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

JANE DOE, INDIVIDUALLY and AS PARENT and NATURAL GUARDIAN OF JOHN DOE, A MINOR	:	CIVIL ACTION
v.	:	
COLONEL PAUL J. EVANKO, et al.	:	NO. 00-5660

MEMORANDUM

Dalzell, J. March 22, 2001

Unnamed plaintiffs, mother and son, have filed an amended civil rights complaint against several law enforcement officers. This complaint sues defendants Trooper Michael K. Evans, State Police Commissioner Paul J. Evanko, Lieutenant David B. Kreiser, Sgt. Kevin T. Krupiewski, Sgt. Gary Fasy, Corporal Gary L. Dance, Jr., Corporal Laura Bowman, and several additional unnamed state police defendants, in their official and individual capacities based on an incident two years ago between plaintiff Jane Doe and defendant Evans.

Defendants Evanko, Kreiser, Krupiewski, Dance, and Bowman have moved to dismiss the complaints based on qualified and sovereign immunity and failure to state a claim under Fed. R. Civ. P. 12(b)(6). Plaintiffs have responded and the defendants have filed reply briefs. For the reasons set forth below, we will grant in part and deny in part defendants' motions to dismiss.[1]

[1] Although defendant Evanko filed his motion to dismiss separately from the remaining moving defendants, the two sets of motions are, in all material respects, identical, and thus we will not distinguish between the two in this analysis.

The Complaint's Allegations

According to plaintiff Jane Doe, on January 31, 1999 at 8:21 p.m., she was a passenger in a car that Trooper Evans had stopped. Allegedly without justification, Evans removed plaintiff from the car by her neck, slammed her against his police car, handcuffed her, arrested her, put her in the back of his patrol car and took her to the State Police Barracks. Upon her release, and after processing, Evans is said to have told plaintiff that he would drive her home. Evans, before placing plaintiff in the front seat of his patrol car, allegedly fondled her breasts. During the drive home, Evans is said to have made lewd remarks to her. At one point, Evans allegedly stopped the car in a field by the side of the road, exposed himself, began masturbating and asked plaintiff to perform sexual acts, which she refused. Upon arriving at her house, Evans entered the house and sexually assaulted plaintiff. Plaintiff's minor son, John Doe, was home at the time and allegedly witnessed part of the assault.

The amended complaint claims that Trooper Evans pleaded guilty in October, 2000 to eleven counts of criminal conduct including corruption of the morals of a minor, indecent assault, and official oppression. This guilty plea allegedly included Evans's admission of guilt as to the events recited above, Am. Compl. at ¶ 56.

Plaintiff claims that Trooper Evans had a history of making improper sexual advances. She asserts that his supervisors, the moving defendants, knew of his past and failed

properly to supervise, discipline and/or train him. She also alleges that the moving defendants adopted and maintained a policy, custom and practice of condoning and/or acquiescing in Evans's improper conduct.

Count I of plaintiff's amended complaint alleges violation of 42 U.S.C. § 1983 for false arrest and false imprisonment. Count II asserts violations of 42 U.S.C. §§ 1983 and 1988 for acquiescence of and failure to investigate constitutional violations. Count III alleges violations of 42 U.S.C. §§ 1983, 1985(3), 1986 and 1988 based on conspiracy. Count IV avers violations of 42 U.S.C. §§ 1983 and 1988 based on policy failures, and Count VI makes claims of violations of 42 U.S.C. §§ 1983 and 1988 on behalf of her son.[2]

Legal Analysis[3]

1. Eleventh Amendment Immunity

As a preliminary matter, moving defendants, all officials of the Pennsylvania State Police, seek to dismiss all claims for damages against them in their official capacities pursuant to the Eleventh Amendment.

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[2] Plaintiff has voluntarily withdrawn Count V, which alleged a violation of the Violence Against Women Act under 42 U.S.C. § 13981, Pl.'s Resp. to Evanko's Mot. at p. 25. See Brzonkala v. Morrison, 169 F.3d 820 (4th Cir. 1999), aff'd sub nom. United States v. Morrison, 529 U.S. 598, 120 S.Ct. 1740 (2000).

[3] In her response to defendants Kreiser, Krupiewski, Dance and Bowman's motion to dismiss, plaintiff includes numerous documents outside the pleadings. As this is a motion to dismiss, we have neither reviewed nor considered these documents and have relied, instead, on the factual summary set forth in her amended complaint.

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State". The Supreme Court has "consistently interpreted the Amendment to immunize an unconsenting state 'from suits brought in federal courts by her own citizens as well as by citizens of another state'", Carter v. City of Philadelphia, 181 F.3d 339, 347 (3d Cir. 1999)(internal citations omitted). "Claims against the state itself and state agencies are barred by the Eleventh Amendment. * * * In addition, claims for damages against a state officer acting in his official capacity...are also barred by the Eleventh Amendment", Pena v. Commonwealth of Pennsylvania, 1999 WL 552775, *3 (E.D.Pa. June 24, 1999), citing Kentucky v. Graham, 473 U.S. 159, 165-67, 105 S.Ct. 3099, 3104-06 (1985).

Accordingly, we will dismiss all of plaintiff's claims against the moving defendants in their official, as opposed to their individual, capacities.

2. Failure to State a Claim

"A motion to dismiss pursuant to Rule 12(b)(6) may be granted only if, accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief", In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1420 (3d Cir. 1997); see also Maio v. Aetna, Inc., 221 F.3d 472, 481-82 (3d

Cir. 2000). "Since this is a § 1983 action, the plaintiffs are entitled to relief if their complaint sufficiently alleges deprivation of any right secured by the Constitution. In considering a Rule 12(b)(6) motion, we do not inquire whether the plaintiffs will ultimately prevail, only whether they are entitled to offer evidence to support their claims", Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996)(internal citations omitted).

A. Plaintiff Jane Doe's § 1983 Claims in Count I[4]

To establish a claim under § 1983, plaintiff must allege (1) a deprivation of a federally protected right, and (2) commission of the deprivation by one acting under color of state law, see, e.g., Lake v. Arnold, 112 F.3d 682, 689 (3d Cir. 1997). Plaintiff Jane Doe has alleged false arrest and false imprisonment in violation of the Fourth, Fifth and Fourteenth Amendments. Moving defendants argue that her amended complaint alleges lack of probable cause to arrest and therefore is based on the Fourth Amendment, not the Fifth or Fourteenth.

The Fifth Amendment's due process clause applies only to actions against the federal government, not state officials, and we will therefore dismiss her Fifth Amendment claim, see Moyer v. Borough of North Wales, 2000 WL 1665132, *2 (E.D.Pa. Nov. 7, 2000)(citing Williams v. Pennsylvania State Police, 108 F.Supp.2d 460, 469 (E.D.Pa. 2000) and Huffaker v. Bucks Cty. Dist. Attorney's Office, 758 F.Supp. 287, 290 (E.D.Pa. 1991)).

[4] We will address John Doe's claims separately.

As for plaintiff's Fourteenth Amendment claim, "when government behavior is governed by a specific constitutional amendment, due process analysis is inappropriate. Although not all actions by police officers are governed by the Fourth Amendment...the constitutionality of arrests by state officials is governed by the Fourth Amendment rather than due process analysis", Berg v. County of Allegheny, 219 F.3d 261, 268-69 (3d Cir. 2000)(internal citations omitted). We will, accordingly, dismiss Jane Doe's Fourteenth Amendment claim.

Moving defendants do not specifically argue that Jane Doe's false arrest claim under the Fourth Amendment fails, but instead attack her false imprisonment claim. Moving defendants contend that she fails to allege any pattern of false imprisonment or that her detention lacked probable cause. Yet, Jane Doe clearly states that her arrest lacked probable cause, see Am. Compl. at ¶ 32, and that Trooper Evans had engaged in a similar pattern with other women, see id. at ¶¶ 44, 49-51, 54. She has, therefore, for purposes of surviving a Rule 12(b)(6) motion sufficiently pled a claim for false arrest and false imprisonment under the Fourth Amendment.

B. Jane Doe's Remaining § 1983 Claims[5]

As to plaintiff's other § 1983 claims, moving defendants contend that she has failed to allege that they "knew or must have known that Evans presented a substantial risk of

[5] Her remaining claims involve failures to investigate (Count (II), conspiracy (Count III), and failure to train and/or supervise (Count IV).

violating women's constitutional rights by sexually assaulting them and was deliberately indifferent to that risk", Evanko's Mot. to Dismiss at p. 10 (emphasis in original). "[T]he standard for personal liability under section 1983 is the same as that for municipal liability", Carter v. City of Philadelphia, 181 F.3d 339, 356 (3d Cir. 1999). "[A] failure to train, discipline or control can only form the basis for section 1983 municipal liability if the plaintiff can show both contemporaneous knowledge of the offending incident or knowledge of a prior pattern of similar incidents and circumstances under which the supervisor's actions or inaction could be found to have communicated a message of approval to the offending subordinate", Montgomery v. De Simone, 159 F.3d 120, 127 (3d Cir. 1998)(citing Bonenberger v. Plymouth Township, 132 F.3d 20, 25 (3d Cir.1997)).[6] Again, for the purposes of surviving a motion to dismiss, Jane Doe's allegations as to the superiors' knowledge are sufficient to state claims against them, see Am. Compl. at ¶¶ 44-48, 51, 54, 72 84-86, 90, 92, 95, 113.[7]

The moving defendants raise the affirmative defense of qualified immunity, "which absolves defendants if reasonable

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[6] See also Carter, 181 F.3d at 357 (3d Cir. 1999)("Where...the policy in question concerns a failure to train or supervise municipal employees, liability under section 1983 requires a showing that the failure amounts to 'deliberate indifference' to the rights of persons with whom those employees will come into contact")(quoting City of Canton v. Harris, 489 U.S. 378, 388 (1989)).

[7] See also Lake v. Arnold, 112 F.3d 682, 689 (3d Cir. 1997)(reversing district court's decision to dismiss § 1983 action at motion to dismiss stage and stating that "[a]nalysis of the law must attend development of the facts").

officers could have believed their conduct was lawful 'in light of clearly established law'", Karnes v. Skrutski, 62 F.3d 485, 491 (3d Cir. 1995)(quoting Ryan v. Burlington County, 860 F.2d 1199 (3d Cir. 1988), cert. denied, 490 U.S. 1020 (1989)). Defendants bear the burden of establishing this defense. Id. In light of the incomplete factual record, especially as measured against the stark allegations of the amended complaint, we decline to resolve the issue of qualified immunity at this stage. We will therefore deny that portion of defendants' motion without prejudice to its reassertion after the completion of discovery.

C. Plaintiff Jane Doe's § 1985(3) Claim

A claim under 42 U.S.C. § 1985(3) requires four predicates. The plaintiff must allege (1) a conspiracy that is (2) motivated by racial or other class-based discriminatory animus to deprive, directly or indirectly, any person or class of persons equal protection of the laws; there must also be (3) an act in furtherance of the conspiracy that (4) causes an injury to her person or property or a deprivation of any right or privilege of a citizen of the United States, United Brotherhood of Carpenters & Joiners of America v. Scott, 463 U.S. 825, 829-30 (1983). Sex is one of the immutable characteristics that has been held as a sufficient class basis for purposes of § 1985(3), Great American Fed. Sav. & Loan Assoc. v. Novotny, 442 U.S. 366, 376 (1979).

Moving defendants argue that Jane Doe has not sufficiently alleged a conspiracy or discriminatory animus. In fact, her amended complaint states in particular that

> [t]he conspiracy between the Defendants herein is clearly evidenced by the fact that multiple complaints were received from prior victims of Defendant, Trooper Evans' illicit and illegal sexual advances and assault which complaints were directed, upon information and belief, to each of the Defendants herein and despite receipt of those Complaints, the Defendants failed to discipline, supervise, or take any other action which was obviously necessary to prevent Defendant, Trooper Evans, from engaging in further illicit and illegal conduct against other female citizens of the Commonwealth of Pennsylvania, including Plaintiff, Jane Doe. Moreover, the fact that Defendant, Trooper Evans, was approved by his supervisors, after they received these prior complaints, to receive sex crimes training wherein he was trained by the Pennsylvania State Police to profile victims of sexual predators and which training he subsequently used to prey upon female citizens of the Commonwealth of Pennsylvania based upon their gender including Plaintiff, Jane Doe",

Am. Compl. at ¶ 77.

As these allegations broadly embrace conspiracy and the inference of the requisite discriminatory animus, they suffice to assert a § 1985(3) claim.[8]

D. Plaintiff John Doe's § 1983 Claim

Considerably more problematic is Count VI, wherein Jane Doe asserts a vicarious claim on behalf of her son.

[8] Because, as defendants readily acknowledge, her § 1986 claim is derivative of her § 1985 claim, plaintiff has also stated a cause of action under § 1986.

Specifically, plaintiff's amended complaint alleges that John Doe witnessed the sexual assault on his mother and "was unreasonably and unlawfully placed in fear of immediate physical harm upon witnessing an uniformed State Trooper sexually assaulting his mother in violations of his civil rights as guaranteed by the United States Constitution and in violation of 42 U.S.C. § 1983", Am. Compl. at ¶ 42, 105-106. Moving defendants contend that minor-plaintiff John Doe cannot maintain a § 1983 claim based on his witnessing Trooper Evans's sexual assault of his mother because Evans's conduct was not directed towards him. They argue that John Doe's claims are derivative of his mother's claims and may not be vicariously asserted.

Although Jane Doe claims that a child may maintain a cause of action for violation of his own constitutional rights as a result of observing an unconstitutional act being committed against his parent, she cites no authority from our Court of Appeals to this effect. Instead, she relies on Coon v. Ledbetter, 780 F.2d 1158 (5th Cir. 1986), which permitted a child who was present in a trailer when police opened fire and injured her father, who was also in the trailer, to maintain a § 1983 action against the police. Coon denied the wife's § 1983 claim because she merely witnessed the event from outside the trailer. Plaintiff also cites Mendez v. Rutherford, 655 F.Supp. 115 (N.D.Ill. 1986), which held that in view of Seventh Circuit law, a daughter who witnessed the police beating her father could maintain a § 1983 action for violation of her substantive due

process rights based on her emotional distress where police already had constructive custody of her.

Moving defendants counter with Archuleta v. McShan, 897 F.2d 495 (10th Cir. 1990), which held that a child who witnessed allegedly excessive force directed solely at his father could not maintain a § 1983 suit. They also cite Grandstaff v. City of Borger, 767 F.2d 161, 172 (5th Cir. 1985), cert. denied, 480 U.S. 916 (1987), which held that stepsons who witnessed the police mistakenly shoot their stepfather could not recover under § 1983.

These Fifth and Tenth Circuit decisions seem to us consistent with one another in that only where the police action was directed toward the minor-child could that child recover under § 1983. Even in Coon, as to the daughter who was caught in the line of fire, the Fifth Circuit pointed out that one of the deputies "fired a round of heavy buckshot into the trailer" where the little girl was. Id. at 1161. Small wonder, then, that the panel held that she "made proof of personal loss required for a constitutional claim," id., but that her mother, who stood next to the deputies outside the trailer, could not.

Although our Court of Appeals has not yet passed upon what circumstances, if any, must exist for a child to have a vicarious constitutional claim after witnessing an assault on his parent, we believe that, at a minimum, the state action would have to have some independent aspect directed at the child, in accordance with the Fifth and Tenth Circuits' holdings. Because the amended complaint fails to allege that the police directed any activity towards John Doe -- indeed, the focus was entirely

upon the mother -- we will dismiss his claims against the moving defendants.

Even if, however, our Court of Appeals ultimately were to hold otherwise on this point, at the time of the events in question the law was by no means “clearly established”. Moving defendants under this hypothesis would be entitled to qualified immunity as to any vicarious § 1983 claim Jane Doe may assert on her son's behalf. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982); Ryan v. Burlington County, supra.