UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-7407

TYLENA LAW,

Plaintiff-Appellant,

VERSUS

BOBBIE HOUSTON, et al.,

Defendants,

CITY OF JACKSON, MISSISSIPPI,

Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Mississippi
(CA-J91-714(W)(N))

(December 6, 1994)

Before JONES, DeMOSS, Circuit Judges, and BUNTON*, District Judge.

PER CURIAM:**

On December 7, 1990, Tylena Law was arrested for an alleged simple trespass in the City of Flowood, Mississippi and taken to the Jackson Detention Center. Upon arrival, Law was booked into the Detention Center; however, it was discovered the booking officer failed to remove a gold necklace from Law.

Two female detention officers, Bobbie Houston and Rosemary Harper, transported Law from

---

* District Judge of the Western District of Texas, sitting by designation.

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

her holding cell into the booking area and attempted to remove the gold necklace from around Law's neck. A struggle ensued between Law and the officers during which Houston drew out and began striking Law with a Monadnock PR-24 police baton or "billy club." Houston struck Law approximately nine times in the presence of other detention officers. The incident was video taped by a security camera in the booking area of the Detention Center.

On December 4, 1991, Law filed suit in the United States District Court for the Southern District of Mississippi, Jackson Division, against Bobbie Houston, Rosemary Harper and the City of Jackson, Mississippi. The suit alleged violations of 42 U.S.C. § 1983 and state law claims of assault and battery. Following an extended period of discovery, the City of Jackson filed a motion to dismiss, or in the alternative, for summary judgment. The District Court held a hearing on the motion, considered briefs, testimony, and arguments of counsel. Ultimately, the District Court granted summary judgment in favor of the City of Jackson based upon the lack of evidence of "a widespread practice of any alleged beatings that should have placed the City on notice of such practices." Further, the District Court found "no evidence of a policy or custom in the City of Jackson or its Police Department which would deprive any citizen of their constitutional rights." Law appeals the District Court's decision.

Law asserts two issues before this Court. First, whether the City of Jackson was bound by the admissions it made during discovery; and second, whether the District Court erred in granting summary judgment in favor of the City of Jackson. We answer both of these issues in the affirmative.

Standard of Review for Summary Judgment

Summary judgment is proper under Rule 56 of the Federal Rules of Civil Procedure if there "is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Anderson v. Liberty Lobby Inc., 477 U.S. 242, 257 (1986). The non-movant "must present affirmative evidence in order to defeat a properly supported motion for summary judgment."

Id. This requires the non-movant to "make a showing sufficient to establish the existence of an[y] element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex v. Catrett, 477 U.S. 217, 322-23 (1986). This Court's standard for reviewing a summary judgment on appeal is the same as that applied by the District Court, and it must be based on the evidence which was presented at the District Court. Sanders v. English, 950 F.2d 1152, 1159 (5th Cir. 1992); Reid v. State Farm Mutual Auto Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986). Thus, the Court reviews a grant of summary judgment de novo and in the light most favorable to the non-movant. Norman v. Apache Corp., 19 F.3d 1017, 1021 (5th Cir. 1994); Forsyth v. Barr, 19 F.3d 1527, 1533 (5th Cir. 1994).

Lastly, in determining whether there are any genuine issues of material fact which would preclude a granting of summary judgment, the Court must first consult the applicable substantive law in this case to ascertain the material factual issues. Harper v. Harris County, Texas, 21 F.3d 597, 600 (5th Cir. 1994).

Discussion

I. Municipal Liability under 42 U.S.C. § 1983

In order to establish liability on the part of the City of Jackson, the Appellant, Law, is required to demonstrate either a policy or custom which caused the constitutional deprivation of her rights. Section 1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

42 U.S.C. § 1983 (1994). The Supreme Court in Monell v. Department of Social Services, 436 U.S. 658 (1978) held that local governments may be the targets of a § 1983 action where official policy

or governmental custom is responsible for a deprivation of rights protected by the Constitution. However, Monell specifically rejected governmental respondeat superior liability under § 1983 concluding:

> [A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

436 U.S. at 694; see also, Oklahoma City v. Tuttle, 471 U.S. 808, 817-18 (1985). The Fifth Circuit has interpreted the Monell decision to show that isolated violations by a police officer are not viewed as persistent or repeated violations constituting policy or custom, Bennett v. City of Slidell, 728 F.2d 762, 768, n.3 (5th Cir. 1984); nor is a city to be held liable for the negligence or gross negligence of its police chief or city officials in failing to properly train a particular police officer who caused an alleged injury. Languirand v. Hayden, 717 F.2d 220, 227 (5th Cir. 1983). Therefore, under existing law, the only way to hold a local government liable for violations of § 1983 is to prove that the action was an established policy or custom carried out by either a lawmaker or official representative of that local government. Moreover, if there is no demonstration of a policy or custom which has caused a deprivation of constitutional rights, there can be "no arguable basis in fact." Macias v. Raul A. (Unknown), Badge No. 153, 23 F.3d 94, 99 (5th Cir. 1994)(dismissing a claim in which plaintiff failed to identify any evidence of a policy or custom by the San Antonio Police Department depriving a constitutional right). Law contends the City of Jackson has conclusively stated such an unconstitutional policy or custom exists.

II. Factual Issue

Law argues there is a genuine issue of material fact in the case which precludes summary judgment. According to Law, it was error for the District Court to grant summary judgment in light of the City of Jackson's responses to Law's requests for admission.

In particular, the City of Jackson offered the following responses to Law's requests:

REQUEST NO. 2: Admit or deny that the force used on Tylena Law on December 7, 1990, was excessive under the circumstances.

RESPONSE: Denied.

REQUEST NO. 3: Admit or deny that it is the position of the City of Jackson that the force used on Tylena Law by Bobbie Houston and Rosemary Harper was not excessive.

RESPONSE: Admitted.

REQUEST NO. 4: Admit or deny that on December 7, 1990, Bobbie Houston acted within established police department policies when she struck Tylena Law with her club.

RESPONSE: Admitted.

Law argues the response to admission number 4 conclusively establishes that the City of Jackson has a policy or custom in contravention of Law's constitutional rights under 42 U.S.C. § 1983.

III. Effect of Admissions under Rule 36

The City of Jackson argues that it is clear from the tenor of the Responses that no admission of a policy allowing constitutional violations was in effect or ever will be in effect. The City of Jackson further argues the admission only proves that when police are equipped with weapons or equipment, that it is the policy to use the weapons or equipment for which they were designed. Along with the motion for summary judgment, the City of Jackson filed several affidavits, including ones by the Mayor, a City Councilman, and the Chief of Police, all stating there are no policies or customs by the City of Jackson which violate any constitutional rights.

Rule 36 of the Federal Rules of Civil Procedure provides that "[a]ny matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." Fed. R. Civ. P. 36. Although the Rule explicitly permits withdrawal or amendment of the admission, the City of Jackson failed to make any attempt to do so. Furthermore, the Fifth Circuit has observed that "[a]n admission that is not withdrawn or amended cannot be rebutted by contrary testimony or ignored by the district court . . . ." American Automobile Assoc. v. AAA Legal Clinic, 930 F.2d 1117, 1120 (5th Cir. 1991).

The purpose of Rule 36 is to dispose of the need to present evidence on a matter that has been admitted. Id. Because the City of Jackson never moved to withdraw or amend its response to admission number 4, Law was not put on notice that additional discovery might be needed regarding the City of Jackson's policies. More importantly, with its response to admission number 4, the City of Jackson has conclusively established that Houston acted within police department policies when she struck Law with the PR-24 police baton.

The affidavits offered by the City of Jackson in an attempt to undo the effects of the response to admission number 4 are ineffectual against the weight of the unopposed admission. "Affidavits and depositions entered . . . that attempt to establish issues of fact cannot refute [an] admission." United States v. Kasuboski, 834 F.2d 1345, 1350 (7th Cir. 1987); accord, Karras v. Karras, 16 F.3d 245, 247 (8th Cir. 1994). Rule 36 allows both parties to restrict the issues to be resolved at trial by effectively eliminating all matters which both parties agree upon. Kasuboski, 834 F.2d at 1350. Such reasoning is echoed by the advisory committee for Rule 36 when they observed that "[u]nless the party securing an admission can depend on its binding effect, he cannot safely avoid the expense of preparing to prove the very matters on which he has secured the admission, and the purpose of the rule is defeated." Fed. R. Civ. P. 36 advisory committee's note. Consequently, in the light most favorable to Law, the response to admission number 4 must be accepted as binding, thereby creating an issue of fact.

Conclusion

The District Court erroneously granted summary judgment in the present case. The effect of the City of Jackson's response to admission number 4, coupled with the binding force of Rule 36, allow for a genuine issue of material fact precluding summary judgment. For the foregoing reasons, we REVERSE and REMAND the District Court's granting of summary judgment to Bobbie Houston, Rosemary Harper and the City of Jackson.