

MARK GARBER, Plaintiff, v. CHIEF THERON BOWMAN, et al., Defendants.

Civil Action No. 4:02-CV-763-BE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION

December 10, 2003, Decided

December 10, 2003, Filed

SUBSEQUENT HISTORY: Summary judgment granted by *Garber v. Chief Theron Bowman*, 2003 U.S. Dist. LEXIS 22482 (N.D. Tex., Dec. 10, 2003)

DISPOSITION: Defendant Bowman's motion for summary judgment granted.

COUNSEL: For Mark Garber, Plaintiff: Terry D Hickey, Law Office of Terry D Hickey, Fort Worth, TX, LEAD ATTORNEY.

For Theron Bowman, Defendant: David A Palmer, Cantey & Hanger, Fort Worth, TX, LEAD ATTORNEY. John C Stewart, Cantey & Hanger, Fort Worth, TX, LEAD ATTORNEY.

For City of Arlington, Defendant: Frank Waite, Arlington City Attorney's Office, Arlington, TX, LEAD ATTORNEY. Elizabeth Ann Lutton, Arlington City of City Attorney's Office, Arlington, TX.

JUDGES: CHARLES BLEIL, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: CHARLES BLEIL

OPINION

MEMORANDUM OPINION AND ORDER

Pending before the court is Defendant Theron Bowman's Motion for Summary Judgment. Having considered the motion, Plaintiff's response, and the evidence submitted, the Court finds that the motion should be granted for the reasons stated below.

A. STATEMENT OF THE CASE

Plaintiff Mark Garber, a former sergeant with the Arlington Police Department, filed suit against Arlington Chief of Police Theron Bowman and the City of Arlington in state court on August 16, 2002. The action was removed to federal court on September 13, 2002, based on the presence of a federal question. 28 U.S.C. §§ 1331, 1441(b).

Garber's suit arises out of the manner in which Bowman and the City handled the media attention and administered discipline after the shooting death of an Arlington police officer during a training demonstration. Garber joined the City of Arlington's police department in 1993, and was promoted to the rank of Sergeant in 1999. (Garber App. at 19, P1). Garber was the Sergeant in charge of the police department's Special Operations Division ("Special Ops"), and was supervising the Active Shooter Training that was being conducted by Special Ops. (Garber App. at 19, P2). One portion of the exercise involved a demonstration of "Simunition," a non-lethal projectile used in converted weapons. (Bowman App. at 2, P4). Garber allowed instructors, other than those playing the roles of "aggressors" in the training exercise, to retain loaded weapons during training, including the instructor demonstrating Simunition. (Bowman App. at 16; Garber App. at 22). On June 7, 2001, Garber was called away from the training exercise and left Officer Johnny Spruiel in charge of the Simunition demonstration. (Garber App. at 19). Officer Blane Shaw was assisting Spruiel. Spruiel decided to allow a Simunition demonstration on a person, rather than an inanimate object, and Corporal Joey Cushman volunteered to be the target. (Garber App. at 22, PP30-31). Spruiel picked up a converted shotgun, aimed and fired at Cushman, who was dressed in safety gear, but the Simunition missed Cushman. Shaw had been carrying a converted pistol that was loaded with Simunition ammunition during the demonstration, but at some point placed the converted pistol on a table in the classroom. After Spruiel missed, Shaw decided to complete the demonstration, but apparently forgetting that he had laid down the converted pistol, drew his loaded duty weapon and fired at Cushman, striking Cushman in the head and killing him. (Garber App. at 31-33; Bowman App. at 2).

Five members of the police department were the subjects of an Internal Affairs (IA) investigation: Garber, Shaw, Spruiel, Lieutenant Roy Mitchell, and Deputy Chief Jerry Kendrick. ¹ (Bowman App. at 3). Spruiel is African American, but the remaining officers are Anglo American. The IA investigator, Lieutenant Fred Collie, is an Anglo American. (Bowman App. at 4). He found that Spruiel should be exonerated from the charge of using

poor judgment in the performance of duty, the only charge of misconduct lodged against Spruiel, but found evidence of rule violations or other misconduct by each of the remaining four officers. More specifically, Collie found evidence to sustain the charges that Garber committed misconduct in judgment and misconduct in planning for failing to prohibit the instructor demonstrating Simunition during the Active Shooter Training sessions from remaining armed with a loaded duty weapon. (Bowman App. at 10; Garber App. at 62-63). Collie forwarded his findings to Police Chief Theron Bowman for the assessment of disciplinary action. Bowman is African American. Bowman assessed no discipline against Spruiel, but demoted Garber to the rank of patrol officer effective August 27, 2001. (Bowman App. at 4, 57; Garber App. at 5, 16). Bowman also demoted Kendrick, and gave Mitchell a written reprimand. Bowman terminated Shaw. (Bowman App. at 4).

1 Mitchell was the Lieutenant over Special Ops, while Kendrick was the Deputy Chief for the Operations Support Division, which included Special Ops. (Bowman App. at 13).

Garber resigned from the police department in April 2002. (Bowman App. at 58). He brings suit asserting that he is the victim of racial discrimination in employment that resulted in his demotion and constructive discharge from the City's police department. He contends that Bowman is liable under 42 U.S.C. § 1983 for damage to his reputation and standing in the community, acts of racial discrimination by a public employer, and violation of equal protection and due process guarantees. In addition, Garber has raised a number of intentional tort claims against Bowman individually, including intentional infliction of emotional distress, statutory libel, libel per se, slander, and defamation.

B. STANDARD OF REVIEW

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *FED. R. CIV. P. 56(c)*; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S. Ct. 2505, 2509-10, 91 L. Ed. 2d 202 (1986). The court views all of the evidence and inferences therefrom in the light most favorable to the nonmovant. *Hibernia Nat'l Bank v. Carner*, 997 F.2d 94, 97 (5th Cir. 1993).

The movant bears the initial burden of showing that no genuine issue of material fact exists, but once the movant makes such a showing, the burden shifts to the

nonmovant to produce competent summary judgment evidence of the existence of a genuine issue of material fact. *Anderson*, 477 U.S. at 256-57, 106 S. Ct. at 2514, 91 L. Ed. 2d 202. An issue is genuine if there is sufficient evidence for a reasonable jury to return a verdict in favor of the nonmovant. *Id.* at 248, 106 S. Ct. at 2510. A fact is material if its resolution would affect the outcome of the suit under the governing law. *Id.*

C. DISCUSSION

1. Section 1983

Garber alleges that he was denied due process when Bowman decided to demote him, thus depriving him of a property and liberty interest in the right to pursue his chosen employment. He also asserts that he was denied equal protection under the law as a result of Bowman's practice of reverse racial discrimination for individuals under his command.²

2 Garber's Second Amended Complaint also contains a cause of action under Title VII for discrimination based on race; however, there is no individual liability for employees under Title VII, and a plaintiff is not entitled to maintain a Title VII action against both an employer and its agent in an official capacity. *Smith v. Amedisys Inc.*, 298 F.3d 434, 448-49 (5th Cir. 2002). *Huckabay v. Moore*, 142 F.3d 233, 241 (5th Cir. 1998). Garber's claims against Bowman in his official capacity have previously been dismissed.

Section 1983 provides that any person who, under color of state law, deprives another of rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured. 42 U.S.C. § 1983. *Section 1983* does not create substantive rights, but only provides a remedy for the rights that it designates. *Harrington v. Harris*, 118 F.3d 359, 365 (5th Cir. 1997).

Public officials violate substantive due process rights if they act arbitrarily or capriciously.³ *Spuler v. Pickar*, 958 F.2d 103, 107-108 (5th Cir. 1992). But the evidence here does not raise a fact question about the arbitrary or capricious nature of Bowman's decision to demote Garber. Garber does not dispute that he was the supervisor of the Active Shooting Training program, that he had permitted instructors to retain their loaded duty weapons during the training sessions, and that he had no written protocol prohibiting this practice. He does not dispute that he was the subject of an internal affairs investigation, that discipline was imposed based on those findings, or that he participated in an extensive multi-level review process to appeal his demotion. Nor has Garber demonstrated that a demotion was an arbitrary or capricious choice just because Spruiel was not discipl-

lined. Bowman had reasonable grounds for not disciplining Spruiel after the internal affairs investigation exonerated him. (Garber App. at 68).

3 The court does not interpret Garber's Second Amended Complaint as raising a procedural due process claim against Bowman, but to the extent Garber is attempting to raise such a claim, it would fail for the same reasons set out in the court's memorandum opinion and order issued in this same civil action that grants the City of Arlington's motion for summary judgment.

Garber asserts that Bowman's disciplinary decision could only be motivated by race, especially when Spruiel was exonerated even though he was the officer in charge at the time of the shooting. There is a Constitutional right to be free from racial discrimination by a public employer. *Southard v. Texas Bd. of Criminal Justice*, 114 F.3d 539, 549-50 (5th Cir. 1997). See, e.g., *Felton v. Polles*, 315 F.3d 470 (5th Cir. 2002). However, Garber has no evidence to suggest that he and Spruiel were in similar circumstances. Garber was the supervisor who permitted instructors to retain live weapons during the training sessions-including the instructor who performed the Simunition demonstration. Spruiel was not charged with misconduct in allowing instructors to retain their weapons because this was a practice permitted by Garber, the higher ranking officer. (Bowman App. at 82). Spruiel was charged with misconduct in altering the demonstration to use a person as the target for the Simunition demonstration. He was exonerated because his choice was within his granted authority and because Simunition was designed to be used on people without harming them. (Garber App. at 13, 85). This distinction between Garber's role and Spruiel's role in the Active Shooter Training accounts for the difference in the outcome of the IA investigations of both officers. Cf. *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 221 (5th Cir. 2001), cert. denied, 535 U.S. 1078, 152 L. Ed. 2d 1022 (2002).

Garber also asserted in his complaint that Bowman has an established practice or policy of treating minority officers more leniently. He accuses Bowman of extending the probationary periods for minority officers, but not Anglo American officers, while Bowman responds that he makes his probation decisions based on the recommendations of the Training Officers. (Garber App. at 14-15). Garber names two minority officers who were granted extensions of their respective probationary periods, but provides no details about the reasons for these extensions or any information about Anglo American officers who were denied extensions; therefore, no effective comparison can be made in Bowman's treatment of the two groups. (Bowman App. at 76-78). Furthermore,

Garber successfully completed his probationary period with the police department. (Garber App. at 22, P32).

Garber also complains that Bowman requires that an officer have a college degree to be eligible for a promotion in rank. Garber does not discuss why this requirement is racially discriminatory and gives no examples of instances when this requirement was not applied across the board to any candidate for promotion. Additionally, Garber has a bachelor's degree and does not demonstrate that the requirement of a college degree affected his employment with the police department. (Bowman App. at 75).

There is no genuine issue of material fact concerning the arbitrary or capricious nature of the disciplinary action imposed against Garber. Although other decision makers might have taken different disciplinary action against Garber or foregone any discipline at all, the Due Process Clause of the *Fourteenth Amendment* is not a guarantee against incorrect or ill-advised personnel decisions. *Bishop v. Wood*, 426 U.S. 341, 350, 96 S. Ct. 2074, 2080, 48 L. Ed. 2d 684 (1976). Garber also fails to raise a viable equal protection claim against Bowman because there is no genuine issue of material fact about a racial motivation for the demotion.

2. Intentional Torts

Bowman asserts that he is entitled to statutory immunity, absolute immunity, or qualified immunity from Garber's causes of action for intentional infliction of emotional distress, libel, slander, and defamation.

Bowman asserts that *Section 101.106* of the Texas Civil Practice and Remedies Code grants him immunity from Garber's tort claims because these same claims against the City have been dismissed.

A judgment in an action or a settlement of a claim under this chapter bars any action involving the same subject matter by the claimant against the employee of the governmental unit whose act or omission gave rise to the claim.

Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 2003 Gen. Sess. Laws 7219 (amended 2003)(current version codified at *TEX. CIV. PRAC. & REM. CODE ANN. § 101.106*). This derivative immunity operates as a bar to even intentional tort claims. See *Newman v. Obersteller*, 960 S.W.2d 621, 622-23, 40 Tex. Sup. Ct. J. 497 (Tex. 1997); *Liu v. City of San Antonio*, 88 S.W.3d 737, 744 (Tex. App.--San Antonio 2002, pet. denied). The court dismissed Garber's intentional tort claims against the City in an order dated February 21, 2003. It is unclear whether the operation of the statute requires a *final*

judgment for or against the employer before the employee is entitled to dismissal of the same claims. See *Resendez v. Johnson*, 52 S.W.3d 689, 44 Tex. Sup. Ct. J. 336 (Tex. 2001). On at least one occasion this court has found this to be the case. See *Jones v. Meyer*, Civil Action No. 2001 U.S. Dist. LEXIS 3711, 3:97-CV-1907-H (N.D. Tex. March 23, 2001)(order denying partial motion for summary judgment). But the court finds the facts in the *Jones* case to be distinguishable because Judge Sanders was addressing only a partial motion for summary judgment. In comparison, the court has granted summary judgment in favor of the City of Arlington and disposed of all remaining claims and causes of action against the City. Likewise, the claims remaining against Bowman have been decided and rejected in this memorandum opinion save this issue of statutory or derivative immunity. The court can find no case law prohibiting the entry of final judgment for or against an employer with a simultaneous final judgment for the employee in accordance with *Section 101.106* of the Civil Practice and Remedies Code, nor are the interests of judicial economy served by doing otherwise. Bowman enjoys derivative immunity from liability for Garber's intentional tort claims.

Alternatively, the court agrees with Bowman that he cannot be liable for claims of statutory libel, libel per se, slander, and defamation because the alleged defamatory statements are protected by absolute privilege. Garber contends that Bowman is not correct because Bowman did not occupy a legislative or judicial office.

Comments made to the press by high-ranking governmental officials concerning personnel matters, such as the reasons for a governmental employee's termina-

tion, are absolutely privileged. *City of Cockrell Hill v. Johnson*, 48 S.W.3d 887, 898 (Tex. App.-Fort Worth 2001, *pet. denied*). In addition, the operation of a police department, including personnel matters such as the hiring and firing of city employees, is considered a governmental function. *City of LaPorte v. Barfield*, 898 S.W.2d 288, 291, 38 Tex. Sup. Ct. J. 533 (Tex.1995); *City of Dallas v. Moreau*, 718 S.W.2d 776, 779 (Tex.App.--Corpus Christi 1986, *writ ref'd n.r.e.*). Texas law provides that a city is immune from a suit for libel and slander where the alleged defamation occurred in the performance of a governmental function, and this immunity extends to city officials acting in their official capacities. *Rosenstein v. City of Dallas*, 876 F.2d 392, 397 (5th Cir.1989)(citing *Moreau*, 718 S.W.2d at 778-79); *Cockrell Hill*, 48 S.W.3d at 898-899. The court finds that this same immunity extends to Bowman with regard to Garber's complaints of defamatory remarks made to the press following the Cushman shooting.⁴

4 The court finds it unnecessary to address Bowman's contention that he is entitled to qualified immunity from liability for the intentional torts raised in Garber's complaint.

ORDER

It is ORDERED that Defendant Bowman's motion for summary judgment is granted.

SIGNED DECEMBER 10, 2003.

CHARLES BLEIL

UNITED STATES MAGISTRATE JUDGE