

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

WILLIAM PRENTICE McNABB and)	
DIANNA McNABB,)	
)	
Plaintiffs,)	
)	
v.)	
)	No. 03-2334 M1/P
CITY OF MEMPHIS, et al.,)	
)	
Defendants.)	
)	

ORDER DENYING THE CITY OF MEMPHIS' MOTION TO DISMISS

This case is before the Court on Defendant City of Memphis' Motion to Dismiss, filed May 14, 2003. Plaintiff responded in opposition on June 23, 2003, to which the City replied on July 2, 2003. For the following reasons, the Court DENIES the City's motion to dismiss.

I. Background

In this case, Plaintiff alleges that during his arrest for driving under the influence, reckless driving, public intoxication, refusal to submit to a Blood Alcohol Concentration test, and violations of the Tennessee open container law, Officers Eric Richardson and Dennis Normal physically and verbally abused him. In particular, Plaintiff alleges that the officers handcuffed him "to the point where [he] experienced

great pain in his wrists and hands." He complains that the officers refused to loosen the handcuffs when he requested that they do so. Plaintiff also claims that because the handcuffs were too tight and because Officer Richardson repeatedly jerked his handcuffed wrists, he "sustained deep gouges, scars, and nerve damages to both of his wrists." He further asserts that Officer Richardson struck him in the right temple and "attempted to close the door of the police car on [his] legs and feet."

Plaintiff claims that other officers at the jail refused to conduct intake procedures when he arrived because he needed medical treatment.¹ Plaintiff was then transported to the hospital where Officer Richardson allegedly pulled him from the police car by his handcuffed wrists. Once in the emergency room, Plaintiff claims that Officer Richardson released one of his wrists, spun him around and "us[ed] the freed handcuff to shackle [him] to the right of the hospital bed." Officer Richardson also allegedly used a leg iron to secure him to the hospital bed. While at the hospital, both officers allegedly continued to verbally abuse Plaintiff.

Plaintiff initially filed his Complaint in this case on April 4, 2003. Defendants removed the action to this Court on

¹ Although Plaintiff's Second Amended Complaint makes reference to arriving at the police station, it is clear from his affidavit and the affidavits of the officers, that they were at intake at the jail.

May 8, 2003. Plaintiff's Complaint has since been amended twice. The Second Amended Complaint asserts state law causes of action against Officers Richardson and Norman for assault, battery, negligence, gross negligence, and recklessness, and a 42 U.S.C. § 1983 claim for use of excessive force in violation of the Fourth Amendment. The Second Amended Complaint also asserts a state law claim for negligence against the City of Memphis as well as 42 U.S.C. § 1983 claims for unreasonable search and seizure and excessive force in violation of the Fourth Amendment. Plaintiff's Second Amended Complaint further adds a claim for loss of consortium on behalf of Dianna McNabb.

II. Standard of Review

Under Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss the plaintiff's complaint "for failure to state a claim upon which relief can be granted." When considering a 12(b)(6) motion to dismiss, a court must treat all of the well-pleaded allegations of the complaint as true, Saylor v. Parker Seal Co., 975 F.2d 252, 254 (6th Cir. 1992), and must construe all of the allegations in the light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). "A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

III. Analysis

The City moved to dismiss each of the claims in the original Complaint. Plaintiff's Second Amended Complaint cured some of the defects in the original Complaint and also eliminated some of the causes of action. The Court will discuss the disposition of each of the issues raised in the motion to dismiss with reference to the Second Amended Complaint.

A. Negligence

The City argues that Plaintiff's state law claim for negligence should be dismissed because Plaintiff failed to affirmatively plead the City's waiver of sovereign immunity under the Tennessee Governmental Tort Liability Act (the "GTLA"). The City also maintains that it has not waived its sovereign immunity pursuant to the GTLA.

Plaintiff's Second Amended Complaint pleads that the City waived its sovereign immunity pursuant to Tennessee Code Annotated § 29-20-205. (Second Am. Compl. ¶ 8.) The pleading defect has been removed and can no longer be a basis for dismissal of the negligence claim against the City. Therefore, the Court will address the substance of the GTLA waiver.

The GTLA is the statutory codification of the common law rule granting absolute immunity from suit to all local governments, subject to statutory exceptions in the Act's provisions. Tennessee Code Annotated § 29-20-205 removed the

City's governmental immunity where its negligence is alleged to have caused an injury.

Subsection 1, however, carves out an exception to the waiver of immunity in cases in which an injury arises from "the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused." Tenn. Code Ann. § 29-20-205(1). The City argues that it retains its immunity from suit because its "decisions regarding training clearly rise to the level of planning or policy-making. Therefore, they are discretionary acts which do not give rise to tort liability." (Def.'s Mot. to Dism. at 4.)

The parties agree that Tennessee applies the "planning-operational" test to determine which governmental acts are entitled to immunity. Bowers v. City of Chattanooga, 826 S.W.2d 427, 430 (Tenn. 1992). "Under the planning-operational test, decisions that rise to the level of planning or policy-making are considered discretionary acts which do not give rise to tort liability, while decisions that are merely operational are not considered discretionary acts and, therefore, do not give rise to immunity." Id. The court explained the distinction as follows:

A consideration of the decision-making process, as well as the factors influencing a particular decision, will often reveal whether that decision is to be viewed as planning or operational. If a particular course of conduct is determined after consideration or debate by an individual or group charged with the formulation of plans or policies, it strongly

suggests the result is a planning decision. These decisions often result from assessing priorities; allocating resources; developing policies; or establishing plans, specifications, or schedules.

On the other hand, a decision resulting from a determination based on preexisting laws, regulations, policies, or standards, usually indicates that its maker is performing an operational act. Similarly operational are those ad hoc decisions made by an individual or group not charged with the development of plans or policies. These operational acts, which often implement prior planning decisions, are not "discretionary functions" within the meaning of the Tennessee Governmental Tort Liability Act. In other words, "the discretionary function exception [will] not apply to a claim that government employees failed to comply with regulations or policies designed to guide their actions in a particular situation."

Id. at 431 (citations omitted).

The City maintains that decisions regarding training constitute planning or policy-making under Bowers and restore the government's immunity pursuant to the exception in Tenn. Code Ann. § 29-20-205(1). In response, Plaintiff argues under Bowers that the City's negligent "failure to effectively apply its adopted guidelines, standards, and/or regulations in its training of the defendant officers, rather than its decision to train or its method of training" constitute operational activities that permit the City to be sued for its negligence pursuant to the waiver of governmental immunity. (Pla.'s Resp. to Def.'s Mot. to Dism. at 6.)

Tennessee Supreme Court and Court of Appeals decisions issued after Bowers have clarified that a governmental entity's broad discretion to adopt or implement a policy can not give rise to liability for negligence due to the exception contained in Tenn. Code Ann. § 29-20-205(1). See, e.g., Limbaugh v. Coffee Med. Ctr., 59 S.W.3d 73, 85 (Tenn. 2001) (finding that a "nursing home's broad discretion to implement a policy governing the questions of whether and how to discipline combative employees is indeed a policy determination that cannot give rise to tort liability"); Jane Doe A v. Coffee County Bd. of Educ., 852 S.W.2d 899, 908 (Tenn. Ct. App. 1992) ("Adopting policies and procedures governing the hiring of employees is clearly a planning function that will not give rise to liability under Tenn. Code Ann. § 29-20-205."). Moreover, where employees follow an established policy, the governmental immunity will not be abrogated. Limbaugh, 59 S.W.3d at 85 ("If the policy, regulation, or other standard of procedure mandates specific conduct, then any employee reasonably complying with that direction will not abrogate the entity's immunity if the action furthers the underlying policies of the regulation."); Jane Doe A, 852 S.W.2d at 908 ("[H]iring decisions made in conformance with applicable statutes, ordinances, policies and procedures are not amenable to suit.").

However, the Tennessee courts have also found that decisions

that fail to comply with the applicable policies and procedures are operational in nature and may give rise to liability for negligence by the governmental entity under Tenn. Code Ann. § 29-20-205. See, e.g., Chase v. City of Memphis, 1998 Tenn. Lexis 435, *11-*12 (Tenn. July 21, 1998) ("A negligent act or omission is operational in nature and not subject to immunity when the act or omission occurs: (1) in the absence of a formulated policy guiding the conduct or omission; or (2) when the conduct deviates from an established plan or policy."); Limbaugh, 59 S.W.3d at 85 ("If . . . an employee does not act reasonably but pursues a course of conduct that violates mandatory regulation, the discretionary function exception will not apply because the action would be contrary to the entity's established policy."); Jane Doe A, 852 S.W.2d at 908 ("[D]ecisions that fail to comply with applicable legal requirements may give rise to liability if the failure to follow the requirements is the proximate cause of injury.").

In Jane Doe A, the Tennessee Court of Appeals was presented with the question of whether a school board could claim immunity from a negligent hiring claim based on the discretionary function exception to the removal of immunity. Jane Doe A, 852 S.W.2d at 908. The court concluded that because the record contained insufficient evidence regarding the personnel requirements, policies, or procedures that the local school board may have

adopted, the school board had not demonstrated that they were entitled to judgment as a matter of law based on the discretionary function exception. Id. at 909.

Likewise here, the Court has no information about what policies the City may have adopted in regard to the training of officers, or whether these policies have been followed, because the Court is without the benefit of material outside the pleadings on the City's motion to dismiss. Accordingly, the Court is not capable of determining whether the City may take advantage of the discretionary function exception at the present time. The Court DENIES this portion of the City's motion to dismiss without prejudice to its resubmission at a later date.

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

The City asserts that Plaintiff failed to properly plead municipal liability pursuant to § 1983 because he failed to allege that his injuries resulted from a policy or practice of the City pursuant to Monell v. Department of Soc. Servs. of the City of New York, 436 U.S. 658 (1978). In his Second Amended Complaint, Plaintiff asserts that the use of excessive force against him "was the result of the policy, practice, or custom of the City to inadequately train, supervise and discipline law enforcement officers who use excessive force." (Second Am. Compl. ¶ 47.) Plaintiff also alleges that the City has a policy or practice of failing to adequately investigate and respond to

citizen complaints against officers. (Id. ¶¶ 49-50.) Plaintiff has now properly plead municipal liability under § 1983 and the City's motion to dismiss on this basis is DENIED.

C. Fourth Amendment Claim

At the time the City filed its motion to dismiss, Plaintiff had not articulated a Fourth Amendment claim, but the City preemptively moved to dismiss in anticipation that Plaintiff would raise such a claim. In his Second Amended Complaint, Plaintiff has, indeed, raised a claim against the City for unreasonable search and seizure and the use of excessive force in violation of the Fourth Amendment. The City's motion addressed only the excessive force issue, but did not address the question of unreasonable search and seizure.

The City moves to dismiss the Fourth Amendment excessive force claim on the basis that the allegations in the Complaint, when taken as true, could not support a finding of liability under the Fourth Amendment's "objective reasonableness standard" as a matter of law.²

Overly tight handcuffing can constitute excessive force depending upon the circumstances. Martin v. Heideman, 106 F.3d

² The City makes assumptions in its motion about facts not in evidence. Specifically, the City argues that Plaintiff's behavior at the time of the incident was threatening to himself and others. There is no basis in the record for these assumptions and the Court has not considered them in connection with the motion to dismiss.

1308, 1312-13 (6th Cir. 1997). The allegations of the Second Amended Complaint regarding the alleged injuries to Plaintiff's wrists due to the tightness of the handcuffs and the manner in which he was treated while restrained in handcuffs are sufficient to survive a motion to dismiss.³ The Court DENIES the City's motion to dismiss the Fourth Amendment excessive force claim.

D. Fourteenth Amendment and Punitive Damages Claims

The City also moved to dismiss Plaintiff's Fourteenth Amendment and punitive damages claims. Plaintiff did not respond to these arguments. However, he removed these claims against the City from his Second Amended Complaint. Accordingly, the City's motion as to the Fourteenth Amendment and punitive damages claims is DENIED as moot.

IV. Conclusion

For the foregoing reasons, the Court DENIES without prejudice the City's motion to dismiss the negligence claim based on the City's immunity for discretionary functions. The Court DENIES the motion to dismiss the Fourth Amendment excessive force claim. The Court DENIES the motion to dismiss the Fourteenth Amendment and punitive damages claims as moot because they have

³ Notably, even Officers Richardson and Norman acknowledge in their own motion for summary judgment that "the Plaintiff's wrist injuries, which he alleges were caused by the handcuffs, could rise to the level of a constitutional violation." (Mot. of Def.'s Richardson & Norman to Dism. or for Summ. J. at 11.)

been removed from Plaintiff's Second Amended Complaint.

So ORDERED this ____ day of March, 2004.

JON P. McCALLA
UNITED STATES DISTRICT JUDGE