

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 17-30961

United States Court of Appeals
Fifth Circuit

FILED

March 8, 2019

Lyle W. Cayce
Clerk

M'LEAH HASSAN,

Plaintiff - Appellee

v.

WILLIE L. SHAW, JR., in his individual capacity,

Defendant - Appellant

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 5:15-CV-2820

Before STEWART, Chief Judge, and SOUTHWICK and ENGELHARDT,
Circuit Judges.

PER CURIAM:*

M'Leah Hassan alleges she was raped at the Shreveport police station by James Greene, a former juvenile services detective with the Shreveport Police Department (the "SPD"). Hassan brought the instant action for damages pursuant to 42 U.S.C. §§ 1983 and 1988, alleging several constitutional violations and Louisiana state law violations against the City of Shreveport

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

and Willie L. Shaw, Jr., the Shreveport Chief of Police at the time of the alleged rape. The district court found that Shaw was not entitled to qualified immunity and denied both Shaw's and the City's motions for summary judgment on Hassan's failure-to-train claim. The district court also denied summary judgment on all remaining state law claims. Shaw, in his individual capacity, appeals the district court's judgment that he was not entitled to qualified immunity. For the reasons below, we REVERSE the district court's denial of summary judgment on Hassan's claims against Shaw in his individual capacity and RENDER summary judgment as to those claims.

I.

On February 10, 2015, Hassan went to the SPD to file a report against a former boyfriend who had threatened her life. Greene took her report inside his office. While Hassan was there, Greene allegedly touched her breast under the guise of looking at her tattoo. She brushed his hand away and told him his actions were inappropriate and to stop. She then left.

The following day, Greene telephoned Hassan and asked her to return to the police station for a follow-up on her report. The parties dispute what occurred inside the office. Hassan alleges that Greene again groped Hassan's breasts and then, twisting her arm behind her back, leaned her over his desk and raped her. Greene admitted to having sex with Hassan in his office but stated that it was consensual. Greene was fired from the SPD for engaging in inappropriate conduct in his office.

Based on Hassan's complaint to the SPD, Greene was arrested and charged with abuse of office in violation of Louisiana Revised Statute § 14:134.3. Greene was acquitted following a trial. Shreveport Police Officer Stephen Gipson was a material witness in Greene's criminal trial. At the time of the alleged rape, Gipson was romantically involved with Hassan.

In addition to federal and state law claims against Greene in his individual and official capacities, Hassan brought the following claims against the City and Shaw: (1) 42 U.S.C. § 1983 claims against the City and against Shaw in his individual and official capacities for failure to train Greene appropriately and for maintaining a policy, custom, or practice that allowed the alleged rape to occur; (2) a state law claim against the City for negligent hiring, training, and supervision of Greene; and (3) state law claims for assault, battery, and false imprisonment against the City as Greene’s employer.

Gipson’s relevant deposition for purposes of this appeal took place on February 3, 2017.¹ During his deposition, he invoked his Fifth Amendment privilege to remain silent numerous times. Importantly, Gipson invoked his Fifth Amendment right in response to the question: “Do you remember telling M’Leah Hassan that James Greene had a reputation for getting fresh with women?”

Shaw moved for summary judgment on grounds of qualified immunity as to the claims against him in his individual capacity, relying on his affidavit statement that he was unaware of Greene or anyone “having sexual activity in their office at the Shreveport Police Department while on or off duty.” The district court found that Shaw was not entitled to qualified immunity as to Hassan’s failure-to-train claim. The district court adversely inferred that Shaw was aware of Greene’s reputation for inappropriate sexual behavior from Gipson’s invocation of his Fifth Amendment right.² Specifically, the district court relied on the inference that Greene had a reputation for getting “fresh

¹ Gipson was first deposed in this case on July 14, 2016. During this deposition, he stated that he was not aware that Greene had any known reputation.

² The Fifth Amendment does not prohibit a factfinder from drawing adverse inferences in a civil trial from a non-party witness’s invocation of the Fifth Amendment. *FDIC v. Fid. & Deposit Co. of Md.*, 45 F.3d 969, 977 (5th Cir. 1995) (citation omitted).

with women.” Based on the implied inference that Shaw knew of Greene’s reputation, the district court found that Shaw did not act reasonably in failing to provide training on appropriate sexual behavior to Greene. The district court also found that Shaw’s failure to intervene and discipline Greene before the alleged rape occurred was unreasonable given the inferred knowledge of Greene’s reputation. The district court denied summary judgment on all remaining state law claims. Shaw, in his individual capacity, appealed the district court’s judgment that he was not entitled to qualified immunity.

II.

“When considering an appeal from the denial of qualified immunity, our inquiry does not seek to determine disputed issues of fact.” *Cantrell v. City of Murphy*, 666 F.3d 911, 922 (5th Cir. 2012) (citation omitted). “Rather, our inquiry concerns the purely legal question of whether the defendant [] [is] entitled to qualified immunity on the facts” in the summary judgment record. *Id.* When reviewing a denial of qualified immunity, we ask “whether the district court erred in assessing the legal significance of the conduct that the district court deemed sufficiently supported for purposes of summary judgment.” *Id.* (quoting *Kinney v. Weaver*, 367 F.3d 337, 348 (5th Cir. 2004)). We review the legal significance of the facts de novo. *Id.* (citation omitted).

When, as here, a plaintiff alleges a failure to train or supervise, “the plaintiff must show that: (1) the supervisor either failed to supervise or train the subordinate official; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiff’s rights; and (3) the failure to train or supervise amounts to deliberate indifference.” *Estate of Davis ex rel. McCully v. City of North Richland Hills*, 406 F.3d 375, 381 (5th Cir. 2005) (quoting *Smith v. Brenoettsy*, 158 F.3d 908, 911–12 (5th Cir. 1998)). “For an official to act with deliberate indifference, the [supervisor] must both be aware

of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” *Id.* (quoting *Smith*, 158 F.3d at 912).

Hassan’s argument relies on the following inferences which she asserts can be drawn from Gipson’s invocation of his Fifth Amendment privilege: (1) Greene had a reputation in the SPD for engaging in inappropriate sexual conduct towards women while he was on duty; (2) Shaw was aware of Greene’s reputation for inappropriate sexual behavior; and (3) Gipson perjured himself during Greene’s criminal trial in a concerted effort to secure Greene’s criminal exoneration and to shield the City from civil liability. Based on such inferences, Hassan maintains that no reasonable police chief would have failed to provide additional training or otherwise intervene and discipline Greene. Hassan alleges that because there is a genuine material fact dispute as to Shaw’s knowledge of Greene’s reputation for inappropriate sexual behavior, Shaw was not entitled to qualified immunity.

“We apply a two-step analysis to determine whether a defendant is entitled to summary judgment on the basis of qualified immunity.” *Cantrell*, 666 F.3d at 922. “First, we determine whether, viewing the summary judgment evidence in the light most favorable to the plaintiff, the defendant violated the plaintiff’s constitutional rights.” *Id.* (quoting *Freeman v. Gore*, 483 F.3d 404, 410 (5th Cir. 2007)). “If so, we next consider whether the defendant’s actions were objectively unreasonable in light of clearly established law at the time of the conduct in question.” *Id.* (quoting *Freeman*, 483 F.3d at 411). “To make this determination, the court applies an objective standard based on the viewpoint of a reasonable official in light of the information then available to the defendant and the law that was clearly established at the time of the defendant’s actions.” *Id.* (quoting *Freeman*, 483 F.3d at 411). “Judges are

permitted to exercise their sound discretion” in deciding which step to address first. *Id.* (citation omitted).

We begin with the outcome determinative step in this case: whether Shaw’s actions were unreasonable in light of the information then available to him and the law clearly established at the time.

The summary judgment record is insufficient to create a genuine dispute of material fact as to whether Shaw’s actions were unreasonable. Shaw asserts that he was not aware of any issues involving sexual misconduct concerning Greene prior to the incident involving Hassan. This is supported by Greene’s testimony. He testified that the incident involving Hassan was the only time he had sexual relations with anybody in his office or while on duty. Once Greene admitted to having “consensual” sexual relations with Hassan in his office while on duty, Shaw terminated Greene. Hassan did not provide the district court with any evidence that Greene was improperly trained or supervised other than her allegation of rape. The summary judgment record does not contain the SPD’s training manuals or policies, nor does it reveal evidence that Shaw knew about any prior inappropriate sexual behavior by Greene. Importantly, Shaw was not deposed.

Tellingly, when pressed during oral argument before this court, Hassan could not point to record evidence of Shaw’s knowledge beyond Gipson’s invocation of his Fifth Amendment right. The attenuated adverse inferences drawn from vague deposition questions are insufficient to establish a genuine issue of material fact. *See State Farm Life Ins. Co. v. Gutterman*, 896 F.2d 116, 119 (5th Cir. 1990) (holding that the guardian was unable to meet his burden of showing that disputed issues of material fact remained when the only support he was able to offer was the widow’s assertion of her Fifth Amendment rights during her deposition); *see also United States v. White*, 589 F.2d 1283, 1287 (5th Cir. 1979) (citation omitted) (“[W]e accept the proposition that []

[rendering] summary judgment merely because of the invocation of the [F]ifth [A]mendment would unduly penalize the employment of the privilege.”).

The summary judgment record is also insufficient to create a genuine dispute of material fact as to whether Shaw acted with deliberate indifference. Pertaining to training and supervising subordinates, stronger and more robust evidence of a violation has not necessitated the denial of qualified immunity. *See Rivera v. Bonner*, 691 F. App'x 234, 236–43 (5th Cir. 2017) (granting qualified immunity on allegations of inadequate training and supervision claims when a prior sexual assault by another jailer occurred approximately six months before the sexual assault in question). This court has also declined to find deliberate indifference as to excessive force claims where the officer in question had a history generally suggestive of future misconduct and the employer knew of the particular officer's propensities for violence or recklessness. *See Roberts v. City of Shreveport*, 397 F.3d 287, 294–96 (5th Cir. 2005) (holding there was no deliberate indifference by a supervising official who had received complaints about an officer brandishing his firearm when that officer later shot and killed a driver because propensity for displaying a firearm is “fundamentally different” from propensity to use deadly force). Because there is no evidence in the summary judgment record to convey that Shaw was even “aware of facts from which the inference could be drawn that a substantial risk of serious harm exist[ed],” Shaw's actions do not rise to the level of deliberate indifference. *Estate of Davis ex rel. McCully*, 406 F.3d at 381.

Based on the foregoing reasons, we find that Shaw, in his individual capacity, is entitled to qualified immunity on Hassan's claims.

III.

We REVERSE the district court's denial of summary judgment on Hassan's claims against Shaw in his individual capacity and RENDER summary judgment as to those claims.