

**THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

RICHARD BANKS, JUDY BANKS, ROGER
MCCARREN and LARRY MEYER,

Plaintiffs

vs.

KAREN GALLAGHER, ANTHONY
MARIANO, WILLIAM STADNITSKI and
DICKSON CITY BOROUGH,

Defendants

EDWARD J. KRAFT, JR.,

Plaintiff,

vs.

KAREN GALLAGHER, ANTHONY
MARIANO, and DICKSON CITY BOROUGH,

Defendants.

CIVIL ACTION NO. 3:08-1110

(CAPUTO, D.J.)
(MANNION, M.J.)

CIVIL ACTION NO. 3:08-1177

(CAPUTO, D.J.)
(MANNION, M.J.)

(ELECTRONICALLY FILED)

**DICKSON CITY'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR
PARTIAL SUMMARY JUDGMENT**

AND NOW, comes the Defendant, Dickson City Borough, by and through its counsel,
Post & Schell, P.C., and files this Memorandum of Law in Support of its Motion for Partial
Summary Judgment.

Procedural History

Defendant Dickson City Borough submitted its Motion for Partial Summary Judgment to
the claims made against it by Plaintiffs Richard Banks, Judy Banks, Roger McCarren, and Larry
Meyer, and submits this memorandum of law in support thereof.

Statement of Facts

Defendant incorporates its Short & Concise Statement of Facts in Support of its Motion for Partial Summary Judgment as if same were fully set forth at length herein.

Questions Involved

Whether the District Court should grant Defendant's Motion for Partial Summary Judgment to Counts III, IV, and VI of Plaintiffs Richard Banks, Judy Banks, Roger McCarren, and Larry Meyer's Amended Complaint?

Suggested Answer: Yes.

Argument

Defendant submits that 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." F.R.C.P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

The moving party bears the burden of informing the district court of the basis of its motion and of identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. Mazaheri v. Prudential Ins. Co. of Am., 2007 U.S. Dist. LEXIS 93024 at 11-12. Once the moving party demonstrates that there is an absence of evidence to support the nonmoving party's claims, the "non-moving party must rebut the motion with facts in the record and cannot rest solely on assertions made in the pleadings, legal memoranda, or oral argument." Berkeley Inv. Group, Ltd. V. Colkitt, 455 F.3d 105, 201 (3d Cir. 2006). Summary

judgment is appropriate if the nonmoving party fails to make a sufficient showing to establish an essential element on which that party will bear the burden at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

For reasons set forth at length herein, Defendants submit that no genuine issue of material fact remains with regard to the Amended Complaint, and Defendants are entitled to judgment as a matter of law.

Count III-All Plaintiffs v. Dickson City

Plaintiff alleges that Dickson City Borough violated their constitutional rights due to a failure to train the officers as well as on its alleged development and maintenance of policies and procedures which demonstrated deliberate indifference to the constitutional rights of its citizens.

It is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to a municipality. The plaintiff must also demonstrate that, through its deliberate conduct, *the municipality* was the "moving force" behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate *a direct causal link* between the municipal action and the deprivation of federal rights. Bd. of the County Comm'Rs v. Brown, 520 U.S. 397, 403 (U.S. 1997). Moreover, a plaintiff seeking to impose liability on a municipality under § 1983 must identify a municipal "policy" or "custom" that caused the plaintiff's injury. Locating a "policy" ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality. Id.

It is critical to understand that Plaintiffs knowingly sought to provoke an encounter such as occurred as is clearly set forth in the e-mails sent to one another and posted at the organizational website which were attached as Exhibit 1 to the Reply to the Summary Judgment Motion of Edward Kraft. They descended upon this restaurant without ever calling to advise the

establishment that 10 armed men would be arriving together and it is of little surprise that the patrons were afraid and sought the help and protection of the police. They were prepared to and did videotape this staged encounter, where only one side of the encounter was privy to their plan and purpose in being there. Yet, when the Officers calmly and professionally responded to the complaints and fears of the citizens which were obviously expected and intended by the Plaintiffs, Plaintiffs respond with a lawsuit suggesting nefarious actions and evil motives with absolutely no basis in fact. They attempt to conjure injuries as well as theories, where neither exist.

In this matter, it is alleged that the Borough failed to properly train its officers. When the policy in question concerns a failure to train or supervise municipal employees, liability under section 1983 requires a showing that the failure amounts to a deliberate indifference to the rights of persons with whom those employees will come into contact. Carter v. City of Philadelphia, 181 F.3d 339, 357 (3d Cir. 1999) (citing City of Canton v. Harris, 489 U.S. 378, 388-89 (1989)). Failure to train ordinarily constitutes deliberate indifference when the failure has caused a pattern of violations. Berg v. County of Allegheny, 219 F.3d 261, 261, 276 (3d Cir. 2000).

There was a policy in effect at the police department for officers to contact the police chief immediately when serious offenses are at issue. Exhibit 7 at pp. 24-25, 26, 28. Further, police officers are required to undergo all state-mandated trainings, and Plaintiffs have produced no evidence, either factual or expert, that Dickson City Borough had a policy that undermined these requirements or made it likely that constitutional violations would occur. In this case, there is no evidence, either factual or expert, that Dickson City Borough has exhibited deliberate indifference to the rights of persons with whom police officers come into contact.

Based on the depositions of Officers Gallagher (see pp. 7-17 of Officer Gallagher's Deposition transcript, attached to Plaintiff's Motion for Summary Judgment as Exhibit "1") and Mariano (see pp. 5-9 of Officer Mariano's Deposition transcript, attached to Plaintiff's Motion for Summary Judgment as Exhibit "3"), it is evident that the both Officers received and completed the State mandated Act 120 training as it is required to work as a police officer in the Commonwealth of Pennsylvania. [Then] Police Chief Stadnitski confirmed that the Borough requires that police officer applicants must have successfully completed their Act 120 training. (See p. 22 of Chief Stadnitski's Deposition transcript, attached to Plaintiff's Motion for Summary Judgment as Exhibit "4"). Accordingly, it is obvious that the Officers received and completed training (Act 120) consistent with state requirements.

Moreover, Police Chief Stadnitski confirmed that in his thirty-seven years of service to the police department, he has never once seen the issue Officers Gallagher and Mariano encountered on the day in question. Exhibit 7 at pp. 31-32. Plaintiffs have not produced any evidence to prove a pattern of similar occurrences. Furthermore, there is no expert report challenging the appropriateness of the training or suggesting that an officer needed to be trained on an issue that is rarely, if ever, encountered in typical policing. In fact, it was never encountered until Plaintiffs sought to set up and then video tape an encounter.

In a 2009 opinion from this District, the Court stated, "As a practical matter, a municipality cannot be expected to train every officer on every element of every statute or law that exists in Pennsylvania. Such an undertaking would be ineffective at best, futile at worst, and most importantly, is beyond what is required by the law." Kelly v. The Berough of Carlisle, et al., 2009 U.S. Dist. LEXIS 37618, *29 (M.D. Pa. 2009).

While it is submitted that no constitutional rights were violated, even if they were, Plaintiffs bear the burden of proving a pattern of similar violations. They have failed to do so. Therefore, there is no evidence to support Plaintiffs' claim against Dickson City Borough on the basis of failure to train because they have not demonstrated deliberate indifference.

Count IV-All Plaintiffs v. All Defendants

Count IV is merely a repetition of the other claims in the Amended Complaint, reiterating that Plaintiffs allege that the Defendants violated their rights under the First, Fourth, Fifth and Fourteenth Amendments. Amended Complaint at ¶ 37. For the reasons the Plaintiffs' claims against Dickson City Borough fail, and to the extent that they fail, Count IV also cannot withstand Dickson City Borough's motion for partial summary judgment.

Count VI-Pennsylvania Constitution

Plaintiffs' demands for money damages on the basis of Pennsylvania Constitutional violations must be dismissed because "[a]lthough the Pennsylvania Constitution has been said to provide for an action for injunctive relief to enforce its equal rights provisions, there has been no such holding as to an action for damages." Kaucher v. County of Bucks, 2005 U.S. Dist. LEXIS 1679, *31-32 (E.D. Pa. 2005). Courts in the Eastern District of Pennsylvania that have considered whether there is a private cause of action for damages under the Pennsylvania Constitution have concluded that no such right exists. See, e.g., Dooley v. City of Philadelphia, 153 F. Supp. 2d 628, 633 (E.D. Pa. 2001).

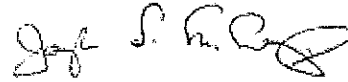
Plaintiffs' demands for injunctive relief should also be dismissed because they are overly broad and would be unenforceable.

WHEREFORE, Defendant Dickson City Borough requests that its Motion for Partial Summary Judgment on the above bases be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joseph F. McNulty, Jr., Esquire do hereby certify that I caused a true and correct copy of the foregoing document(s) to be served upon the following designated person(s) via Electronic Service on the date set forth below:

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