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

Jane Doe,	:	**CIVIL ACTION**
	:	
Plaintiff,	:	
v.	:	
	:	**Judge A. Richard Caputo**
LUZERNE COUNTY, RYAN FOY, in his individual capacity, and BARRY STANKUS, in his individual capacity	:	
	:	
Defendants.	:	**NO. 3:08-CV-1155**

DEFENDANTS' BRIEF IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

Defendants Ryan Foy ("Foy"), Barry Stankus ("Stankus")[1] and Luzerne County (the "County") (collectively "Defendants") respectfully submits this brief in support of their motion for summary judgment.

I. SUMMARY OF FACTS NECESSARY TO DISPOSITION

A. Factual Background.

On September 27, 2007, two County sheriff deputies, including Plaintiff, were infested with fleas while executing a warrant. (See Defendants' Statement of

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[1] Stankus has separately filed a motion to dismiss Plaintiff's second amended complaint. (See Defendant Stankus' motion to dismiss). By this Court's Order of February 25, 2010, said motion was converted into a motion for summary judgment. (See, Docket, ("Dkt.") No. 43). The instant motion for summary judgment is also filed on behalf of Stankus as the issues raised herein apply to all of the above-captioned Defendants, including Stankus.

Material Facts "DSMF" at ¶2). In her second amended complaint, Plaintiff alleges that Stankus, the County Sheriff at the time, ordered the two deputies to be decontaminated and the decontamination procedure was to be videotaped for future "decon" procedures as a learning tool. (See second amended complaint, generally). Plaintiff's claims are based on this September 27, 2007 incident when Plaintiff was allegedly videotaped prior and subsequent to taking a decontamination shower. (Id.).

B. Procedural Background.

Plaintiff commenced this action on June 17, 2008 by filing a complaint against the County and Foy alleging, inter alia, a Fourth Amendment violation of her privacy rights. (See complaint, generally). On June 30, 2008, Plaintiff filed her amended complaint also against the County and Foy. (See amended complaint, generally). On November 25, 2009, Plaintiff filed her second amended complaint for the first time joining Stankus as a defendant and alleging, inter alia, a Fourth Amendment violation of her privacy rights. (See second amended complaint, generally).

II. ARGUMENT

A. Summary Judgment Standards.

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that

there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Andritz Sprout-Bauer, Inc. v. Beazer East, Inc., 12 F. Supp. 2d 391, 398 (M.D. Pa. 1998)(quoting Fed.R.Civ.P. 56(c)). Pursuant to this standard, the "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)(emphasis in original).

The moving party bears the initial responsibility of "stating the basis for its motion and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact." Andritz Sprout-Bauer, Inc., 12 F. Supp. 2d at 398. This burden can be discharged by demonstrating "that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Once the moving party's burden is satisfied, the burden shifts to the nonmoving party, who must demonstrate the existence of a genuine issue of material fact. Celotex Corp., 477 U.S. at 323. However, the nonmoving party cannot simply rely on the pleadings, but must demonstrate the existence of a genuine issue of material fact through affidavits, depositions or answers to interrogatories. Id. at 324; Fed.R.Civ.P. 56(e). "Mere conclusory allegations or denials taken from the pleadings are insufficient to withstand a motion for

summary judgment once the moving party has presented evidentiary materials." Roginski v. Time Warner Interactive, Inc., 967 F. Supp. 821, 824 (M.D. Pa. 1997)(citing Schoch v. First Fidelity Bancorporation, 912 F.2d 654, 657 (3d Cir. 1990)).

Finally, to defeat a properly supported motion for summary judgment, the nonmoving party "must proffer evidence to show the existence of every element essential to its case which it bears the burden of proving at trial." Moore v. Lehman, 940 F. Supp. 704, 707 (M.D. Pa. 1996)(citing Equimark Commercial Fin. Co. v. C.I.T. Fin. Servs. Corp., 812 F.2d 141, 144 (3d Cir. 1987)).

As demonstrated below, Plaintiff cannot establish by competent summary judgment evidence that she is entitled to the relief requested or that a genuine issue of material fact exists for trial.

B. There Is No Genuine Issue Of Material Fact As To Plaintiff's Fourth Amendment Claim Against The Individual Defendants.

1. There Is No "Despicable And Outrageous Abuse Of Official Power And Invasion Of Carefully Guarded Personal Modesty".

The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. See, U.S. Const. amend. IV. "The Amendment guarantees the privacy, dignity and security of persons against certain arbitrary and

invasive acts by officers of the government or others acting at their direction. See, Skinner Labor Railway Executives' Ass'n, 489 U.S. 602, 613-614, 109 S.Ct. 1402, 103 L. Ed. 2d 639 (1989).

The United States Supreme Court has noted that the right to privacy encompasses two separate spheres. See Doe v. Southeastern Pa. Transp. Auth. & Pierce, 72 F.3d 1133, 1137 (3d Cir. 1995) citing Whalen v. Roe, 429 U.S. 589, 599, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977). One sphere is an individual's interest in independence in making certain decisions. Id. The other is an interest in avoiding disclosure of personal information. Id.

With respect to the second sphere, the United States Court of Appeals for the Third Circuit has recognized Constitutional protection in cases involving private medical files, see United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980); medical, financial and behavioral information relating to police applicants, Fraternal Order of Police v. City of Philadelphia, 812 F.2d 105, 110 (3d Cir. 1987); a public employee's drug purchases through the employee health program, Southeastern Pa, Transp. Auth., 72 F.3d 1133, supra., a high school swim coach requiring a student to take a pregnancy test, see Gruenke v. Seip, 225 F.3d 290, 301 (3d Cir. 2000); and the confidentiality of a person's sexual orientation, Sterling v. Borough of Minersville, 232 F.3d 190, 196 (3d Cir. 2000).

The Third Circuit has announced that they take "an encompassing view of information entitled to a protected right to privacy". Sterling, 232 F.3d at 195-196. The "zone of privacy" is not, however, absolute. In particular, information that falls within the zone of privacy may be disclosed by the state when it has a "genuine, legitimate and compelling" interest in disclosing the otherwise private information. Id. (quoting Southeastern Pa. Transp. Authority, supra. Thus, the Third Circuit has instructed that a balancing test, weighing the government's interest against the individual, be conducted. See Doe, 72 F.3d at 1138. In applying this test, the court shall either apply intermediate scrutiny, where the intrusion has been minimal, or strict scrutiny, when an intrusion was severe. Id. at 1139-40.

In a case particularly instructing to the matter sub judice, the Ninth Circuit analyzed a case involving the exhibition of nude photos, but this time ruled against the appellant. In Davis & Davis v. Butcher, 853 F.2d 718, 719 (9th Cir. 1988), an inmate scheduled for transfer had among his possessions an envelope containing nude photographs of his wife. A correctional officer, removed the photos from the envelope and exhibited the pictures to at least two other inmates before replacing them. Id. Several months later, the corrections officer recounted this incident to another correctional officer, adding gratuitous derogatory comments, and was overheard by at least one guard and one inmate. Id.

Based on those facts, the appellate court held that corrections officer's actions did not create an injury of constitutional magnitude. Id. at 720. The court stated that "[t]he mere fact that [the appellee] was clothed in official garb cannot transform his act into one of constitutional significance. There is no allegation that [the appellee] committed a shocking degradation of [the appellant] by circulating the sensitive photos to some inmates and derogatory comments to his coworkers; rather, this case presents two isolated instances of poor judgment." Id. The court went on to state that "to violate [a]ppellant's constitutional right of privacy the information disclosed must be either a shocking degradation or an egregious humiliation of [appellant] to further some specific state interest, or a flagrant breech [sic.] of a pledge of confidentiality which was instrumental in obtaining the personal information." Alexander v. Peffer, et. al., 993 F.2d 1348, 1350 (8th Cir. 1993) citing Davis, 853 F.2d at 721.

The same result is warranted instantly. Plaintiff was videotaped, with her knowledge, while undergoing a delousing procedure. (See, DSMF at ¶ 35). At no time during the recording is Plaintiff seen nude. (See DSMF at ¶¶ 25-30). In fact, all body parts which one might have an expectation of privacy in remain completely covered at all times. (See, DSMF at ¶¶ 25-30). Based on the well reasoned judgment of the Ninth Circuit, these actions do not come close to constitutional significance. See, Davis, supra. Thus, there is no "despicable and

outrageous abuse of official power and invasion of carefully guarded personal modesty" as there was in that case. Davis, 853 F.2d at 721. Neither was there any "calculated and egregious humiliation of the plaintiff." Id. Moreover, there is absolutely no evidence of a wide spread dissemination of any of the photographs or videos taken of the plaintiff on the day in question. (See, DSMF at ¶¶ 32, 38, 43-45, 47, 50-55). Accordingly, like the plaintiff's Fourth Amendment claims in Davis, supra, Plaintiff's Fourth Amendment claims against the Individual Defendants must fail.

2. Defendant Had A Genuine, Legitimate, Compelling Interest In Recording The Delousing Procedure Plaintiff Was Undergoing.

In the instant case, as stated above, Plaintiff's body was not revealed and she had knowledge of the videotaping at all times. (See, DSMF at ¶¶ 17, 25-30, 34-34, 48). As such, the intrusion into Plaintiff's privacy would be minimal at worst. Applying intermediate scrutiny, the County had an interest in recording the delousing procedure Plaintiff was undergoing so the County Sheriff's office would know how to proceed if any similar incidents happened in the future. (See DSMF at ¶ 12). Thus, this recording was strongly related to the important government interest of ensuring the health and welfare of its employees and efficiency. These interests are clearly of greater weight than the minimal invasion, if any, claimed by Plaintiff.

C. There Is No Genuine Issue Of Material Fact As To Plaintiff's Fourth Amendment Claim Against The County.

The federal claims against Luzerne County are policy and custom claims pursuant to Monell v. Department of Soc. Servs. of City of New York, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). (See second amended complaint at Count II). However, because Plaintiff's federal claims against the individual Defendants fail, Plaintiff's Monell claims also fail as a matter of law. Green v. City of Philadelphia, 92 Fed. Appx. 873, 876 (3d Cir. 2004). Accordingly, such claims must be dismissed. See City of Los Angeles v. Heller, 475 U.S. 796, 799, 106 S. Ct. 1571, 89 L. Ed. 2d 806 (1986)("If a person has suffered no constitutional injury at the hands of individual police officers, the fact that the department regulations might have authorized the use of constitutionally excessive force is quite besides the point").

Further, Plaintiff contends that the County "failed to train its employees and agents not to invade an employee's privacy by videotaping them nude or partially clothed naked body (sic) when using a decontamination shower facility". (See second amended complaint at ¶ 18). Only where a failure to train reflects a "deliberate" or "conscious" choice to deliberately disregard the Constitutional rights of a person will liability attach to a municipality. Id. at 1205. Even more specifically, "failure to train municipal employees can ordinarily be considered

deliberate indifference only when the failure has caused a pattern of violations." Berg v. County of Allegheny, 219 F.3d 261, 276 (3d Cir. 2000).

Plaintiff must identify a training deficiency which actually caused the ultimate constitutional injury. City of Canton v. Harris, 489 U.S. 378, 385, 109 S. Ct. 1197, 103 L. Ed. 2d 412, (1989). Evidence of an isolated incident is not sufficient to show the existence of a policy or custom, to the contrary, isolated violations are not the persistent, often repeated, constant violations that constitute a custom or policy. See Beck v. City of Pittsburgh, 89 F.3d 966, 973 - 975 (3rd Cir. 1996).

Plaintiff alleges one particular instance. (See amended complaint and second amended complaint, generally). There is absolutely no testimony or evidence of record which Plaintiff can rely to support the proposition that any custom, policy or practice of the County resulted in the alleged constitutional violation to Plaintiff. (See DSMF at ¶55). Further, there is no evidence that the failure to train County employees was either a deliberate or a conscious choice. (See DSMF at ¶55). Moreover, there is no evidence that there were previous and similar patterns of violations. (See DSMF at ¶56). Given the foregoing, Plaintiff's failure to train claim fails as a matter of law.

III. CONCLUSION

For the foregoing reasons, this Court must grant Defendants Foy, Stankus and the County's motion for summary judgment.

Respectfully submitted,

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DATED: March 29, 2010

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CERTIFICATE OF SERVICE

I, Mark W. Bufalino, hereby certify that I have caused to be served this day a true and correct copy of Defendants Ryan Foy, Barry Stankus and Luzerne County's brief in support of their motion for summary judgment via electronic filing and United States First Class Mail, addressed as follows:

Cynthia L. Pollick, Esquire
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/s/Mark W. Bufalino
Mark W. Bufalino

DATED: March 29, 2010