

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

LISA MILLER : CIVIL ACTION
 :
 v. :
 :
 JACK WEBBER, et al. : NO. 96-5832

MEMORANDUM ORDER

Presently before the court is the Motion of defendants Jack Webber and the School District of Philadelphia for Sanctions pursuant to Fed. R. Civ. P. 11(c). Defendants assert that plaintiff's amended complaint shows a failure by counsel appropriately to investigate the merits of plaintiff's case before filing this action and that counsel continues to violate his duties under Rule 11 by refusing to abandon a claim which is not viable. Defendants ask the court to dismiss plaintiff's remaining claim and to order counsel to reimburse the School District for the costs of defending this action.

The factual background and pertinent legal principals in this case are set forth in the court's memorandum of May 30, 1997.

Plaintiff alleges in her amended complaint that she was sexually assaulted. If true, as the court noted in the memorandum of May 30th, this could implicate her liberty interest in bodily integrity and physical safety which is protected by substantive due process. Defendants present evidence to suggest

that plaintiff will be unable to sustain this allegation. If they have intentionally misrepresented an improper verbal sexual overture as a sexual assault, plaintiff and her counsel may be subject to sanctions as well as an adverse judgment. The court, however, will not make such a determination at this juncture.

The court does invite plaintiff's counsel to reread the discussion regarding state-created danger claims at pages 8-12 of the May 30th memorandum. The court reiterates that to sustain her claim, plaintiff must show she was deprived of a right protected by substantive due process. See Kneipp v. Tedder, 95 F.3d 1199, 1205 (3d Cir. 1996). The court reiterates that cases in which cognizable state-created danger claims have been recognized involved death or substantial physical injuries or assaults.¹ Courts have refused to recognize such claims where a plaintiff's injuries have been less severe.²

¹ See e.g., Kneipp, 95 F.3d at 1203 (plaintiff sustained permanent brain damage and impairment of basic bodily functions); L.W. v. Grubbs, 974 F.2d 119, 120-21 (9th Cir. 1992) (nurse directed by state officials to work alone with known violent sex offender was assaulted and raped), cert. denied, 113 S. Ct. 2442 (1993); Cornelius v. Town of Highland Lake, 880 F.2d 348, 350 (11th Cir. 1989) (plaintiff kidnapped at knife point and held hostage for three days), cert denied, 494 U.S. 1066 (1990); Nashiyama v. Dickson County, Tenn., 814 F.2d 277, 279 (6th Cir. 1987) (plaintiffs' daughter beaten to death); Wood v. Ostrander, 879 F.2d 583, 586 (9th Cir. 1989) (plaintiff was raped), cert. denied, 498 U.S. 938 (1990).

² See, e.g., Abeyta By Martines v. Chama Valley Independent School District, 77 F.3d 1253, 1257-58 (10th Cir. 1996) (unless so severe as to amount to torture even extreme
(continued...))

The court reiterates that a state-created danger claim cannot be premised on nonfeasance or the failure of an official to act or to investigate. See D.R. By L.R. v. Middle Bucks Area Vo. Tech. School, 972 F.2d 1364, 1375-76 (3d Cir. 1992); Brown v. Grabowski, 992 F.2d 1097, 1116 (3d Cir. 1992); Stoneking v. Bradford Area School Dist., 882 F.2d 720, 730 (3d Cir. 1989), cert. denied, 493 U.S. 1044 (1990). Insofar as plaintiff's counsel argues that he may be able to convince the court to expand the state-created danger theory to encompass officials who did not but "should have" known of a potential danger to a citizen, he runs the risk that such an argument in the face of current and consistent Third Circuit and other case law may well be deemed unreasonable or frivolous. Of greater import, plaintiff's counsel has not abandoned his position at this

(...continued)

verbal abuse or psychological harassment is not substantive due process violation); Niebus v. Liberio, 973 F.2d 526, 533 (7th Cir. 1992) ("[e]ven bodily integrity is not protected completely; minor assaults and batteries are not actionable as deprivations of constitutional liberty"); Pittsley v. Warish, 927 F.2d 3, 9 (1st Cir. 1991) (fear or emotional injury resulting from verbal abuse or harassment generally insufficient to show deprivation of liberty interest in absence of physical injury or touching); Bibbo v. Mulhern, 621 F. Supp. 1018, 1025 (D. Mass. 1985) (being "humiliated, denigrated and frightened" in absence of physical force generally insufficient to implicate substantive due process).

junction that he will or may be able to show that Mr. Webber knew of Mr. Crouche's background.

Defendants have put plaintiff and her counsel on notice of potentially fatal deficiencies in her claim based upon available evidence. They have elected to proceed and accept the attendant risks. The court will not at this juncture determine whether the totality of evidence to be adduced will show that plaintiff's claim is so patently defective it should not have been prosecuted and requires imposition of sanctions.

ACCORDINGLY, this day of November, 1997, upon consideration of the Motion of defendants Webber and the School District of Philadelphia for Sanctions pursuant to Fed. R. Civ. P. 11(c) (Doc. #18), **IT IS HEREBY ORDERED** that said Motion is **DENIED** without prejudice to renew at the close of discovery or upon resolution of an appropriate summary judgment motion.

BY THE COURT:

JAY C. WALDMAN, J.