Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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NIDIA GONZALEZ,

Plaintiff,

- against -

THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT and THE NEW YORK CITY DEPARTMENT OF CORRECTIONS,

Defendants.

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Index Number: 12220/04

Motion Date: 05/08/07

Motion Cal. Number: 9

Motion Seq. No. 2

The following papers numbered 1 to 10 read on this cross-motion by defendants for summary judgment.

	Papers Numbered
Notice of Cross-Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-7
Reply Affirmation.....	8-10

Upon the foregoing papers it is ordered that the cross-motion is decided as follows:

This Court is deciding the instant cross-motion since it was referred to this Court pursuant to the order issued by Justice David Elliot on May 23, 2007. The papers were received in chambers on May 25, 2007. The motion in chief seeking vacatur of the dismissal of the complaint and restoration of the case to the trial calendar was granted pursuant to the order of Justice Martin J. Schulman issued on May 14, 2007. Pursuant to that same order, the cross-motion was referred to Justice Elliot who, in turn, referred it to this Court.

Plaintiff specifically denominates four causes of action. In her First Cause of Action, she alleges negligence in the hiring, training, supervision and retention of the City's employees, negligence in failing to operate, manage and maintain

the Queens Central Booking facility, negligence in failing to provide precautionary safety measures, that the City's employee was acting within the scope of his employment and in furtherance of its business (hence, plaintiff apparently is alleging that the City is liable under the doctrine of respondeat superior), and that the City violated plaintiff's Constitutional rights. As a second cause of action, erroneously captioned as "Sixth Cause of Action", plaintiff apparently articulates a claim under the doctrine of respondeat superior as well as constitutional rights violations. Her third cause of action, captioned "Second Cause of Action", alleges violation of her Constitutional rights, pursuant to 42 U.S.C. §1983 and 1985(3) by virtue of customs, practices or policies. Plaintiff's fourth cause of action, captioned "Third Cause of Action", inter alia, merely repeats her allegation that the City had a practice, policy and procedure allowing access to female inmates by male officers.

Motion by defendants for summary judgment dismissing the complaint is granted to the extent that the causes of action asserting claims under respondeat superior, negligent hiring, training, supervision and retention of employees and for constitutional rights violations pursuant to 42 U.S.C. §1983 and 1985 (3) are dismissed.

Plaintiff was allegedly sexually assaulted by a male officer of the NYC Department of Corrections (C.O.)and a male inmate while being detained in the Queens Central Booking facility on December 4, 2003.

On December 3, 2003, plaintiff was incarcerated at Central Booking and confined in a common holding cell for female inmates under the supervision of C.O. Gray, a female officer. At some point, C.O. Gray's shift ended and she left the area and was replaced by C.O. Roach, a male officer. Roach removed plaintiff from the common holding cell and transferred her to a vacant cell reserved for minors. Plaintiff testified in her deposition that Roach permitted a male inmate, who had been assigned work detail in the area, to enter her cell. That inmate allegedly coerced plaintiff to engage in oral sex with him. Thereafter, C.O. Roach entered the cell and coerced her to perform oral sex upon him. When C.O. Gray assumed the post again, she noticed that plaintiff was in the cell reserved for adolescents and demanded to know why. At some point she was informed of the incident.

Sexual assault by an employee is clearly not within the scope of his employment and not done in furtherance of his employer's interests, but is done solely for personal reasons and, thus, is not an action for which the employer may be held liable under the doctrine of respondeat superior (see Waxler v. State, 2005 NY Slip Op 50305 [U] [Court of Claims]).

In order to sustain causes of action for negligent hiring,

retention and supervision, plaintiff must demonstrate that the employer knew or should have known of the employee's propensity for the type of conduct that caused plaintiff's injury (see Shantelle S. v. State, 2006 NY Slip Op 50768 [U] [Court of Claims]).

In the present case, there is no showing that the City knew or should have reasonably known that Roach had the propensity to commit a sexual offense. Alan Vengersky, the Assistant Commissioner for Personnel of the City of New York Department of Correction, avers in his affidavit in support of the cross-motion, that Roach began his career as a probationary Correction Officer in 1989 and received a permanent appointment in 1991 after receiving "satisfactory" or "exceeds requirements of performance" evaluations. Roach indicated in his employment questionnaire that he had never been arrested, convicted of a crime or summoned to court, had never been treated for any mental illness and was not in default on any obligation. He also had a consistent employment record. Vengersky also averred that Roach's personnel file revealed that there were no complaints or charges of improper sexual conduct or violent, abusive or improper behavior toward inmates or fellow- workers. There were only four charges or disciplinary actions against him: for sleeping on duty, excessive lateness, failure to properly log-in an inmate and disobeying a supervisor's command to report to the intake area. None of these infractions, avers Vengersky, was a ground for termination.

Plaintiff fails to demonstrate how the City knew or should have known that a veteran Correction Officer of 14 years with no history of abusive behavior possessed the propensity to commit a sexual assault of an inmate. Therefore, in the absence of any evidence to the contrary, plaintiff's causes of action for negligent hiring, retention and supervision must be dismissed.

As to plaintiff's cause of action alleging negligent training, such requires a showing of a specific deficiency in training that caused the C.O. to engage in misconduct, which in this case was the sexual assault of plaintiff (see Shantelle S. v. State, supra). Plaintiff fails to allege or show what training should have been in place that was designed to train correction officers not to become sexual abusers of inmates. Therefore, plaintiff's cause of action alleging negligent training must be dismissed.

With respect to plaintiff's cause of action for violation of her Constitutional rights, a municipality may be found liable under 42 U.S.C. §1983 where plaintiff specifically pleads and proves an official policy or custom that causes plaintiff to be subjected to a denial of a constitutional right (see Monell v. Department of Social Services, 436 U.S. 658 [1978]). The complaint alleges that certain customs, practices and policies resulted in

abuse of plaintiff. Specifically, the complaint alleges that defendants were negligent in failing to supervise their male employees properly by allowing them unsupervised access to female inmates, thus creating an opportunity for the male officers to abuse the female inmates. Plaintiff alleges that the resultant sexual abuse by a male correction officer deprived her of her rights pursuant to the Fourth, Eighth and Fourteenth Amendments to the Constitution.

Plaintiff cannot sustain a cause of action against the municipality under §1983 for lack of supervision merely by proving negligence, but is required to establish that it acted with deliberate indifference to plaintiff's safety (see Schulik v. County of Monroe, 202 AD 2d 960 [4th Dept 1994]).

"[T]hree requirements must be met before a municipality's failure to train or supervise constitutes deliberate indifference to the constitutional rights of citizens. First, plaintiffs must show that the policymaker knows 'to a moral certainty' that employees will encounter a given situation . . . Second, plaintiffs must show that the situation either presents the employee with a difficult choice, the kind which training will make less difficult, or that there is a history of employees mishandling the situation. Finally, plaintiffs must show that the wrong choice by the municipal employee will frequently result in the deprivation of a citizen's constitutional rights" (Johnson v. Kings County District Attorney's Office, 308 AD 2d 278 [2nd Dept 2003]).

With respect to the first requirement, plaintiff has failed to establish that the City knew with moral certainty that a correction officer would commit a sexual assault upon a female prisoner.

With respect to the second requirement, the first part thereof, namely, that "the situation either presents the employee with a difficult choice, the kind which training will make less difficult," obviously relates only to a claim involving failure to train, and has no application to a claim for failure to supervise in a case involving sexual misconduct.

As to the second part thereof, namely, whether there is a history of employee mishandling (or, in the present context, of employee abuse), in addition to Vengersky's affidavit heretofore mentioned, Correction Captain Cumberbatch, in his affidavit in support of the cross-motion, dated April 6, 2005, averred that he was responsible for all pre-arraignment facilities in Queens County, including Queens Central Booking, and it is his duty to investigate any unusual incidents, including sexual abuse, at such facilities. He has held said position for six years. He there were no reports of any sexual assaults at Queens Central Booking by an employee of the Correction Department or any other

City employee upon a prisoner for the two years prior to December 4, 2003. Moreover, in his deposition, he testified that there were no disciplinary problems regarding Roach during the six years he was his supervisor. Moreover, when asked by plaintiff's attorney whether there were any prior alleged incidents of sexual mistreatment of prisoners by correction officers in Central Booking for the three years prior to December 4, 2003, he answered. "No." In addition, he stated that he was not aware of any subsequent incidents of sexual mistreatment.

C.O. Gray, in her deposition, when asked whether she was aware of any sexual incidents between male correction officers and any prisoners at Central Booking within four years prior to the subject incident, she answered, "No."

Plaintiff offers no proof to rebut the City's showing that there were no prior incidents of sexual mistreatment of female prisoners by male correction officers and that there was no indication that Roach had any propensity to commit the misconduct alleged herein.

As to the third requirement, plaintiff failed to establish that any "wrong choice" as it may relate to a failure to supervise will "frequently" result in sexual mistreatment of female prisoners.

Therefore, plaintiff has failed to set forth any evidence of municipal supervisory indifference to support a §1983 claim against the City (see Jackson v. Police Dept. Of City of New York , 192 AD 2d 641 [2nd Dept 1993]).

Plaintiff's cause of action under §1985(3) is likewise dismissed. That section deals with conspiracy to interfere with civil rights. As there has been no showing that the municipality conspired to commit sexual abuse of a prisoner, plaintiff has failed to establish her claim pursuant to §1985(3).

The record on this cross-motion, however, raises questions of fact as to whether the City was negligent in failing to operate, manage and maintain the Queens Central Booking facility and in failing to provide precautionary safety measures.

Plaintiff's counsel appeals to 9 NYCRR §7504, which the Commissioner of the Department of Corrections promulgated to establish minimum standards for the management and supervision of detention areas, and the City's deviation from those regulations, as evidence of negligence. Specifically §7504.1(e) provides, " Supervision of female prisoners shall be accomplished by a matron, and a female prisoner shall not be placed in or removed from a detention area unless the matron is present. The matron shall retain the key for the detention area for females and no male person shall be permitted to enter an area where female

prisoners are detained unless accompanied by the matron."

Captain Cumberbatch stated in his deposition that male correction officers have access to the keys to the cells for female prisoners and is authorized to use them. However, he also stated that male correction officers do not go into a cell with a female prisoner on a one-to-one basis. He also stated that the supervision of female prisoners is done by a combination of male and female officers. He also stated that male inmates on work duty are given access to the female detention area to sanitize and to hand prisoners their meals.

C.O. Gray, in her deposition, stated that male correction officers are allowed to supervise female prisoners without female officers being present.

Therefore, the apparent violation of the Correction Department regulations regarding the standards for regulation and supervision of detention areas, pursuant to §7504.1, establishes some evidence of negligence precluding the granting of summary judgment as to this issue.

Counsel for the City argues that §7504.1(e) is unconstitutional and should be disregarded by this Court, since a similar provision contained in County Law §652(2) was stricken by the Legislature in response to Forts v. Ward (621 F. 2d 1210 [2nd Cir. 1980]) which held that such provisions constitute employment discrimination. However, even were §7504.1(e) unconstitutional pursuant to Forts, it nevertheless evinces an obvious concern for the safety of female prisoners and was designed to interdict any possible situation that might arise as a result of contact between male personnel and inmates with female prisoners. Therefore, there are questions of fact as to whether the conduct of the City in allowing access by male officers and even male inmates to female prisoners without the supervision of a female officer constitutes negligence on the part of the City.

This Court does not consider the sur-reply submitted by plaintiff's counsel in opposition to the cross-motion, as such is not authorized by CPLR 3011.

Dated: June 18, 2007

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KEVIN J. KERRIGAN, J.S.C.