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United States District Court, D. Kansas.

Sarah L. ALLEN, Plaintiff,
v.
The BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WYANDOTTE, Owen L. Sully, Wyandotte County Sheriff's Department, Joan Grogan, Roger Riley, Theodore Robinson, the State of Kansas, the Kansas Board of Regents, the University of Kansas, B.D. Harrelson, and Sandy Omtvedt, Defendants.

Civ. A. No. 90–2059–O. | Dec. 7, 1990.

**Attorneys and Law Firms**

Douglas C. Beach, Beach and Hanson, Overland Park, Kan., for plaintiff.

John M. Duma, Kansas City, Kan., for Owen L. Sully.

Paul C. Gurney, Holbrook Ellis & Heaven, Kansas City, Kan.,

Thomas M. Sutherland, Holbrook, Ellis & Heaven, P.A., Merriam, Kan., for Board of County Commissioners of the County of Wyanotte.

W. Terry Fitzgerald, Catherine R. Hutson, Overland Park, Kan., for Owen L. Sully, Wyandotte County Sheriff's Dept., Joan Grogan and Roger Riley.

John C. McFadden, Special Assistant Attorney General, Kansas City, Kan., for State of Kan., Kansas Bd. of Regents, University of Kan., B.D. Harrelson and Sandy Omtvedt.

**Opinion**

***MEMORANDUM AND ORDER***

EARL E. O'CONNOR, Chief Judge.

***1** This matter comes before the court on a motion to dismiss filed by the defendant Board of County Commissioners of the County of Wyandotte, Kansas (hereinafter "the Board"). The Board contends that the allegations set forth Count I of plaintiff's First Amended Complaint fail to state a "valid and recognizable" claim under 42 U.S.C. § 1983. In addition, defendant asserts that Counts II, III, and IV of plaintiff's First Amended Complaint must be dismissed because the Board cannot be held liable under K.S.A. 19–801, *et seq.* The defendant Board also claims that plaintiff cannot, as a matter of law, obtain punitive damgages. For the reasons stated below, we will grant in part the Board's motion to dismiss.

**I.** ***STATEMENT OF FACTS***

On March 11, 1989, at approximately 9:30 p.m., defendant officers B.D. Harrelson (hereinafter "Harrelson") and Sandy Omtvedt (hereinafter "Omtvedt"), members of the Kansas University Medical Center (hereinafter "KUMC") Police Department, signaled the driver of a 1985 Ford Mustang to stop because the vehicle's license tag had expired. At the officers' request, the driver, plaintiff Sarah L. Allen (hereinafter "Allen"), displayed her license. Plaintiff insists that her license was valid. The officers, however, informed Allen otherwise, and placed her under arrest. Harrelson and Omtvedt then performed a pat-down search, handcuffed plaintiff, and transported her to the Wyandotte County jail. At the jail, Allen alleges that she was unlawfully detained, and subjected to a strip search by defendant Joan Grogan (hereinafter "Grogan"), a guard who is employed by Wyandotte County. Plaintiff contends that the strip search was conducted "in a rude, insolent, abusive, and violent manner."

**II.** ***STANDARDS FOR A MOTION TO DISMISS***

The court may not dismiss a cause of action for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of the theory of recovery that would entitle plaintiff to relief. *Hospital Bldg. Co. v. Trustees of Rex Hosp.,* 425 U.S. 738, 746 (1976); *Mangels v. Pena,* 789 F.2d 836, 837 (10th Cir.1986). "All well-pleaded facts, as distinguished from conclusory allegations, must be taken as true." *Swanson v. Bixler,* 750 F.2d 810, 813 (10th Cir.1984). The court must view all reasonable inferences in favor of the plaintiff and the pleadings must be liberally construed. *Id.* The issue in reviewing the sufficiency of a complaint is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims. *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974).

**III.** ***LIABILITY OF BOARD OF COMMISSIONERS UNDER 42 U.S.C. § 1983***

The defendant Board contends that Count I of plaintiff's First Amended Complaint does not state a claim under 42 U.S.C. § 1983 because Allen does not allege that defendants Grogan, Riley and Robinson were following or adhering to a policy or custom adopted by the Board. A

local governing body may only be sued directly under section 1983 where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by the body's officers." *Monell v. New York City Dep't of Social Serv.,* 436 U.S 658, 690 (1978); *Garner v. Memphis Police Dep't,* 600 F.2d 52, 54 (6th Cir.1979), *aff'd,* 471 U.S. 1 (1985); *Molina v. Richardson,* 578 F.2d 846, 847–48 (9th Cir.), *cert. denied,* 439 U.S. 1048 (1978).

***2** In the second paragraph of the First Amended Complaint, plaintiff states that the Board "exercises the powers of Wyandotte County, Kansas, a body corporate and politic." She adds in the sixteenth paragraph of the complaint that the Wyandotte County, Kansas, jail "is under the care, control, and supervision of ... the Board." In paragraph twenty-one of the amended complaint, Allen alleges that "[e]ach and all of the acts of Defendants alleged herein were done by Defendants, and each of them, under the color of and pretense of the Constitution, Statutes, Ordinances, Regulations, customs, and usages of ... the County of Wyandotte ... under the authority of their offices ..."

The twenty-first paragraph states essentially, as it pertains to plaintiff's claim against the Board, that the actions of Grogan, a Wyandotte County employee, were performed "under the color of and pretense of" statutes, ordinances, regulations, customs and usages of Wyandotte County. Statutes,[1] ordinances[2] and regulations,[3] by their very definition, are adopted by a governing body. Giving the plaintiff the benefit of all reasonable inferences, we have no trouble concluding at this stage of the litigation that Allen has stated a cause of action under 42 U.S.C. § 1983 against the Board. Defendant's motion to dismiss plaintiff's section 1983 claim will be denied.

## IV. *LIABILITY OF THE BOARD FOR ACTIONS OF THE SHERIFF'S EMPLOYEES*

Allen asserts that the defendant Board is liable under the doctrine of respondeat superior[4] for the state law torts of battery and false imprisonment. Plaintiff also claims in paragraph thirty-four of her First Amended Complaint that the Board of Commissioners "negligently and carelessly hired, trained, supervised, and retained Defendants Joan Grogan and/or Roger Riley and/or Theodore Robinson and negligently and carelessly failed to adopt policies, procedures, rules, guidelines, and regulations, which would have reduced the likelihood of or prevented the occurrence of the unlawful detainment, imprisonment and strip search of Plaintiff."

The Board contends that it cannot be held liable for the alleged negligence, false imprisonment and battery of Allen because the sheriff, pursuant to K.S.A. 19–811, had "charge and custody" of the jail.[5] Allen argues that Kansas' statutory scheme creates a dual responsibility for operating a county jail:

Defendant Board has a substantial role in the funding of the Sheriff's office. Its personnel policies, directives, rules and regulations, either in connection with or in addition to such funding, may have caused or contributed to cause Plaintiff's injuries. Additionally, Defendant Board has failed to bring to this Court all the relevant statutory authority from K.S.A. Chapter 19. K.S.A. 19–901 *et seq.,* provides that the Board of County Commissioners may appoint a competent woman to the position of Jail Matron. That person is subject to removal by the Board for just cause. Additionally, K.S.A. 19–104 provides that the County, through its Board, "shall, at its own expense, provide ... a suitable and sufficient jail." K.S.A. 19–901 *et seq.,* discusses at length the duties of the Defendant Board with respect to the jail ...

***3** Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss at 5–6. Again, giving plaintiff the benefit of all reasonable inferences, we cannot conclude that there is no set of facts under which Allen could establish that she is entitled to recover against the Board. As plaintiff points out, Kansas' statutory scheme does empower the Board with some authority over the jail. Whether the Board of Commissioners exercised or failed to exercise this authority in a proper manner may be determined at a later stage of the litigation on an appropriate motion for summary judgment. The court will deny defendant's motion to dismiss counts II, III, and IV of plaintiff's amended complaint.

## V. *WRITTEN NOTICE REQUIREMENT OF K.S.A. 12–105b*

Defendant argues that the Board is entitled to dismissal of the tort claims contained in counts II, III, and IV of plaintiff's First Amended Complaint because Allen has not complied with the provisions of K.S.A.1989 Supp. 12–105b. K.S.A. 12–105b(a) states in pertinent part:

All claims against a municipality must be presented in writing with a full account of the items, and no claims shall be allowed except in accordance with the provisions of this section.

Subsection (d) of K.S.A. 12–105b sets forth the information that should be contained in the written notice and defines the procedure in which to enforce rights under the Kansas Tort Claims Act.[6] The purpose of requiring a person to provide notice is to sufficiently advise the municipality of the time and place of the injury and to give the city an opportunity to ascertain the character and extent of the injury sustained. *Bradford v. Mahan,* 219 Kan. 450, 457, 548 P.2d 1223, 1230 (1976); *Tucking v.*

*Bd. of Comm'rs of Jefferson County,* 14 Kan.App.2d 442, ——, 796 P.2d 1055, 1059 (1990) (quoting *Holmes v. City of Kansas City,* 101 Kan. 785, 786, 168 P. 1110, —— (1917)).

Decisions interpreting predecessor statutes to K.S.A.1989 Supp. 12–105b have always found that a plaintiff need not do more than substantially comply with the requirements of the statute. *See, e.g., Cook v. City of Topeka,* 75 Kan. 534, 536, 90 P. 244, —— (1907) (precise exactness not essential; notice must reasonably comply with statute and not mislead city); *Dunn v. City of Emporia,* 7 Kan.App.2d 445, 450, 643 P.2d 1137, 1141 (1982) (service on city attorney was not in substantial compliance). The statute now expressly provides that substantial compliance "shall constitute valid filing of a claim." In the present case, plaintiff filed notice of her claim with the County Clerk of Wyandotte County, Kansas, by letter dated April 23, 1990. On May 8, 1990, counsel for defendant informed Allen that the Board had considered her claim at a recent meeting and decided to deny it. There is no indication that the defendant suffered any prejudice by plaintiff's failure to file the notice in a timely manner. Accordingly, we hold that Allen's notice was in substantial compliance with K.S.A.1989 Supp. 12–105b. The Board's motion for dismissal of Counts II, III, and IV of plaintiff's First Amended Complaint will be denied.

## VI. *RECOVERY OF PUNITIVE DAMAGES*

***4** A. *Count I*

Defendant argues that Allen's claims for punitive damages must be dismissed. Count I of plaintiff's First Amended Complaint arises under 42 U.S.C. § 1983. Under the authority of *Newport v. Fact Concerts, Inc.,* 453 U.S. 247 (1981), we are compelled to grant defendant's motion to dismiss Allen's claim for punitive damages in Count I. In *Newport,* the Supreme Court stated:

In sum, we find that considerations of history and policy do not support exposing a municipality to punitive damages for the bad-faith actions of its officials. Because absolute immunity from such damages was obtained at common law and was undisturbed by the 42d Congress, and because that immunity is compatible with both the purposes of § 1983 and general principles of public policy, we hold that a municipality is immune from punitive damages under 42 U.S.C. § 1983.

*Id.* at 271. In accordance with the Supreme Court's holding in *Newport,* the Tenth Circuit, as well as courts in the District of Kansas, have denied plaintiffs' requests for punitive damages against municipalities in section 1983 actions. *See, e.g., McKee v. Heggy,* 703 F.2d 479, 483 (10th Cir.1983); *Ray v. City of Edmond,* 662 F.2d 679, 680 (10th Cir.1981); *Lee v. Wyandotte County, Kansas,* 586 F.Supp. at 239–40; *Carter v. City of Emporia,* 543 F.Supp. 354, 359 (D.Kan.1982). Accordingly, we will grant the Board's motion to dismiss plaintiff's claim for punitive damages in count I of the First Amended Complaint.

B. *Counts II, III, and IV*

Defendant also asserts that the court should dismiss Allen's request for punitive damages in her remaining state law tort claims. The Board directs the court's attention to subsection (c) of K.S.A. 75–6105, which states:

A governmental entity shall not be liable for punitive or exemplary damages or for interest prior to judgment. An employee acting within the scope of the employee's employment shall not be liable for punitive or exemplary damages or for interest prior to judgment, except for any act or omission of the employee because of actual fraud or actual malice.

*See also Lantz v. City of Lawrence,* 232 Kan. 492, 499, 657 P.2d 539, 545 (1983) (employee whose acts are exempted by statute not liable for punitive damages). There is no indication of actual fraud or actual malice on the part of any members of the Board. Accordingly, the court will dismiss plaintiff's claim for punitive damages against the Board pursuant to subsection (c) of K.S.A. 75–6105.

IT IS THEREFORE ORDERED that the motion of the defendant Board of County Commissioners of the County of Wyandotte, Kansas, (Doc. # 13) to dismiss plaintiff's request in Count I of the First Amended Complaint for punitive damages against all defendants is hereby granted.

IT IS FURTHER ORDERED that the motion of the Board (Doc. # 13) to dismiss plaintiff's requests in Counts II–IV of the First Amended Complaint for punitive damages against the Board is granted.

IT IS FURTHER ORDERED that the motion of the Board (Doc. # 13) for dismissal is denied in all other respects.

Footnotes

1 A statute is defined as "an enactment made by a legislature and expressed in a formal document." *The American College*

*Dictionary* 1181 (1963).

2 An ordinance is defined as "a public injunction or regulation." *The American College Dictionary* 853 (1963). In its most common meaning, the term is used to designate the enactments of the legislative body of a municipality. *Black's Law Dictionary* 989 (1979).

3 A regulation is defined as "a rule or order, as for conduct, prescribed by authority; a governing direction or law." *The American College Dictionary* 1021 (1963). More specifically, a regulation is a "rule or order having force of law issued by executive authority of government." *Black's Law Dictionary* 1156 (1979).

4 Respondeat superior means literally "let the master answer." *Black's Law Dictionary* 1179 (1979). The Kansas Supreme Court recently summarized several of the general principles relating to the law of respondeat superior:

> The general rule is that the principal and agent are jointly and severally liable for the tortious conduct of the agent for whose conduct he is responsible, and that, as a result, they may be joined in a single suit and a judgment may be obtained against each. *Atkinson v. Wichita Clinic, P.A.,* 243 Kan. 705, 707, 763 P.2d 1085, 1087 (1988) (quoting Sell, *Agency* § 94, 83–84 (1975)). Under Kansas law, there is no distinction between the liability of a principal for the torts of his or her agent and the liability of a master for the torts of his or her servant. Liability in both cases is based upon the doctrine of respondeat superior. *Simpson v. Townsley,* 283 F.2d 743, 746 (10th Cir.1960); *Jacob v. Parrill,* 186 Kan. 467, 472–73, 351 P.2d 194, 199 (1960).

5 Defendant cites *Marks v. Lyon County Bd. of County Comm'rs,* 590 F.Supp. 1129 (D.Kan.1984) and *Lee v. Wyandotte County, Kansas,* 586 F.Supp. 236 (D.Kan.1984) in support of its argument that the conduct of the sheriff and his subordinates cannot be attributed to the Board. In these cases, the plaintiffs were attempting to proceed upon alleged violations of their constitutional and civil rights. *Marks, supra,* 590 F.Supp. at 1132; *Lee, supra,* 586 F.Supp. at 238. The doctrine of respondeat superior may not be used to impose liability under 42 U.S.C. § 1983 against a municipality. *Monell v. Dep't of Social Serv.,* 436 U.S. at 691. The instant case, however, may be distinguished from *Marks* and *Lee* because Allen is asserting the doctrine of respondeat superior to impose liability for the state law tort claims of battery, false imprisonment, and negligence.

6 The provisions and requirements of subsection (d) provide in pertinent part as follows:

> The notice shall be filed with the clerk or governing body of the municipality and shall contain the following: (1) The name and address of the claimant and the name and address of the claimant's attorney, if any; (2) a concise statement of the factual basis of the claim, including the date, time, place and circumstances of the act, omission or event complained of; (3) the name and address of any public officer or employee involved, if known; (4) a concise statement of the nature and extent of the injury claimed to have been suffered; and (5) a statement of the amount of monetary damages that is being requested ... Once notice of the claim is filed, no action shall be commenced until after the claimant has received notice from the municipality that it has denied the claim or until after 120 days ...
>
> K.S.A.1989 Supp. 12–105b(d). *See also Stevenson v. Topeka City Council,* 245 Kan. 425, 427–28, 781 P.2d 689, 692 (1989) (K.S.A. 12–105b(d) requires plaintiff to file written notice containing specific facts upon which claim is based).