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M.K. v. THE STATE OF NEW YORK, # 2021-044-013, Claim No. 128035

Synopsis

After trial, defendant found 100% liable for assault and battery by COs upon incarcerated person while conducting strip frisk and placing him in observation cell.

Case information

UID:	2021-044-013
Claimant(s):	M.K.
Claimant short name:	M.K.
Footnote (claimant name) :	
Defendant(s):	THE STATE OF NEW YORK
Footnote (defendant name) :	
Third-party claimant(s):	
Third-party defendant(s):	
Claim number(s):	128035
Motion number(s):	
Cross-motion number(s):	
Judge:	CATHERINE C. SCHAEWE
Claimant's attorney:	SIVIN, MILLER & ROCHE, LLP BY: Clyde Rastetter, Esq., of counsel
Defendant's attorney:	HON. LETITIA JAMES, ATTORNEY GENERAL BY: Peter DeLucia, Assistant Attorney General
Third-party defendant's attorney:	
Signature date:	October 27, 2021
City:	Binghamton
Comments:	
Official citation:	
Appellate results:	
See also (multicaptioned case)	

Decision

After receiving permission from this Court to late file (*M.K. v State of New York,* UID No. 2016-044-532 [Ct Cl, Schaewe, J., May 10, 2016]), claimant filed this claim to recover for personal injuries allegedly received as a result of being assaulted and battered by several correction officers (COs) while he was in the custody of the Department of Corrections and Community Supervision (DOCCS) at Elmira Correctional Facility (Elmira). Defendant State of New York (defendant) answered and asserted several affirmative defenses. Defendant's previous motion in limine to preclude use of any testimony or evidence at trial of conduct which pertains to a sexual assault or battery by arguing that such conduct is outside the scope of employment was denied, without prejudice to making an appropriate objection during trial (*M.K. v State of New York,* Ct Cl, Jan. 21, 2020, Schaewe, J., Claim No. 128035, Motion No. M-94603). A virtual trial on the issue of liability only was held with the Court sitting in the Binghamton District on September 15, 2021.

In his claim, claimant alleges that on January 26, 2015 and near a mental health observation cell at Elmira, two COs physically attacked and beat him. He further asserts that because of his crimes of conviction, the COs also made him perform perverse sexual acts upon himself.[(1)]

At trial, claimant testified that he had been incarcerated at Elmira for less than two weeks on the date of the incident. He had been convicted of promoting an obscene performance by a minor as a result of his participation in a file-sharing program which apparently involved the downloading and storage of pornographic videos, including videos depicting minors performing sexual acts. Claimant stated that at his sentencing he had been advised that the sentencing judge was recommending him for participation in a "shock program"[(2)] which would have let him out on parole and allowed him to be with his wife, whom he had married approximately two months prior to the date of the incident. On January 26, 2015, claimant learned that he was actually not eligible for the program. He told a CO that he was upset, and the CO referred him to a Mental Health Unit (MHU) employee. That employee had a discussion with claimant in which he told her he did not know how to handle his situation. She referred him to the facility's infirmary to be placed in an observation cell on a suicide watch.[(3)]

Claimant said that he was then escorted to a mental health cell in the infirmary by two COs. He did not have his glasses on, and said that he could not see well enough to read their name badges. He stated that on the way to the infirmary, the officers asked him "if he was into little kids" and hit him in the head and arms, and kicked his legs. He indicated that these acts lasted "probably less than a minute." He responded by saying "no" and "cowering against the wall."

When they arrived at the observation cell, the officers conducted a strip frisk as is required pursuant to DOCCS regulations when an individual is being placed on a suicide watch.[(4)] Claimant testified that the officers ordered him to remove his clothes, run his fingers through his hair and then open his mouth and run his fingers around his gums. Claimant said he was then told to lift his genitalia[(5)] and then insert his fingers in his mouth again. He said this happened more than three times. He testified that he was then told to insert his fingers into his anus and then back into his mouth. He was given a smock to wear and taken to see a nurse.

Claimant said that before he was taken from the observation cell he was told to tell the nurse that his face was red because he fell on the ice outside. He said the nurse did ask him why his face was red and puffy. One of the officers was staring at him, so he said he fell on the ice outside. Claimant did not believe the nurse filled out a report.

Claimant was returned to the observation cell, where the COs told him to lay on a mat on the floor. Claimant said that while he was laying there one of the officers used his boot to "nudge" claimant's genitalia under the smock. The CO then placed his boot on claimant's chest while grabbing his own crotch, stating "you think about this next time." Claimant said that the COs told him they could come back whenever they wanted to, and he should keep quiet or else they "would make it look like a suicide." Claimant said they gathered and took his clothes, but placed his boots in the middle of the cell.[(6)] He said he laid on the mat and stared at the holes in the ceiling tiles.

Claimant did not report the assault while at Elmira, indicating that he was afraid to do so. After spending some time in Elmira's MHU, claimant was transferred to Greene Correctional Facility (Greene). He did not report the incident while at that location either. He was transferred to Mohawk Correctional Facility (Mohawk) in March 2015, where he used a phone line set up to report prison rapes pursuant to the Prison Rape Elimination Act to report the incident.

On cross-examination, claimant said that after being hit by the COs his face was puffy and red, but not bruised. He said "it hurt a little." After he reported the incident, he was interviewed by Investigator Lovelace, who prepared a statement for claimant's signature. Claimant acknowledged that the statement contained no mention of claimant being told to put his fingers in his anus, nor did it mention that one of the COs grabbed his crotch while threatening claimant.

Claimant eventually filed a grievance at Mohawk in August 2015. He agreed that the grievance also contained no mention of being told to place his fingers in his anus. However, it did apparently indicate that he was forced to humiliate himself sexually, and also that a CO grabbed his crotch and threatened him, advising his death could be made to look like suicide. He indicated that he continued to receive mental health treatment at Greene and Mohawk, and was eventually placed on antidepressant medications.

On redirect, claimant said he did tell Lovelace all the details of his strip search, but said that Lovelace was hostile and did not want to rewrite the statement. Claimant rested his case at the close of his testimony. Defendant then moved to dismiss the claim on the basis that claimant failed to establish a prima facie case, in that the conduct alleged fell outside of the scope of the officers' employment. Defendant's counsel further argued that the proof was "insufficient to carry the burden forward." Claimant's counsel responded that defendant's officials ordered

claimant to be placed on a suicide watch, which required him to be escorted to the infirmary, and that the subsequent strip search was mandated pursuant to regulation. He argued that the improper conduct was not sufficiently divorced from the performance of the officers' duties so as to preclude a finding that they were acting within the scope of their employment. The Court reserved decision on the motion.

Sergeant Hogancamp testified on defendant's behalf. He was employed as a security officer in the infirmary at the time of the incident. He acknowledged that according to the logbook[(7)] he was on duty when claimant was brought to the infirmary to be placed on a suicide watch, but said he had no independent recollection of claimant. He said that when an incarcerated person is brought to the infirmary to be placed on a suicide watch they are strip searched,[(8)] and he described that process. He also indicated that he would have had no way of discovering the nature of any incarcerated person's conviction.

Elizabeth Pierce, a Registered Nurse employed at Elmira, also testified for defendant. She did not have any independent recollection of claimant, but acknowledged that her signature was on claimant's Ambulatory Health Record progress note of January 26, 2015. That note states in pertinent part: "[complains of] anxiety, tremors [and] panic attack . . . denies threats of self harm Placed on 1:1 OMH."[(9)] Defendant rested its case at the close of Pierce's testimony.

The parties subsequently submitted posttrial memoranda.

Defendant makes two arguments: first, that claimant did not prove his case by a preponderance of the evidence in light of questions about his credibility; and second, that any of the alleged actions by the COs, if true, fell outside the scope of their employment. With regard to the first point, the Court found claimant to be mostly credible, and his testimony compelling. Moreover, there was no evidence submitted by defendant which might have shown that the events, as related by claimant, did not occur in essentially the manner he testified.[(10)] Consequently, the claim turns upon the issue of whether the actions taken by the COs fell within the scope of their employment.

To establish a cause of action for assault, the claimant must prove physical conduct that placed him or her in imminent apprehension of harmful contact (*Bastein v Sotto,* 299 AD2d 432, 433 [2d Dept 2002]; *Charkhy v Altman,* 252 AD2d 413, 414 [1st Dept 1998]). In order to recover damages for battery, a claimant must establish that there was bodily contact, which was offensive, that is "wrongful under all the circumstances" (*Zgraggen v Wilsey,* 200 AD2d 818, 819 [3d Dept 1994]), and that the defendant intended to cause such contact (*see Messina v Alan Matarasso, M.D., F.A.C.S., P.C.,* 284 AD2d 32, 35-36 [1st Dept 2001]). It is not necessary for the defendant to intend to cause injury (*Zgraggen,* 200 AD2d at 819). While the lack of consent is considered when determining whether the contact was offensive, it is not conclusive (*see Goff v Clarke,* 302 AD2d 725, 726 [3d Dept 2003]; *Zgraggen,* 200 AD2d at 819).

"Under the doctrine of respondeat superior, an employer may be vicariously liable for the tortious acts of its employees only if those acts were committed in furtherance of the employer's business and within the scope of employment" (*N.X. v Cabrini Med. Ctr.,* 97 NY2d 247, 251 [2002]; *see also Riviello v Waldron*, 47 NY2d 297, 304 [1979]; *Steinborn v Himmel,* 9 AD3d 531, 532 [3d Dept 2004]). "Pursuant to this doctrine, the employer may be liable when the employee acts negligently or intentionally, so long as the tortious conduct is generally foreseeable and a natural incident of the employment" (*Judith M. v Sisters of Charity Hosp.,* 93 NY2d 932, 933 [1999]). "[T]he test has come to be whether the act was done while the servant was doing his master's work, no matter how irregularly, or with what disregard of instructions"

(*Riviello,* 47 NY2d at 302 [1979] [internal quotation marks omitted]; *see also Moore v Melesky,* 14 AD3d 757 [3d Dept 2005]; *Cepeda v Coughlin,* 128 AD2d 995 [3d Dept 1987], *lv denied* 70 NY2d 602 [1987]). Accordingly, an employer that puts an employee in a position of trust or responsibility is liable when the employee "through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his [or her] duty or authority, and inflicts an unjustifiable injury upon another" (*Sims v Bergamo,* 3 NY2d 531, 535 [1957] [internal quotation marks omitted]; *see also Siriani v State of New York,* UID No. 2020-015-079 [Ct Cl, Collins, J., Jan. 11, 2021]). It is not necessary for the employer to foresee the exact manner in which the injury occurs "so long as 'the general type of conduct may have been reasonably expected' " (*Stewart v Westchester Inst. for Human Dev.,* 136 AD3d 1014, 1018 [2d Dept 2016], quoting *Riviello,* 47 NY2d at 304).

On the other hand, where an employee's actions are taken for wholly personal reasons not related to his or her job, they are outside the scope of employment (*see Rivera v State of New York,* 34 NY3d 383 [2019]; *N.X.,* 97

NY2d at 252; *Judith M.,* 93 NY2d at 932 [1999]; *Stevens v Kellar,* 112 AD3d 1206 [3d Dept 2013]; *Burlarley v Wal-Mart Stores, Inc.,* 75 AD3d 955 [3d Dept 2010]; *Curtis v City of Utica,* 209 AD2d 1024 [4th Dept 1994]). Whether a particular act is within the scope of employment is "heavily dependent on factual considerations" and not generally suitable for summary disposition (*Riviello,* 47 NY2d at 303).

In determining whether an employee acted within the scope of employment for purposes of vicarious liability, [the Court should] consider, among other factors, the connection between the time, place and occasion for the act; the history of the relationship between employer and employee as spelled out in actual practice; whether the act is one commonly done by such an employee; the extent of departure from normal methods of performance; and whether the specific act was one that the employer could reasonably have anticipated (i.e., whether it was foreseeable) (*Rivera,* 34 NY3d at 389-390 [internal quotation marks omitted]).

There are, in the Court's view, two separate and distinct sets of improper actions by the COs which require separate analysis. First, the two officers escorted claimant from his meeting with the MHU employee to the infirmary, engaging in various uses of force along the way. Second, the two officers conducted claimant's mandatory strip-frisk prior to him being placed on suicide watch.

Claimant testified that while he was being escorted to the infirmary, the COs asked him questions about his alleged sexual interest in children, and hit and kicked him for about a minute while he "cowered" against the wall. DOCCS employees may use a limited degree of physical force when it is reasonably necessary to enforce an incarcerated person's compliance with a lawful directive and to maintain order and discipline in correctional facilities, but "only such degree of force as is reasonably required shall be used" (7 NYCRR 251-1.2 [b]; *see e.g. Johnson v State of New York,* UID No. 2005-037-507 [Ct Cl, Moriarty III, J., Sept. 26, 2005]). When a degree of force is used which is excessive under the circumstances, defendant may be held liable for any injuries sustained by the incarcerated person during that excessive use of force (*see Jones v State of New York*, 33 NY2d 275 [1973]). As set forth above, defendant may be liable for an assault and battery under the doctrine of respondeat superior if such actions were committed in furtherance of the employer's business, but will be found to be outside the scope of employment if the employee is found to be acting for purposes of his or her own.

In this instance, there was no evidence that claimant engaged in any conduct while being taken to the infirmary which would have led to *any* authorized use of force by the officers. Claimant did not testify that he was posing a physical threat or that he was disobeying any direct orders. The Court finds that the actions of the COs in assaulting claimant while taking him to the infirmary were committed by the officers for their own personal purposes, and would thus constitute a clear departure from the scope of their employment (*see Valentin v State of New York*, UID No. 2018-038-108 [Ct Cl, DeBow, J., June 13, 2018]). Consequently, defendant cannot be found liable for those particular actions.

The behavior of the officers during the strip frisk and placement of claimant into the observation cell is a different story, however. The strip frisk was a mandatory step prior to placing an incarcerated person into an observation cell for suicide watch pursuant to DOCCS Directive 4910. The procedure for a strip frisk, also pursuant to DOCCS Directive 4910, includes a visual search of body cavities, including a mouth search, lifting the testicles and spreading the buttocks to expose the anus to the frisking officer. It is unquestionable that the officers were conducting the strip frisk as part of the mandatory procedure of placing claimant under suicide watch observation. The officers' conduct while escorting claimant to his observation cell clearly placed him in apprehension of imminent harmful contact as the officers sought to demean and humiliate him[(11)] during the course of the strip frisk, thus constituting an assault. The officers further committed both assault and battery by forcibly touching and threatening him while placing him in the cell. Further, their conduct during the course of this procedure was clearly foreseeable. The Directive itself provides that "[t]he employee conducting a personal search must assure its thoroughness and not offend the dignity of the inmate being searched."[(12)] The Court finds that the officers were acting within the scope of their employment, albeit with mixed motives and malicious intent.

Based upon the foregoing, the Court concludes that defendant is not liable for any assault/battery upon claimant by COs during the course of escorting him to the infirmary. The Court further concludes that claimant has established, by a preponderance of the credible evidence, that the officers' intentional, offensive, and wrongful conduct during the strip frisk and observation cell placement procedure constituted both an assault and battery for which defendant is 100% liable. Any motions made at trial upon which the Court had previously reserved or which remain undecided are denied.

The Clerk of the Court is directed to enter an interlocutory judgment on the issue of liability. The Court will schedule a trial on the issue of damages as soon as practicable.

October 27, 2021

Binghamton, New York

CATHERINE C. SCHAEWE

Judge of the Court of Claims

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1. Claimant further states that even though the State was aware of the COs' conduct, no action was taken to intervene and stop such attacks. To the extent that claimant is alleging that defendant was negligent in hiring/retaining/supervising the COs, this Court specifically did not grant permission for him to assert such causes of action (*M.K.,* UID No. 2016-044-532, n 8). The Court held that claimant's "motion for permission to late file a claim is therefore granted solely to the extent that movant shall file a claim containing the . . . causes of action for assault and battery based upon the officers' conduct as set forth in [the] affidavit" in support of the motion for late claim (*id.* at 4).

2. All quotes herein are taken from the Court's notes on the proceeding, unless otherwise indicated.

3. Claimant stated that he specifically advised the employee that he was not going to harm himself.

4. Claimant's Exhibit 3 at 11 (DOCCS Directive 4910 IV [F] [2]).

5. DOCCS' definition of permissible activities during a strip frisk includes having the inmate "lift[] his testicles to expose the area behind [them]" (Claimant's Exhibit 3 at 6 [DOCCS Directive 4910 III (E) (1)]).

6. The implication was apparently that claimant would have had access to the laces of the boots and thus would have been able to commit suicide.

7. Claimant's Exhibit 1.

8. Hogancamp's deposition testimony, a portion of which was submitted into evidence as Claimant's Exhibit 4, indicated that the officers escorting an individual to an observation cell frequently performed the strip search, rather than the infirmary's security officers (of which he was one) (Claimant's Exhibit 4 at 8).

9. Defendant's Exhibit A at 2.

10. DOCCS is notably thorough in its documentation of the movements of every person throughout each facility, particularly a maximum security facility. The Court finds it surprising, to put it mildly, that DOCCS was unable to identify the officers who escorted claimant to the infirmary.

11. The Court agrees with claimant's argument that the officers were not seeking sexual gratification, and that this was not a sexual assault which would clearly have been outside the scope of their duties. Instead, their motivation appeared to be retribution for the crime for which claimant was incarcerated.

12. Claimant's Exhibit 3 at 1 (DOCCS Directive 4910 III).

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