasonable person to believe that the offense has been or is being committed by the person to be arrested. Orsatti v. New Jersey State Police, 71 F.3d 480, 483 (3d Cir. 1995); Groman, 47 F.3d at 634 (citing Dowling v. City of Phila., 855 F.2d 136, 141 (3d Cir. 1988)).

Accepting plaintiff's version of the pertinent events and construing all other evidence in her favor as we must at this juncture, she has a triable excessive force claim against Sergeant Porter and Officer Terman and the other officers who were present and did not intervene when she was struck and sprayed at the time of her arrest. See Groman, 47 F.3d at 634; Frohman v. Wayne, 958 F.2d 1024, 1025-26 (10th Cir. 1992). Plaintiff's version that she was doing nothing illegal, was

merely in the process of peacefully leaving the premises and was not resisting arrest but merely holding onto a roof rack to steady herself after initially being sprayed, if believed, could support a claim for false arrest. There is evidence that Sergeant Porter and Officers Gaffney, Rockwell, McGuigan, Terman, Fuhrmann and Moors participated in plaintiff's arrest and from which one could find that Officer Lancieri was present and could have intervened. See Groman, 47 F.3d at 636.

A government official exercising discretionary authority, however, is immune from liability for civil damages if a reasonable official could have believed that his conduct was lawful in light of clearly established law and the information he possessed. Hunter v. Bryant, 502 U.S. 224, 227 (1991); Anderson v. Creighton, 483 U.S. 635, 641 (1987); Parkhurst v. Trapp, 77 F.3d 707, 712 (3d Cir. 1996). The right to be free from excessive force and arrest without probable cause were, of course, clearly established long before the time of this incident. Because there are factual disputes about plaintiff's conduct and thus what those participating in her arrest reasonably could have believed or perceived at the pertinent time, the question of qualified immunity cannot be resolved as a matter of law at this juncture. See Gainor v. Rogers, 973 F.2d 1379, 1385 (8th Cir. 1992) (dispute of fact necessary to immunity determination must be resolved by jury).

If, as she avers, plaintiff was peacefully leaving the Club when she was sprayed with OC for no reason during the arrest

of Ms. Wilson and was merely holding onto a roof rack to steady herself from the effect of the OC when she was accosted and arrested by defendants, then a reasonable officer could not have believed that probable cause existed to arrest plaintiff or that he was justified in using force upon her. If plaintiff reasonably appeared to be disorderly and to be struggling with officers attempting to effect a lawful arrest, then defendants would qualify for immunity.¹¹ If plaintiff was in fact being disorderly and resisting attempts lawfully to arrest her by lesser force, there would be no constitutional violation and the question of immunity would be superfluous.

A municipality cannot be held liable under § 1983 on a respondeat superior theory. Monell v. Department of Social Services, 436 U.S. 658, 691 (1978); Andrews v. City of Phila., 895 F.2d 1469, 1481 (3d cir. 1990)). A plaintiff must prove the existence of a municipal policy or custom that has caused a constitutional violation to hold a municipality liable under § 1983. Monell, 436 U.S. at 690-91.

A municipality may be liable under § 1983 for a failure to train subordinate officers only where such failure reflects a policy of deliberate indifference to the constitutional rights of

11. The court does not suggest that an arresting officer must personally observe the conduct justifying an arrest. An officer who makes an arrest based on information related by a fellow officer qualifies for immunity if it was objectively reasonable for him to credit that information and based upon it to believe probable cause to arrest existed. See Rogers v. Powell, 1997 WL 458999, *8 (3d Cir. Aug. 11, 1997).

citizens. See City of Canton v. Harris, 489 U.S. 378, 390-91 (1989); Stoneking v. Bradford Area School Dist., 882 F.2d 720, 725 (3d Cir. 1989), cert. denied, 493 U.S. 1044 (1990). The same standard applies to claims of negligent supervision and failure to investigate. See Groman, 47 F.3d at 637.

To sustain a failure to train claim against a municipality, a plaintiff generally must show that responsible municipal policymakers had actual or constructive knowledge of incidents or conduct which were so likely to result in future violations of constitutional rights that their failure adequately to train their employees to prevent this reasonably can be said to constitute tacit approval or deliberate indifference to the need to ensure the particular right in question and to represent a policy for which the municipality is responsible. City of Canton, 489 U.S. at 390; Simmons v. City of Philadelphia, 947 F.2d 1042, 1059-60 (3d Cir. 1991), cert. denied, 112 S. Ct. 1671 (1992). Of course, the failure adequately to train must also cause the violation complained of. Id. at 1065. There must be a pattern of constitutional violations or a very apparent need for training to avoid imminent deprivations of a constitutional right such that any reasonable policymaker or supervisor would have taken appropriate preventive measures. Jones v. City of Chicago, 787 F.2d 200, 205 (7th Cir. 1986); Fulkerson v. City of Lancaster, 801 F. Supp. 1476, 1483 (E.D. Pa. 1992), aff'd, 993 F.2d 876 (3d Cir. 1993).

A plaintiff cannot sustain a failure to train claim merely by showing that a particular officer acted improperly or simply that better training would have enabled an office to avoid the particular conduct causing injury. Simmons, 947 F.2d at 1060. A single unconstitutional action by a municipal official can result in municipal liability only if the plaintiff can prove it was caused by an existing unconstitutional policy attributable to a municipal policymaker. Oklahoma City v. Tuttle, 471 U.S. 808, 823-24 (1985); Baker v. Monroe Twp., 50 F.3d 1186, 1191 (3d Cir. 1995); Groman, 47 F.3d at 637.

Plaintiff's claims against the municipal defendants are premised on their alleged failure to provide adequate training in the use of OC spray and the alleged failure of their police chiefs to investigate this incident or prior citizen complaints. It is uncontroverted that all of the individual officers attended a training program on the use of OC spray. Plaintiff has not presented evidence to sustain a finding that such training was inadequate or otherwise to demonstrate deliberate indifference. One cannot reasonably conclude from the evidence of record that either municipality had a custom or policy of encouraging or ignoring the use of OC spray in an unconstitutional manner.

Plaintiff has failed to demonstrate that either municipality or police chief failed adequately to investigate prior citizen complaints. The failure to investigate this incident alone is not sufficient to prove the existence of a

policy or custom within the meaning of § 1983. Groman, 47 F.3d at 637.

Plaintiff cannot sustain her claims against the municipal defendants, Chief Mills or Chief Peranteau.

2. Abuse of Process

Abuse of process occurs where process is lawfully initiated and thereafter perverted to achieve some unlawful purpose. Heck v. Humphrey, 114 S. Ct. 2364, 2372 n.5 (1994); Rose v. Bartle, 871 F.2d 331, 350 n.17 (3d Cir. 1989); Jennings v. Shuman, 567 F.2d 1213, 1217 (3d Cir. 1977). "An abuse of process is by definition a denial of procedural due process." Jennings, 567 F.2d at 1220. Unlike the tort of malicious prosecution, abuse of process does not require termination of the proceedings in the plaintiff's favor. Heck, 114 S. Ct. at 2372 n.5; Davis v. Cheltenham Twp. Police Dept., 767 F. Supp. 104, 106 (E.D. Pa. 1991). The presence or absence of probable cause is irrelevant. Jennings, 567 F.2d at 1218.

Plaintiff alleges that defendants initiated and continued criminal proceedings against her as a "cover" or justification for their use of excessive force against her. Defendants correctly characterize plaintiff's claim as one for malicious prosecution and contend correctly that such a claim must fail because plaintiff pled guilty to disorderly conduct. The criminal proceedings thus did not terminate in her favor. See Heck, 114 S. Ct. at 2371; Rose, 871 F.2d at 349.

Plaintiff's arrest and the filing of charges against her constitute "process." See Puricelli v. Borough of Morrisville, 820 F. Supp. 908, 919 (E.D. Pa. 1993); Garner v. Twp. of Wrightstown, 819 F. Supp. 435, 445 (E.D. Pa. 1993). Plaintiff, however, appears to misperceive the distinction between malicious prosecution and abuse of process.

In making this distinction, the Court in Jennings stated:

Likewise, the use to which process is put can be either legitimate or illegitimate, and, if illegitimate, there is malicious abuse [of process]. For example, if the defendant justifies issuance of process by untruthfully saying that the plaintiff solicited burglary and uses the process only to have him jailed, this is malicious [prosecution] only. It is not malicious abuse [of process] because jailing is the purpose for which the criminal process was intended. If the defendant has process issued based on the truthful statement that the plaintiff solicited burglary and then uses the threat of prosecution for purposes of extortion, this is malicious abuse [of process] only.

Jennings, 567 F.2d at 1219.

Charging, like jailing, an arrestee, is "the purpose for which criminal process was intended." Plaintiff has not made out a claim for abuse of process.

B. § 1981 Claim

Section 1981 proscribes intentional discrimination based on race. General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 391 (1982). Plaintiff alleges that defendants

engaged in the conduct underlying her § 1983 claims because of her "race and ethnicity" in violation § 1981.¹²

Plaintiff presents two pieces of evidence to support her § 1981 claim. One is plaintiff's testimony that she overheard an unidentified officer at the scene of her arrest say "this is a big black bitch we have to deal with here." The other is plaintiff's testimony that at the Bristol Borough Police Station, Officer Moors said "[W]hy do all you people act like this? All you people need to be locked up and the key thrown away" to plaintiff, Ms. Wilson and Ms. Green, all of whom are African-Americans.

The first comment to which plaintiff testified cannot be attributed to any defendant. The comment plaintiff swears Officer Moors made at the Borough Police Station, however, may support a finding of discriminatory animus, but only on the part of Officer Moors. See Alexis v. McDonald's Restaurants of Mass., 67 F.3d 341, 348 (1st Cir. 1995) (officer's statement "You people have no rights. You better shut up your . . . mouth before I arrest you too" made to persons present at time of arrest of

12. Section 1981(a) provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, exactions of every kind, and to no other.

African-American sufficient to support § 1981 claim where only common characteristic apparent to officer was their race).

A municipality cannot be held liable for its employees' violations of § 1981 under a respondeat superior theory. See Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 735-36 (1989); Dennis v. County of Fairfax, 55 F.3d 151, 156 n.1 (4th Cir. 1995). Plaintiff has not presented any evidence to support a finding that Bristol Borough had a custom or policy of discriminating against citizens in making arrests or filing charges because of race.

C. § 1985 Claim

To sustain a claim under § 1985(3), a plaintiff must prove the existence of a conspiracy between at least two people for the purpose of depriving her of the equal protection of the law or of privileges and immunities under the law, an act in furtherance of that conspiracy and an injury to her as a result of such conspiracy. United Brotherhood of Carpenters & Joiners of America, Local 610 v. Scott, 463 U.S. 825, 828-29 (1983); Maki v. Laako, 88 F.3d 361, 367 (6th Cir. 1996). There must be proof of "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Id. at 829.

The only evidence from which one might find that any defendant acted with discriminatory racial animus involves Officer Moors. There is no evidence that any other defendant

with whom Officer Moors collaborated or could have conspired made a racial remark or acted with a discriminatory purpose.

Plaintiff has not sustained a § 1985 claim.

V. CONCLUSION

Consistent with the foregoing, defendants' motions will be granted in part and denied in part.

Plaintiff's § 1983 abuse of process claim, § 1985 claim and § 1981 claim against all but defendant Moors, as well as her claims against the municipal defendants and their police chiefs will be dismissed. The motions will be denied as to plaintiff's § 1981 claim against defendant Moors and her § 1983 excessive force and false arrest claims against the remaining individual defendants.

An appropriate order will be entered.

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BOROUGH OF BRISTOL : NO. 96-3751

O R D E R

AND NOW, this day of September, 1997, upon consideration of the Motion of Township of Bristol and the Township Defendants for Summary Judgment (Doc. #18) and the Motion of Borough of Bristol and the Borough Defendants for Summary Judgment (Doc. #21), consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motions are **GRANTED** in part in that **JUDGMENT is ENTERED** for defendants Township of Bristol, Borough of Bristol, Mills and Parenteau and against plaintiff on her claims against them in the above action, and said Motions are otherwise **DENIED**.

BY THE COURT:

JAY C. WALDMAN, J.