

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

SHEPHARD DE'VALL CHERRY

v.

CITY OF PHILADELPHIA, et al.

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CIVIL ACTION
No. 01-CV-966

O'Neill, J.

February , 2002

MEMORANDUM

Plaintiff Shephard De'Vall Cherry has sued, among others, the City of Philadelphia, the Philadelphia Police Department, Officer Marcus Kirkland, Officer Billy Golphin, and Officer Alan Fried. He asserts civil rights violations under 42 U.S.C. §1983 and various state law claims for injuries he sustained while being arrested¹ on February 27, 1999 as a suspected car thief.² Before me is the City's motion for reconsideration of the Order of January 22, 2002 denying its motion for summary judgment with respect to plaintiff's § 1983 and state law claims. Because plaintiff has failed to produce any evidence of municipal liability under § 1983 and cannot recover against the City on his state claims as a matter of law, I will grant the City's motions for reconsideration and for summary judgment.

Federal Rule of Civil Procedure 56(c) provides that summary judgment is appropriate if

¹ Specifically, plaintiff asserts that the officers used excessive force during the arrest in violation of the Fourth Amendment's prohibition of unreasonable seizures and that the officers failed to see that his injuries were treated in a timely fashion.

² Plaintiff also sued Curran Fromhold Correctional Facility, the Medical administrator at the correctional facility, and Prison Health Services for alleged civil rights violations following his arrest.

“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.” An issue is “material” only if the dispute over facts “might affect the outcome of the suit under the governing law.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). If the record taken as a whole in a light most favorable to the nonmoving party “could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’” Matsushita Elec. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986) (citation omitted). If the evidence for the nonmoving party is merely colorable, or is not significantly probative, summary judgment may be granted. Anderson, 477 U.S. at 249-50 (citations omitted).

A reasonable jury could not infer municipal liability under § 1983 because plaintiff has failed to produce any evidence that the City’s has a pattern or practice of failing to properly train its police officers. A municipality can be liable for civil rights violations inflicted by police officers only when such violations are permitted as a matter of policy or as a custom. See Beck v. City of Pittsburgh, 89 F.3d 966, 971 (3d Cir. 1996), citing Monell v. New York City Dept. of Soc. Servs., 436 U.S. 658 (1978).

Policy is made when a "decisionmaker possess[ing] final authority to establish municipal policy with respect to the action" issues an official proclamation, policy, or edict. A course of conduct is considered to be a "custom" when, though not authorized by law, "such practices of state officials [are] so permanent and well settled" as to virtually constitute law.

Id., quoting Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990).

Moreover when a plaintiff alleges municipal liability under § 1983 based on a custom of failing to train the police properly a plaintiff must demonstrate that the city was “deliberately

indifferent” to the rights of persons with whom the police come into contact. See City of Canton v. Harris, 489 U.S. 378, 389 (1989) (“Only where a municipality’s failure to train its employees in a relevant respect evidences a ‘deliberate indifference’ to the rights of its inhabitants can such a shortcoming be properly thought of as a city ‘policy or custom’ that is actionable under § 1983.”). As the Supreme Court noted in City of Canton, the standard of deliberate indifference can be met only when a municipality makes a conscious choice to ignore the improper training of police officers. Id. “A showing of simple or even heightened negligence will not suffice.” Board of County Comm’rs of Bryan County v. Brown, 520 U.S. 397, 407 (1997). The Court of Appeals for the Third Circuit has recognized that “[f]ailure to adequately screen or train municipal employees can ordinarily be considered deliberate indifference only where the failure has caused a pattern of violations. Berg v. County of Allegheny, 219 F.3d 261, 276 (3d Cir. 2000); see also Beck, 89 F.3d at 973 (concluding that a series of citizen complaints issued against an officer was sufficient to allow a reasonable jury to infer that chief of police knew or should have known that officer was violating civil rights during arrests). Although the Berg Court noted that it was possible to prove an allegation of failure to train without pattern evidence, “the burden on the plaintiff in such a case is high.” Berg, 219 F.3d at 276-77 (noting that no pattern of violation would be necessary to show deliberate indifference where it was obvious that a policy or custom would lead to constitutional violations).³

³ An often-cited example of such obvious indifference is when a municipality issues handguns to officers without providing any accompanying training. See City of Canton, 489 U.S. at 390 n.10.

Here, the evidence plaintiff offers to demonstrate municipal liability is insufficient for a reasonable jury to infer that the city was deliberately indifferent in training its officers.⁴ With regard to municipal liability, the only colorable evidence plaintiff offers is a few excerpts of an expert witness's report by John G. Peters, Ph.D., stating in conclusory terms that the city of Philadelphia had a custom, practice, or policy of failing to train its officers adequately in "core tasks." From the report's language, it appears that the expert based this portion of the report solely on the deposition of defendant Golphin.⁵ The expert points to three defects in defendant

⁴In addition to demonstrating that the municipality was "deliberately indifferent," a plaintiff must also show that the municipal indifference was the cause of the plaintiff's injuries under a failure to train theory. See City of Canton, 489 U.S. at 391 (determining that plaintiff must prove that deficiency in officer's training actually caused police officer to violate plaintiff's civil rights). Because I find that plaintiff has failed to produce evidence of deliberate indifference, I need not address causation here.

⁵ In his brief, plaintiff asserts that Dr. Peters did not solely rely upon the defendant Golphin's deposition and notes that the expert's report cites Officer Golphin's deposition as "one example" of the City's deliberate indifference. Plaintiff also points out that "[T]hroughout the course of his expert report, Dr. Peters, relies on various police treatises and standards, not to mention his own experiences and as an expert on cases concerning specifically the City of Philadelphia, as part of the basis of his opinions."

Although Dr. Peters may have relied upon such treatises, standards, and experiences in forming his opinion, his report fails to address or analyze these underlying data. The report provides no basis for concluding that there is a pattern evidencing a failure to train. Instead, the report solely analyzes alleged lapses in defendant Golphin's personal knowledge and skills. The report then makes a giant leap by concluding that because Golphin has inferior knowledge and skills the entire Philadelphia police force is inadequately trained. This evidence is insufficient to support Dr. Peter's conclusion that the City is deliberately indifferent to the training of its police officers. See City of Canton, 489 U.S. at 390-91 ("That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program."); see also Elcock v. Kmart Corp., 233 F.3d 734, 745 (3d Cir. 2000) ("An expert's opinion is reliable if it is 'based on the methods and procedures of science rather than on subjective belief or unsupported speculation; the expert must have good grounds for his or her belief.'"); Henderson v. City of Philadelphia, No. Civ. A. 98-3861, 1999 WL 482305, at *22 (E.D. Pa. July 12, 1999) ("Plaintiffs' expert's conclusory opinion that the city was deliberately indifferent to the need for further training is insufficient to prevent summary judgement, as the court is not obliged to

Golphin's law enforcement knowledge as substantive proof that the City of Philadelphia was deliberately indifferent to the proper training of its police officers: an inability by defendant Golphin to define succinctly a "use of force continuum;" Golphin's failure to receive additional training regarding the use of force between October 1998 and October 2001; and Golphin's inability to produce copies of memos updating police use-of-force orders.

Defendant Golphin's deposition regarding lapses in his own professional knowledge and skills is insufficient for a jury to infer deliberate indifference by the City. One unsatisfactorily trained officer "will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program." City of Canton, 489 U.S. at 390. Plaintiff has not produced any pattern evidence of civil rights violations by defendant Golphin or other officers.⁶ Nor has plaintiff provided any evidence of obvious indifference to the proper training of officers on the part of the City, such as issuing guns to officers without

accept conclusory allegations from either plaintiffs or their experts."), citing Anderson, 477 U.S. at 249-50.

⁶ Plaintiff asserts that the prior complaint records of defendants Golphin and Kirkland "evidence a continuing custom, pattern and practice of police brutality by the Philadelphia Police Department and the City's apparent acquiescence to the same"

This statement, however, is incorrect. Defendant Golphin's record contains only a single complaint and that complaint dealt with an alleged false arrest and perjury. Similarly, defendant Kirkland's record only contains one complaint regarding excessive force. Cf. Beck, 89 F.3d at 969 (finding that numerous excessive force complaints lodged over a narrow period of time were sufficient to infer knowledge for an officer's propensity for violence).

Plaintiff also submits a newspaper article pertaining to an alleged pattern of injuries to custodial suspects caused by police officers intentionally driving patrol wagons with abrupt starts and stops so as to injure the wagon's occupants.

Assuming that this article is admissible for the limited purpose of demonstrating that the City knew about potential police misconduct, it clearly would be inadmissible as hearsay for demonstrating that such a pattern of police misconduct actually occurred. See Fed. R. Evid. 802.

providing training. Although plaintiff's expert opines that the defects in Golphin's knowledge are "consistent with other cases involving the Philadelphia Police Department where there was a lack of training, or inadequate training," the report fails to cite these cases,⁷ nor does it analyze how they demonstrate a pattern of inadequate training. Consequently, plaintiff's conclusory expert report is insufficient to allow a reasonable jury to find the municipal defendant liable. See Henderson, 1999 WL 482305, at *22.

Plaintiff cannot recover against the municipal defendant on his state claims because under the Pennsylvania Political Subdivision Tort Claims Act the City is immune from suit as a matter of state law. See Wakshul v. City of Philadelphia, 998 F. Supp. 585, 588 (E.D. Pa. 1998). Under 42 Pa. Cons. Stat. Ann. § 8541 (West 1998), the City of Philadelphia is absolutely immune from tort liability except in eight enumerated instances: (1) vehicle liability; (2) care, custody, control of personal property; (3) real property; (4) trees, traffic controls and street lighting; (5) utility service facilities; (6) streets; (7) sidewalks; and (8) care, custody or control of animals. Id. As Judge Brody noted in Wakshul, "while there is a statutory abrogation of immunity of individual employees for intentional torts, this does not remove the immunity of the local agency, here the City." Id. Because the plaintiff does not allege any torts related to the eight limited exceptions that would abrogate the city's immunity, the municipal defendant cannot be liable for the alleged torts of its employees.

⁷ The expert report cites one case for pattern evidence, "Klose v. City of Philadelphia, et al." After an extensive research I have been unable to locate the case. Additionally, after mentioning the case in his memorandum of law, plaintiff did not provide an accurate citation or a copy of the case.

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ORDER

AND NOW, this day of February, 2002, after consideration of the City's motion for reconsideration of the Order of January 22, 2002 and the plaintiff's response thereto, it is ORDERED that the motion is GRANTED and judgment entered in favor of the City of Philadelphia and against plaintiff.

THOMAS N. O'NEILL, JR., J.