

2000 WL 33174398
United States District Court, S.D. Florida.

Liliana CUESTA, Plaintiff,
v.
THE SCHOOL BOARD OF MIAMI DADE
COUNTY, et al., Defendants.

No. 99-517-CIV. | Oct. 18, 2000.

Opinion

OMNIBUS ORDER

UNGARO-BENAGES, District J.

*1 THIS CAUSE is before the Court upon Plaintiff's Motion for Partial Summary Judgment on Counts I and II to Determine Liability of Defendants Alexander and School Board of Miami-Dade County, filed February 29, 2000, The School Board of Miami-Dade County, Florida and Michael Alexander's Motion for Final Summary Judgment, filed April 3, 2000, Plaintiff's Request for Oral Argument on Pending Motions, filed May 22, 2000, Plaintiff's Motion to Strike Defendants' Statement of Disputed Facts, filed May 5, 2000, Plaintiff's Motion to Strike Portions of Defendants' Statement of Undisputed Facts, filed May 5, 2000, Plaintiff's Motion to Strike Portions of Affidavit of Timothy Dawson, filed May 5, 2000, Plaintiff's Motion to Strike Affidavit of Charles P. Ewing, filed May 5, 2000.

THE COURT has considered the Motions, the pertinent portions of the record and is otherwise fully advised in the premises.¹

¹ The parties agree that those portions of the Motions with respect to the propriety of summary judgment on the claims against Defendant Michael Alexander have been rendered moot by the Court's April 10, 2000 Order dismissing said claims based on qualified immunity.

FACTS

Unless otherwise noted, the following material facts are undisputed:

On or about February 20, 1998, Timothy Dawson

("Dawson"), the principal of Killian Senior High School, was made aware of the distribution of an anonymous pamphlet entitled "First Amendment" (the "Pamphlet") on school grounds and received a list of nine students believed to have participated in its creation and distribution. Affidavit of Timothy Dawson ("Dawson Aff.") at ¶ 10; Exhibit 2 to Plaintiff's Notice of Filing Exhibits in Support of Motion for Partial Summary Judgment Against Miami Dade School Board ("Notice of Filing Exhibits"). The Pamphlet contains sketches, including a picture of Dawson with a dart drawn through his head and essays, including one in which the author wonders what would happen if he shot certain fellow students as well as Dawson and derogatory comments regarding Blacks and Hispanics. Exhibit 1A to Dawson Aff.

On February 23, 1998, the nine students believed to have participated in the creation and distribution of the Pamphlet were summoned to Dawson's office. Dawson requested that John Galardi ("Officer Galardi"), a Miami-Dade police officer then assigned to Killian, come to his office and be present during the questioning of the students. Dawson also requested that Michael Alexander ("Officer Alexander"), a police officer with the Division of School Police, come to his office and question the students. Deposition of Michael Alexander ("Alexander Depo.") at pp. 9, 10, 12. Dawson explained to Officer Alexander that based on the contents of the Pamphlet, he feared for his safety and wanted an investigation initiated. Id. at p. 14.

After Officer Alexander read each student his *Miranda* rights, Dawson and Alexander questioned the students about the Pamphlet and obtained written statements from the students, including Plaintiff, admitting their involvement. Alexander Depo. at p. 17, 38; Defendant's Statement of Undisputed Facts at ¶ 14; Exhibit 5 to Plaintiff's Notice of Filing Exhibits. Based on the contents of the Pamphlet and Dawson's concern for his personal safety, Officer Alexander believed that the actions of the students were criminal. Alexander Depo. at p. 38. Dawson advised Alexander that he wanted to pursue the matter through the legal system, and if appropriate, do so through arrests of the students. Id. at p. 41. Officer Alexander, after consultation with the State Attorney's Office, decided to arrest the students. Id. at pp. 41-42, 49.

*2 Specifically, Alexander and Galardi determined that Fla. Stat. § 836.11² was applicable to the students' publication and distribution of the Pamphlet. Id. at p. 42. Alexander then called the Office of the State Attorney to discuss the situation and obtain advice regarding the existence of probable cause to make an arrest under § 836.11. Id. at pp. 44-47. Additionally, Alexander inquired

whether the charges could be enhanced under Fla. Stat. § 775.085,³ Florida's hate crime statute. *Id.* at 45. After being read portions of the Pamphlet, Assistant State Attorney Carlos Guzman confirmed the applicability of § 836.11 and § 775.085 and the existence of probable cause. *Id.* at 46.

² Fla. Stat. § 836.11 provides, in pertinent part, that it shall be a misdemeanor of the first degree to print, publish, distribute or cause to be printed, published or distributed by any means, or in any manner whatsoever, any publication, ... pamphlet, ... or other printed material which tends to expose any individual ... to hatred, contempt, ridicule or obloquy unless clearly printed thereon [is] ... the true name and post office address of the person, ... or organization causing the same to be printed, published or distributed. Fla. Stat. § 836.11(1)(a), (2).

³ Fla. Stat. § 775.085 reclassifies a misdemeanor of the first degree to a felony of the third degree if the commission of the misdemeanor evidences prejudice based on, *inter alia*, race, color, ancestry or ethnicity. *See* Fla. Stat. § 775.085(1)(a).

Officer Alexander advised Plaintiff and the other students that they were under arrest. *Id.* at 65. Additional officers were called to assist with transporting the students to the Juvenile Assessment Center and the Turner Guilford Knight Correctional Facility. *Id.* at 66.

LEGAL STANDARD

Summary judgment is authorized only when the moving party meets its burden of demonstrating that "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." Fed.R.Civ.P. 56(c). *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The *Adickes* Court explained that when assessing whether the movant has met this burden, the court should view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion. *See Adickes*, 398 U.S. at 157; *Poole v. Country Club of Columbus, Inc.*, 129 F.3d 551, 553 (11th Cir.1997) (citing *Adickes*).

The party opposing the motion may not simply rest upon mere allegations or denials of the pleadings; after the moving party has met its burden of coming forward with proof of the absence of any genuine issue of material fact, the nonmoving party must make a sufficient showing to

establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial. *See Celotex Corp. v. Catrell*, 477 U.S. 317 (1986); *Barfield v. Brierton*, 883 F.2d 923, 933 (11th Cir.1989).

If the record presents factual issues, the Court must not decide them; it must deny the motion and proceed to trial. *See Environmental Defense Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir.1981). Summary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. *See Lighting Fixture & Elec. Supply Co. v. Continental Ins. Co.*, 420 F.2d 1211, 1213 (5th Cir.1969). If reasonable minds might differ on the inferences arising from undisputed facts, then the Court should deny summary judgment. *See Impossible Electronics Techniques, Inc. v. Wackenhut Protective Sys., Inc.*, 669 F.2d 1026, 1031 (5th Cir.1982). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("[T]he dispute about a material fact is 'genuine,' ... if the evidence is such that a reasonable jury could return a verdict for the non-moving party.").

*3 Moreover, the party opposing a motion for summary judgment need not respond to it with evidence unless and until the movant has properly supported the motion with sufficient evidence. *See Adickes*, 398 U.S. at 160. The moving party must demonstrate that the facts underlying all the relevant legal questions raised by the pleadings or otherwise are not in dispute, or else summary judgment will be denied notwithstanding that the nonmoving party has introduced no evidence whatsoever. *See Brunswick Corp. v. Vineberg*, 370 F.2d 605, 611-12 (5th Cir.1967). The Court must resolve all ambiguities and draw all justifiable inferences in favor of the nonmoving party. *See Anderson*, 477 U.S. at 255. In resolving multiple motions or summary judgment, the Court will construe the facts in the light most favorable to the nonmovant when the parties' factual statements conflict of inferences are required. *See Barnes v. Southwest Forest Indus.*, 814 F.2d 607, 609 (11th Cir.1987).

LEGAL ANALYSIS

Plaintiff contends that she is entitled to summary judgment against the School Board because § 836.11, the law pursuant to which Officer Alexander effected her arrest, is vague and overbroad and thus violative of the First Amendment. Plaintiff contends that as a result, Officer Alexander's arrest of her violated her rights under the First and Fourth Amendments, thereby triggering § 1983 liability.

As Plaintiff recognizes, however, a local governmental

body, such as the School Board, is not subject to § 1983 liability for the constitutional injuries inflicted by its employees based solely on *respondeat superior*. See *Board of the County Comm. of Bryan County, Oklahoma v. Brown*, 117 S.Ct. 1382 (1996)(citing *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658 (1977)); *Denno v. School Bd. of Volusia County, Florida*, 218 F.3d 1267, 1276 (11th Cir.2000). Rather, as the Eleventh Circuit has explained, “ § 1983 provides a fault-based analysis for imposing [governmental body] liability; therefore, plaintiffs must establish that the [governmental body] was the person who caused them to be subjected to their deprivation.” *Depew v. City of St. Marys, Georgia*, 787 F.2d 1496, 1499 (11th Cir.1986). Accordingly, Plaintiff must establish the liability of the School Board under § 1983 in one of the following two ways.

First, Plaintiff may establish § 1983 liability if she identifies as the cause of the alleged constitutional deprivation an express policy or a “widespread practice that, ‘although not authorized by written law or express ... policy, ... is so permanent and well settled as to constitute a custom and usage with the force of law.’ ” *Brown v. City of Fort Lauderdale*, 923 F.2d 1474, 1481 (11th Cir.1991) (quoting *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 ((1988)). Second, Plaintiff may establish the School Board’s § 1983 liability if she demonstrates that the alleged constitutional deprivation was caused by a person who possessed final authority to establish policy with respect to the action ordered. *Id.* at 1480 (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986)).

*4 In resolving the cross-motions for summary judgment, the Court notes the parties’ extensive argument on the issue of the constitutionality of § 836.11, however, the Court need not reach this issue because even assuming § 836.11 is unconstitutional, thereby rendering Plaintiff’s arrest pursuant to the statute unconstitutional, Plaintiff has failed to identify a sufficient policy, custom or decision of a final policymaker of the School Board that caused the alleged unconstitutional arrest and thereby permit the imposition of § 1983 liability.⁴

⁴ In making this determination, the undersigned has considered Plaintiff’s reliance on *Tennessee v. Garner*, 471 U.S. 1 (1985) but rejects Plaintiff’s contention that *Garner* compels judgment in her favor. While it is true that *Garner* instructs that a finding of the unconstitutionality of a state statute should be applied in determining the liability of the parties in the case such a finding is made, *Garner* does not relieve a court from undertaking the additional analysis required by *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978) to determine a governmental entity’s § 1983 liability for action taken pursuant to the unconstitutional statute. See *Garner*, 471 U.S. at 22. Moreover, contrary to Plaintiff’s assertion, the

defendant city’s § 1983 liability in *Garner* was based on a city police department policy that implemented the unconstitutional statute. *Garner v. Memphis Police Dept.*, 8 F.3d 358, 364-65 (6th Cir.1993). Here, there is no evidence of a School Board policy or custom that implements Fla. Stat. § 836.11.

I. Express Policy or Custom that Caused the Constitutional Injury

In reaching the conclusion that Plaintiff has failed to identify an unconstitutional policy or custom, the Court finds that contrary to Plaintiff’s argument, the relevant showing for establishing the instant claims is a School Board policy or custom that required unlawful arrests of students or otherwise required violations of students’ First and Fourth Amendment rights. See, e.g., *Walters v. City of Andalusia*, 89 F.Supp.2d 1266, 1276 (M.D.Ala.2000) (denying summary judgment where plaintiff failed to offer any evidence of a city policy approving the illegal acts of its employees or a single prior incident in which an individual’s constitutional rights were violated); *Penn v. City of Miami*, 1999 WL 1050059, *10-11 (S.D.Fla. Sept. 7, 1999) (granting summary judgment where plaintiff failed to present any evidence of a custom of engaging in false arrests). Cf. *Brown*, 923 F.2d at 1481 (noting plaintiff’s allegation that discriminatory practices were accepted by the defendant police department was sufficient to demonstrate municipal liability based on custom of racial discrimination).

A. Express Policy

With respect to an express policy, Plaintiff points to School Board Rules 6Gx13-5D-1.08 (“5D-1.08”), 6Gx13-4A-1.21 (“4A-1.21”) and 6Gx13-4A-1.09(1) (“4A-1.09”) to satisfy her burden of identifying a policy that caused the alleged unlawful arrest. Plaintiff asserts that School Board Rules 5D-1.08 and 4A-1.21 require ‘reference of criminal acts to the Dade County Public School Police and the local police agency for appropriate action’ and require ‘the principal [] to report to the appropriate law enforcement agencies and the District Office of the Dade County Public Schools Police any criminal act occurring on school premises or at any school related function,’ respectively. Plaintiff further asserts that Rule 4A-1.09 requires the Division of School Police to enforce the penal laws of the state with respect to any violations that occur on or to Miami-Dade County school property. Plaintiff reasons that these Rules, as well as the existence of a Dade County School police force, all but guarantee a student’s arrest for on-campus crime and thus demonstrate a policy of arrest sufficient to establish the School Board’s liability. Plaintiff’s arguments are misplaced.

As an initial matter, the Court points out after its own review of the text of Rules 5D-1.08, 4A-1.21 and 4A-1.09 that Plaintiff has misconstrued and in some instances misquoted the Rules. *See* Miami-Dade County School Board Rule 6Gx13-5D-1.08; Rule 6Gx13-4A-1.21; Rule 6Gx13-4A-1.09.⁵ This notwithstanding, neither the Rules nor Plaintiff's construction of them are sufficient to constitute the requisite policy for imposing § 1983 liability against the School Board because, at most, the Rules simply clarify the responsibilities of school police to enforce the law on school campuses (not necessarily by way of arrest) and require only that school employees report instances of criminal activity. In short, the Rules are not reasonably susceptible of being construed to mandate *arrests* of students who commit on-campus crimes, much less *unlawful arrests*. *Cf., e.g., Gattis v. Brice*, 136 F.3d 724, 725 (11th Cir.1998) (affirming summary judgment where record was devoid of evidence of a county policy requiring the plaintiff's demotion in retaliation for engaging in the subject speech); *Sewell v. Town of Lake Hamilton*, 117 F.3d 488, 489 (11th Cir.1997) (noting the obvious lack of a policy of the defendant town commanding its officers to barter arrests for sexual favors as well as the lack of a custom of allowing such behavior).⁶

⁵ Rule 5D-1.08 provides, in pertinent part, only that "[s]tudent behavior that disrupts [the learning and teaching] process or that infringes upon the rights of other individuals will not be tolerated. The Board endorses a zero tolerance policy toward school related violent crime." School Board Rule 6Gx13-5D-1.08 (Maintenance of Appropriate Student Behavior).

Rule 4A-1.21 provides, in pertinent part, that "[a]ll employees are under an affirmative duty to report any criminal act, and/or disruptive, and/or inappropriate behavior.... All violations of law and incidents of disruptive and/or appropriate behavior are to be reported in accordance with administrative procedures established by the Superintendent of Schools." School Board Rule 6Gx13-4A-1.21.III, IV (Responsibilities and Duties).

Lastly, Rule 6Gx13-4A-1.09 provides, in pertinent part, that [t]he functions of the Division of School Police shall include providing assistance in the following areas: 1. The prevention and detection of crime and the enforcement of the penal laws of this state as the violation occurs on or to the properties of the Dade County Public Schools...." School Board Rule 6Gx13-4A-1.09 (Division of School Police-Organization and Responsibilities).

The Court's staff obtained official copies of these Rules from School Board Clerk Ileana Martinez of the Miami-Dade County School Board. Unofficial copies of the School Board Rules may be found at <http://www.dade.k12.fl.us/board/rules>. *See also* Exhibit 3 to Dawson Aff.

⁶ Even assuming the relevant inquiry is the existence of a School Board policy of arrest for on-campus crime, the only specific evidence in this regard is Officer Alexander's deposition testimony that no such policy exists. Alexander Depo. at 63.

B. Custom

*5 With respect to a custom, Plaintiff contends that the record contains evidence of "frequent" arrests of Miami-Dade County students for on-campus crimes, thus establishing the School Board's § 1983 liability. Again, however, Plaintiff's focus on the frequency of *arrests*, rather than the frequency of arrests that violated the arrestees' First or Fourth Amendment rights or were otherwise unlawful, is misplaced. *Cf., id.* More importantly, the record is devoid of any evidence that any of the arrests effected on the campuses of the thirty-four Miami-Dade senior high schools during the school years leading up to and including the year Plaintiff was arrested were in fact unlawful.⁷ *See* Exhibits 7 and 8 to Plaintiff's Notice of Filing Exhibits in Support of Motion for Partial summary Judgment Against Miami-Dade School Board. Consequently, Plaintiff has failed to establish the School Board's liability based on a relevant policy or custom.

⁷ In fact, the Court is doubtful that the record supports a finding of a legally sufficient custom of arrest. For the school year 1997-98, the year Plaintiff was arrested, police officers made arrests in only 14.91% of the total number of incidents reported. *See* Affidavit of Joanne Sinckler-Mack at ¶ 4, 5; *Brown*, 923 F.2d at 1481 (requiring proof of a "widespread practice" that is so "permanent and well-settled" as to constitute custom with the force of law).

II. Final Policymaker that Caused the Constitutional Injury

Notwithstanding the fact that the argument on this issue was relegated to a single paragraph in a footnote, the Court also finds that Plaintiff has failed to establish the School Board's liability under § 1983 based on the acts of a final policymaker. The undersigned rejects Plaintiff's contention that Dawson's degree of involvement in the investigation leading to Plaintiff's arrest alone is sufficient to establish liability under this theory.

As discussed above, a local governmental body may be subject to § 1983 liability where the action alleged to have caused the particular constitutional injury was taken by one having final policymaking authority with respect to the action. *See McMillan v. Johnson*, 88 F.3d 1573, 1577 (11th Cir.1996). The evidence is undisputed that Dawson

did not arrest Plaintiff, the action alleged to have caused Plaintiff's constitutional injury. Moreover, there is no evidence that Dawson directed, rather than simply requested if appropriate, Plaintiff's arrest. *See Hill v. Clifton*, 74 F.3d 1150, 1152 (11th Cir.1996) (explaining that municipal liability may lie where final policymaker ratifies the subject action of a subordinate and the basis for the action). Instead, the evidence, even when viewed in the light most favorable to Plaintiff, demonstrates that while Dawson initiated the school police investigation and participated in questioning the students involved in the Pamphlet's creation and distribution, Officer Alexander alone made the decision to arrest Plaintiff after consulting with the State Attorney's Office and confirming the existence of probable cause.

Finally, and most importantly, even assuming Dawson's desire that the students be arrested factored into Officer's Alexander's decision to arrest Plaintiff, there is no evidence that Dawson or any of the other thirty-four principals of Miami-Dade County's senior high schools have any authority, much less final authority in the area of arrests for offenses committed on school campuses. *See* School Board Rule 6Gx13-4A-1.095 (conferring upon school police officers the power to make arrests for crimes committed upon School Board property); Miami-Dade County Public Schools Code of Student Conduct (Secondary), p. 8 (providing a three-step appeal process for review of disciplinary action taken at the school level). Consequently, Plaintiff also has failed to establish the School Board's liability based on the acts of

a final policymaker and thus, the School Board is entitled to summary judgment. Accordingly, it is hereby

***6 ORDERED AND ADJUDGED** that Plaintiff's Motion for Partial Summary Judgment on Counts I and II to Determine Liability of Defendants Alexander and School Board of Miami-Dade County is **DENIED**. It is further

ORDERED AND ADJUDGED that the School Board of Miami-Dade County, Florida and Michael Alexander's Motion for Final Summary Judgment is **GRANTED**. It is further

ORDERED AND ADJUDGED that Plaintiff's Request for Oral Argument on Pending Motions is **DENIED**. It is further

ORDERED AND ADJUDGED that Plaintiff's Motion to Strike Defendant's Statement of Disputed Facts is **DENIED** and Plaintiff's Motion to Strike Portions of Defendants' Statement of Undisputed Facts, Plaintiff's Motion to Strike Portions of Affidavit of Timothy Dawson and Plaintiff's Motion to Strike Affidavit of Charles P. Ewing are **DENIED** as moot.

Parallel Citations

14 Fla. L. Weekly Fed. D 215