John Doe v. Dearborn Public Schools
2008 WL 896066 (E.D. Mich 2008)

DENISE PAGE HOOD, District Judge.

BACKGROUND/FACTS

Plaintiffs Michael Helisek, Scott Hummel and Christopher Grodzicki allege in their Complaint, removed to this Court by Defendants, Dearborn Public Schools and Gail Lynn Shenkman, principal of Dearborn High School, that Defendants violated MICH. COMP. LAWS § 750.539d, Count I; committed Invasion of Privacy, Count II; intentionally inflicted emotional distress upon Plaintiffs, Count III; violated 42 U.S.C. § 1983 by violating Plaintiffs' Fourth Amendment right to be free from unreasonable searches, Count IV; and committed gross negligence, Count V.[1]

[1] On June 16, 2006, the Plaintiffs' moved for this Court to issue a Protective Order to proceed pseudonymously. On August 30, 2006, the Court denied Plaintiffs' Motion.

Plaintiffs are tenured male physical education teachers employed by Dearborn Public Schools at Dearborn High School. Plaintiffs initiated the instant matter after a student discovered the presence of a hidden video camera within the staff office which was located inside, but separated from, the male locker room at the high school. Access to the office is available by way of two doors, one door, which remains locked at all times, leads to the training room, which is also enclosed within the boys' locker room, and the other door leads to the boys locker room. (Plfs.' Br. in Opp'n to Defs.' Mot. for Summ. J., Ex. J) The door that leads to the boys locker room is locked when no staff is in the office. (Id. at Exs. B, C and D) However, when staff are in the office the door is unlocked and left open so that students may freely enter and confer with their physical education instructors. (Defs.' Mot. for Summ. J., Deposition of Scott Hummel) The office also has two windows that look out onto the boys' locker room.

In 2004-2005, the high school was experiencing thefts from the boys' locker room. Defendants claim that a pattern was starting to emerge indicating that the thefts were occurring during the fifth hour period, which was Plaintiff Helisek's preparation time. Mr. Michael Shelton, Assistant Principal, testified that he became concerned that Plaintiff Helisek was involved in the thefts. (Shelton Dep., pp. 14, 29-31) Mr. Shelton approached Defendant Shenkman and the police liaison about his concerns. They agreed that a hidden camera would be installed in the office. (Shenkman Dep., pp. 27-28) Defendant Shenkman believed that the camera would catch Plaintiff Helisek, or the other teachers, when they placed the objects taken from the boys' lockers into their desks. (Shelton Dep ., pp. 36-37) Defendant Shenkman directed the security director, Don Ball, to install the cameras in the offices. Two cameras were placed in the office. (Ball Dep., pp. 61-62)

Mr. Ball testified that in 2005 and 2006, there was only one monitor, which was part of a DVR, to monitor all the video cameras in the school, including the security cameras which covered the parking lots and corridor areas. (Ball Dep., pp. 78-80) The monitor was located in the main office copy room and could display images from the concealed camera and the other various cameras around the building. (Ball Dep., pp. 56, 64) Mr. Ball testified that the first DVR (Model 7000) had 16 slots, one for each camera. (Ball Dep., pp. 79-80) The 7000 DVR was later replaced with two 8000 DVRs in 2006. Each 8000 DVR also had 16 slots; the two 8000 DVRs had the capacity to monitor 32 cameras.

(Ball Dep., pp. 79-80) When he left on May 16, 2005, there were no images of the Plaintiffs' office being shown since he did not plug in the video surveillance from this particular video camera. (Ball Dep., p. 96) Although the school installed two new upgraded DVRs in February 2006, Mr. Ball testified that the lead from the camera in the Plaintiffs' office was not plugged into the DVR, therefore, no image of the office was being shown. (Ball Dep., pp. 97-98) Mr. Ball testified that the system does record live images on the disc but that the storage capacity was 30 days. (Ball Dep., p. 57) This meant that on the 31st day, the 1st day was recorded over and that the "looping" is automatic. (Ball Dep., p. 57) The images from the DVR could be recorded or burned onto a CD. (Ball Dep., p. 75) The three persons who had access to the security system were Defendant Shenkman, Mr. Ball, and Mr. Shelton. (Shenkman Dep., pp. 67-68)

Mr. Shelton testified that there was a request to have the data captured by the camera in Plaintiffs' office deleted. (Shelton Dep., p. 43) Mr. Shelton testified that he remembers seeing an image of Plaintiff Helisek sitting at his desk in his office on the monitor. (Shelton Dep., p. 44)

On March 10, 2006, a student entered Plaintiffs' office and saw the camera in the ceiling tile. Upon learning of the camera, Plaintiffs Helisek and Hummel went to Defendant Shenkman's office to complain about the camera. (Hummel Dep., p. 27) Defendant Shenkman discussed the situation with the Director of Human Resources, Thomas D. Rafferty, and a decision was made to remove the cameras. (Rafferty Dep., pp. 33-34)

ANALYSIS

Plaintiffs' § 1983 claim (Count IV)
Qualified Immunity-Defendant Shenkman

Defendants claim that Defendant Shenkman is entitled to qualified immunity. Plaintiffs' brief states that Defendant Shenkman directed the actual placement and ultimate removal of the cameras. (Pl.'s Br ., pp. 11-12) Plaintiffs do not expressly address qualified immunity under § 1983 in their response brief, only governmental immunity under M.C.L. § 691.1407 for state law violations. Qualified and governmental immunities are two separate defenses and require two separate analysis.

Government officials are entitled to qualified immunity where their actions do not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." Green v. Reeves, 80 F.3d 1101, 1104 (6th Cir.1996) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). A government official will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that [the action at issue was lawful]; but if the officer of reasonable competence could disagree on this issue, immunity should be recognized. Malley v. Briggs, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). Qualified immunity is an initial threshold question the court is required to rule on early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive. Saucier v. Katz, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). The privilege is "an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." Id.

The first inquiry to determine qualified immunity is, taken in the light most favorable to the party asserting the injury, do the facts alleged show the official's conduct violated a constitutional right. Siegert v. Gilley, 500 U.S. 226, 232, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991). "To successfully state a claim under 42 U.S.C. § 1983, a plaintiff must identify a right secured by the United States Constitution and the deprivation of that right by a person acting under color of state law." Russo v. City of Cincinnati, 953 F.2d 1036 (6th Cir.1992). The following requirements must be met: (1) the conduct at issue must have been under color of state law; (2) the conduct must have caused a deprivation of constitutional rights; and (3) the deprivation must have occurred without due process of law. Nishiyama v. Dickson County, 814 F.2d 277, 279 (6th Cir.1987). As § 1983 is not itself a source of substantive rights, and only a method for vindicating federal rights elsewhere conferred, a plaintiff must set forth specific constitutional grounds for asserting a § 1983 claim. Graham v. Connor, 490 U.S. 386, 393-94, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989); Baker v. McCollan, 443 U.S. 137, 144 n. 3, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979).

If no constitutional right would have been violated, there is no necessity for further inquiries concerning qualified immunity. Saucier, 533 U.S. at 201. If a violation could be made out, the next step is to determine whether the right was clearly established in light of the specific context of the case, not as a broad general proposition. Id. Under the doctrine of qualified immunity, an official will not be found personally liable for money damages unless the official's actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818. The "clearly established" rights allegedly violated by the official cannot be considered at an abstract level, but must be approached at a level of specificity, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). "Reasonableness" is a question of law to be decided by the trial court. Jeffers v. Heavrin, 10 F.3d 380 (6th Cir.1993).

Constitutional Right

Plaintiffs meet the first requirement of a § 1983 claim against Defendant Shenkman because there is no dispute that Defendant Shenkman is a state actor in her capacity as the principal of Defendant Dearborn Public Schools.

The second requirement discussed in this section is whether Plaintiffs have stated a constitutional violation. Defendants assert that Plaintiffs did not have a reasonable expectation of privacy in their office. Plaintiffs claim they have a reasonable expectation of privacy in their office and an expectation not to be video taped in their office.

The Fourth Amendment, applicable to the States through the Fourteenth Amendment's Due Process Clause, prohibits government actors from conducting unreasonable searches and seizures. New Jersey v. T.L. O., 469 U.S. 325, 334-35, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). The occurrence of a "search" is defined in terms of whether a person had a "constitutionally protected reasonable expectation of privacy." Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) When interpreting the Katz definition, a "reasonable expectation of privacy" exists when: (1) "the individual [has] manifested a subjective expectation of privacy in the object of the challenged search" and (2) "society [is] willing to recognize that expectation as reasonable." California v. Ciraolo, 476 U.S. 207, 211, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986).

The second prong of the Katz test generally addresses two considerations. The first consideration focuses on "what a person had an expectation of privacy in, for example, a home, office, phone booth or airplane." Dow Chemical Co. v. United States, 749 F.2d 307, 312 (6th Cir.1984); see also Oliver v. United States, 466 U.S. 170, 178, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984) (noting "our societal understanding that certain areas deserve the most scrupulous protection from government invasion"); United States v. White, 401 U.S. 745, 786, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971) (Harlan, J., dissenting) (assessing "the individual's sense of security"). This inquiry centers on "whether the human relationships that normally exist at the place inspected are based on intimacy, confidentiality, trust or solitude and hence give rise to a 'reasonable' expectation of privacy." Dow Chemical Co., 749 F.2d at 312.

The second consideration of the second prong examines "what the person wanted to protect his privacy from, for example, non-family members, non-employees of a firm, strangers passing by on the street or flying overhead in airplanes." Id. (emphasis in original); see also Oliver, 466 U.S. at 178 (discussing "government invasion" and "arbitrary government interference"); White, 401 U.S. at 762 (asking whether, in a particular situation, "self-restraint by law enforcement officials [is] an inadequate protection"). This inquiry, therefore, focuses on the government intrusion at issue. The United States Supreme Court has held that the Fourth Amendment governs the conduct of school officials and that searches and seizures by government employees or supervisors of the private property of their employees are subject to the constraints of the Fourth Amendment. O'Connor v. Ortega, 480 U.S. 709, 715-17, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987). The Supreme Court has acknowledged that society recognizes that a person enjoys a reasonable expectation of privacy in an office, even in a shared office. Id. at 716-17.

Addressing the first prong of the Katz test, Plaintiffs have established subjective expectations of privacy in the object of the challenged search. Plaintiffs claim they are entitled to privacy in their office and/or locker room.

As to the second prong of the Katz test, Plaintiffs have sufficiently provided evidence that they have an expectation of privacy in their locker room/office and from the students and other staff members to change or to do some office work. The locker room/office contains lockers provided by the school so that Plaintiffs could change their clothes. The locker room/office can only be accessed from the boys' locker room and is contained within the boys' locker room. Plaintiffs use the office at least three times a week to change their clothes from street clothes to athletic clothes and to disrobe in order to shower after conducting physical education classes or working out in the school's fitness room. (Ex. B, Grodzicki Dep.; Ex. C, Hummel Dep.; Ex. D, Helisek Dep.) The office was for the exclusive use of the male physical education teachers. (Ex. E, Rafferty Dep.) Even if the Plaintiffs did not use the office to change their clothes, Plaintiffs still had a reasonable expectation of privacy in the office, as noted by the Supreme Court in O'Connor, in light of the fact that the office was a room contained in the boys' locker room and was for the exclusive use of the male physical education teachers.

Regarding the issue of the reasonableness of the search, "[d]etermining the reasonableness of any search involves a twofold inquiry: first, one must consider 'whether the ... action was justified at its inception,' Terry v. Ohio, 392 U.S. [1], at 20, 88 S.Ct. 1868, 20 L.Ed.2d 889; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place,' ibid." T.L.O., 469 U.S. at 341. Ordinarily, a search of an employee's office by a supervisor will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a noninvestigatory work-related purpose

such as to retrieve a needed file. The search will be permissible in its scope when "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of ... the nature of the [misconduct]." Id. at 342.

Although at its inception, the videotape search may have been justified to determine whether Plaintiff Helisek was stealing, as argued by Defendants, there are genuine issues of fact as to whether the measures adopted were reasonably related to the objectives of the search. There were other teachers who share the office with Plaintiff Helisek who were not suspected in the alleged thefts. Also, the search may have been excessively intrusive since there is testimony submitted that the office was also used by Plaintiffs and referees to change their clothing. Although Defendants claim that no one saw a video live, Mr. Shelton, the Assistant Principal, testified he inadvertently saw an image from Plaintiffs' office. This statement does not make the search less intrusive since the images were recorded, for at least 30 days. The images could also be copied or burned onto a CD. The reason given for the installation of the camera was to "catch" Plaintiff Helisek in the act of stealing. What then is the purpose of video taping the office if no one is watching the monitor or reviewing the recorded images? Plaintiffs have sufficiently shown that they have a constitutional right to be free from unreasonable video searches of their shared office.

Clearly Established Right

The Court finds that based on the 1987 Supreme Court case of O'Connor noted above, Plaintiffs, as public employees, had a clearly established right to be free from unreasonableness searches by their employer and supervisor. Although neither the Sixth Circuit nor the Supreme Court have specifically addressed the role of video surveillance in a school office or locker room context, the Court notes that O'Connor clearly established that a public employee does have a constitutional right to be free from unreasonable searches by their public employer. "Video" surveillance is merely a method used in the search.

It is noted that Plaintiffs submitted on February 22, 2008, after briefing and oral arguments held in this matter, a recent Sixth Circuit case on video surveillance in a school locker room, Brannum v. Overton County School Board, 516 F.3d 489 (6th Cir. Feb.20, 2008). Although the case is persuasive, this Court has relied on the O'Connor case to reach its decision. However, the Court finds that the Brannum case is on point and may be applied to school district employees as well as students.

The Brannum case involved a video installation and surveillance in a boys' and girls' locker rooms in a middle school. The Sixth Circuit held that video surveillance is inherently intrusive and significantly invaded the students' reasonable expectations of privacy in the locker rooms. Id. at 496-97. The Sixth Circuit further held that although neither the Supreme Court nor the Sixth Circuit has specifically addressed the applicability of video surveillance to the Fourth Amendment's proscription against unreasonable searches, "[s]ome personal liberties are so fundamental to human dignity as to need no specific explication in our Constitution in order to ensure their protection against government invasion." Id. at 494-95, 499. The Sixth Circuit went on to state,

> Stated differently, and more specifically, a person of ordinary common sense, to say nothing of professional school administrators, would know without need for specific instruction from a federal court, that teenagers have an inherent personal dignity, a sense of decency and self-respect, and a sensitivity about their bodily privacy that are at the core of their personal liberty and that are grossly offended by their being surreptitiously videotaped while changing their clothes in a school locker room. These notions of personal privacy are "clearly established" in that they inhere in all of us, particularly middle school teenagers, and are inherent in the privacy component of the Fourth Amendment's proscription against unreasonable searches. But even if that were not self-evident, the cases we have discussed, supra, would lead a reasonable school administrator to conclude that the students' constitutionally protected privacy right not to be surreptitiously videotaped while changing their clothes is judicially clearly established. Id. at 499.

Based on the above analysis, Defendant Shenkman is not entitled to qualified immunity. Defendant Shenkman was the official who contacted the security director to effectuate the placement of two cameras in Plaintiffs' office. (Ball Dep., p. 26) Summary judgment is denied on Plaintiffs' § 1983 Fourth Amendment claim against Defendant Shenkman.

Municipal Liability

Defendants argue that Defendant Dearborn Public Schools must be dismissed since Plaintiffs cannot show that the Board of the Dearborn Public Schools had any knowledge of Defendant Shenkman's installation of the cameras nor can Plaintiffs show the Board had a policy with regard to the placement of video cameras in the teachers' office.

Plaintiffs respond that there is a question of fact whether Defendant Dearborn Public Schools had a policy of using covert cameras to detect theft, attaching the District's policy on "Plant Security" to their brief as Exhibit K. Plaintiffs also attached Mr. Rafferty's deposition which Plaintiffs claim demonstrates that the District has used covert cameras to detect theft in a school classroom.

In order for a municipality to be liable under Section 1983 there must be some evidence that "execution of [the] 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." Monell v. Department of Social Services, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). "[A] municipality cannot be held liable solely because it employs a tortfeasor-or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory." Id. at 691. Generally, the doctrine of respondeat superior has no application in a § 1983 claim absent an allegation that the defendants were following the government's policies or customs. Dunn v. Tennessee, 697 F.2d 121, 128 (6th Cir.1982). Rather, "the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution." Monell, 436 U.S. at 690. The Supreme Court has indicated that "municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances." Pembaur v. City of Cincinnati, 475 U.S. 469, 480, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986). However, "an 'official policy' is one adopted by someone with 'final authority to establish municipal policy with respect to the action ordered.' " Hull v. Cuyahoga Valley Joint Vocational Sch. Dist. Bd. of Educ., 926 F.2d 505, 515 (6th Cir.1991) (quoting Pembaur, 475 U.S. at 481) (emphasis

added). In other words, "[l]iability for unauthorized acts is personal; to hold the municipality liable, Monell tells us, the agent's action must implement rather than frustrate the government's policy." Id. Moreover, a municipal employee is not a "final policymaker" unless his decisions "are final and unreviewable and are not constrained by the official policies of superior officials." Feliciano v. City of Cleveland, 988 F.2d 649, 655 (6th Cir.1993).

Plaintiffs have failed to establish that the Dearborn School District, through its Board, had a custom or policy of installing video cameras in staff offices and/or locker rooms. Exhibit K to Plaintiffs' brief is the District's "Plant Security" Policy. The premise of the Policy is that the buildings of the District are a financial investment of the District and that the buildings and equipment owed by the Board shall be protected from theft and vandalism. (Ex. K, Plant Security) The Policy authorizes the Superintendent to develop and supervise security of the buildings, grounds and equipment, including video surveillance equipment in appropriate areas in District facilities. (Ex. K., Plant Security) This Policy does not show that the Defendant School District, through its Board, had a policy of installing video cameras in staff offices and/or locker rooms to detect thefts of individual personal items. The Policy focuses on theft and vandalism of District property.

Mr. Rafferty's deposition also does not show that the Defendant Dearborn School District had a policy of installing video cameras in staff offices and/or locker rooms to detect thefts. The one occasion noted by Mr. Rafferty in his deposition involved a camera in a classroom, not a staff office or a locker room. (Rafferty Dep., p. 36)

Plaintiffs have not shown that the Defendant Dearborn School District had a policy or custom of placing video surveillance in staff offices and/or locker rooms to detect theft. The § 1983 claim against Defendant Dearborn School District is dismissed.

Invasion of Privacy (Intrusion Upon Seclusion)-Count II

Defendant Shenkman argues that Plaintiffs cannot establish a prima facie case on their invasion of privacy claim because Plaintiffs cannot demonstrate that they had a right of privacy in changing clothes in their office.

In order for Plaintiffs to state a cause of action based on an invasion of privacy claim, they must demonstrate: 1) an intrusion; 2) into a matter in which the Plaintiffs had a right of privacy; and, 3) by means that would be objectionable to a reasonable person. See Lewis v. Dayton-Hudson Corp., 128 Mich.App. 165, 339 N.W.2d 857 (1983).

Plaintiffs have stated a prima facie case for the reasons set forth above in the Fourth Amendment claim analysis. Defendant Shenkman intruded by placing two video cameras in Plaintiffs' office in which Plaintiffs had a right of privacy and reasonable persons would object to such video surveillance, in light of the testimony that Plaintiffs and referees changed in and out of their clothing in this space. Defendant Shenkman is not entitled to governmental immunity on Plaintiffs' invasion of privacy claim.

Intentional Infliction of Emotional Distress-Count III

Defendant Shenkman argues that Plaintiffs cannot state a claim for intentional infliction of emotional distress. Plaintiffs claim that they have stated sufficient facts to create a question of material fact.

In order for Plaintiffs to state a claim for intentional infliction of emotional distress they must show: "(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." Graham v. Ford, 237 Mich.App. 670, 674, 604 N.W.2d 713 (1999). Plaintiffs have created a genuine issue of material that Defendant Shenkman's actions of video taping Plaintiffs could constitute extreme and outrageous conduct while Plaintiffs undressed, that such actions were intentional or reckless, that the actions caused severe emotional distress upon Plaintiffs. Defendant Shenkman is not entitled to governmental immunity on Plaintiffs' intentional infliction of emotional distress claim.

Gross Negligence-Count V

Defendant Shenkman argues that Plaintiffs cannot demonstrate that Defendant Shenkman was grossly negligent when she authorized the use of the video surveillance of the Plaintiffs' office. Plaintiffs argue in response that Defendant Shenkman admitted she never thought about the privacy of Plaintiffs when she conducted the surveillance of Plaintiffs' office. Plaintiffs claim that Defendant Shenkman's testimony makes it clear that she had absolutely no concern whatsoever for the constitutional, statutory and common law rights of Plaintiffs.

Gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." See M.C.L. § 691.1407(2)(c). Based on Defendant Shenkman's testimony, there is a question of fact as to whether her conduct of covertly video taping Plaintiffs' office was so reckless as to demonstrate a substantial lack of concern for Plaintiffs' injuries. Defendant Shenkman is not entitled to governmental immunity as to the gross negligence claim against her.

CONCLUSION

For the reasons set forth above,

IT IS ORDERED that Defendants' Motion for Summary Judgment (Doc. No. 17, filed November 10, 2006) is GRANTED IN PART and DENIED IN PART as more fully set forth above. Defendant Dearborn Public School District is DISMISSED. Defendant Shenkman remains as a Defendant.