

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

DAMONE L. HARRIS,)
)
 Plaintiff,)
)
 v.) Case No. 02-0546-CV-W-HFS
)
 BOARD OF POLICE COMMISSIONERS,)
 Kansas City, Missouri, et al.,)
)
 Defendants.)

MEMORANDUM AND ORDER

Before the court is defendants' motion for summary judgment. Defendants in this case consist of members of the Board of Police Commissioners of Kansas City, including Angela Wasson-Hunt, Javier M. Perez, Jr., Dr. Stacey Daniels-Young¹, Karl Zobrist, and Mayor Kay Barnes ("the Board"); as well as Kansas City Police Chief, Richard D. Easley.² An additional named defendant is former police officer Jayson A. Cherry.³ The moving defendants are sued in both their individual and official capacities. Defendant Cherry is sued only in his individual capacity.

In his third amended complaint plaintiff asserts the following claims: Count I alleges summary punishment and denial of due process by Cherry; Count II alleges excessive force in

¹In their answer to plaintiff's third amended complaint, moving defendants state that the term of Dr. Daniels-Young has expired, and she is no longer a member of the Board.

²For the sake of uniformity, the Board and Easley will most often be referred to as the "moving defendants."

³On August 25, 2002, Cherry waived service of summons (Doc. 17). On June 12, 2003, Cherry was served the second amended complaint. Yet, to-date, he has failed to answer or otherwise appear in this action.

violation of 42 U.S.C. § 1983, by Cherry; Count III alleges battery by Cherry; Count IV alleges false arrest by Cherry. The three remaining counts are alleged against the moving defendants as violations of 42 U.S.C. § 1983. Count V alleges negligent training and failure to train; Count VI alleges negligent supervision and failure to supervise; Count VII alleges negligent retention; and Count VIII alleges that the policies, procedures, and practices of the Kansas City, Missouri Police Department were the moving force behind the constitutional deprivations suffered by plaintiff. Plaintiff seeks actual, and nominal damages, as well as punitive damages. Plaintiff also seeks attorney fees and expenses pursuant to § 1988.

Factual Background

The record of the incident giving rise to the claim, viewed in the light most favorable to plaintiff, supports the following set of facts. Andrews v. Fowler, 98 F.3d 1069, 1073 (8th Cir. 1996). In the early morning hours of June 7, 2000, after exiting his parked car, plaintiff was approached by defendant Cherry who had his gun drawn. Cherry directed plaintiff to raise his hands, and plaintiff complied by raising his hands in the air. Cherry then grabbed plaintiff's wrist in an attempt to force him to the ground. Plaintiff heard someone say, "He is fighting," and plaintiff was then tackled by either Police Officer Randy Webb or Police Officer Chris Smith. Plaintiff recalled being forced to the ground, and striking his head. He was choked and struck in the face; he was in and out of consciousness. Plaintiff also heard someone yell, "he's got a gun."

Police Officer Bonita Cannon, and her partner, Police Officer Michael Curley, in addition to other police officers, arrived at the scene. Officer Curley observed that while plaintiff was being handcuffed, he was lying face down, motionless, and bleeding from the face. Plaintiff appeared to

be unconscious due to the application of a lateral vascular neck restraint (LVNR) by Officer Webb. Officers Cannon and Curley moved plaintiff onto his left side and struck him in the small of the back so that plaintiff would regain consciousness. Concerned with the growing crowd, Officer Cannon stood up, and when she looked back, she observed Cherry punching plaintiff in the groin area with both fists, and shouting obscenities at plaintiff. Officer Cannon pushed Cherry away from plaintiff.

Plaintiff suffered facial contusions, closed head trauma, abrasions to the face, elbows, knees, and other extremities, and swelling of his face, head, and neck. Plaintiff's left eye was cut and swollen, and his right cheek and forehead were bruised. Plaintiff's ankle and wrist was twisted. Plaintiff's car, although legally parked, was towed, and Cherry issued plaintiff a ticket for speeding, and a ticket for failing to stop for a pursuing police vehicle. Plaintiff was charged with intentionally inflicting bodily injury on Cherry. The tickets and the charges were subsequently dismissed.

Summary Judgment

Summary judgment is appropriate if, after viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party, the record "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Lansdown v. Chadwick, 152 F.Supp.2d 1128, 1137 (W.D.Ark. 2000). "Once a party moving for summary judgment has made a sufficient showing, the burden rests with the nonmoving party to set forth specific facts, by affidavit or other evidence, showing that a genuine issue of material fact exists." Lansdown, at 1137; quoting, National Bank of Commerce v. Dow Chemical Co., 165 F.3d 602, 607 (8th Cir. 1999).

The nonmoving party “must do more than simply show that there is some metaphysical doubt as to the material facts.” Lansdown, at 1137; quoting, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). “They must show that there is sufficient evidence to support a jury verdict in their favor.” Lansdown, at 1137; quoting, National Bank, 165 F.3d at 607; citing, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). “A case founded on speculation or suspicion is insufficient to survive a motion for summary judgment.” Lansdown, at 1137.

Moving defendants concede that plaintiff has successfully pled claims against them in both their individual and official capacities. However, they argue that since there was no personal contact between plaintiff and any member of the moving defendants on June 7, 2000, this is not an individual capacity action, and, therefore, they are entitled to judgment as a matter of law. Plaintiff does not dispute this argument.⁴ Moving defendants also concede that plaintiff has pled claims against them in their official capacity, but they argue that since there is no underlying constitutional violation, they are entitled to summary judgment.

Moving defendants correctly argue that neither the Board members nor Easley can be held liable under § 1983 if there is no underlying constitutional violation. Lansdown, at 1145-46; see also, Monell v. New York City Dep’t of Social Servs., 436 U.S. 658, 691 (1978). However, plaintiff claims that he was choked, and that once he was on the ground, Cherry slammed his head into the pavement, and punched him in the groin while he was barely conscious, all without probable cause to seize him, and without any attempt on his part to resist arrest or to flee. Plaintiff argues that under

⁴Thus it is anticipated that the case will proceed against the moving defendants in their official capacity and that punitive damages could only be recovered against defendant Cherry.

the circumstances this treatment was unreasonable and violated his constitutional right to be free from unreasonable seizure and from excessive use of force.

Summary Punishment and Excessive Force

Plaintiff claims that Cherry's treatment of him constituted a summary punishment subjecting him to excessive force. It has been held that where the State imposes punishment without a formal adjudication of guilt, a determination must be made whether the disability was imposed for the purpose of punishment or as an incident of some other legitimate governmental purpose. Putnam v. Gerloff, 639 F.2d 415, 419 (8th Cir. 1981). For if the restriction is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." Putnam, at 419. However, if the conduct is not reasonably related to a legitimate goal, or is arbitrary or purposeless, an inference may be made that the purpose of the governmental action is punishment which may not be constitutionally inflicted upon detainees. Id. A jury may find direct evidence of intent to punish, or, under the circumstances of this case, a jury may infer that the intent to punish existed if Cherry's treatment of plaintiff was not reasonably related to stop resistance, or an attempt by plaintiff to flee, or if whatever purposes Cherry had in mind could have been achieved by less harsh methods. Putnam, at 420.

Claims that law enforcement officers have used excessive force during an arrest or other seizure are analyzed under the Fourth Amendment and its "objective reasonableness" standard. Coleman v. Rieck, 253 F.Supp.2d 1101, 1106 (D.Neb. 2003); citing, Graham v. Connor, 490 U.S. 386, 395 (1989). To decide whether a particular use of force is objectively reasonable, the facts and circumstances of each case must be examined, including the crime's severity; whether the suspect

poses an immediate threat to the safety of officers or others; and whether the suspect actively resists or flees. Coleman, at 1106. The proper perspective in judging an excessive force claim is that of “a reasonable officer on the scene” and “at the moment” force was employed. Id. Because “police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving,” the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. Coleman, 253 F.Supp.2d at 1106-07. Although not every push or shove violates the Fourth Amendment. Guite v. Wright, 147 F.3d 747, 750 (8th Cir. 1998), the use of gratuitous force against a helpless individual is unreasonable. Coleman, at 1107; Phelps v. Coy, 286 F.3d 295, 301 (6th Cir. 2002) (Gibson, Circuit Judge).

Moving defendants claim that the circumstances at bar fail to meet the test of a constitutional violation. In support of this claim, moving defendants contend that a struggle ensued, and that plaintiff was not handcuffed, and not under police control. Moving defendants further argue that the report of plaintiff’s expert Melvin Tucker, purportedly demonstrates his finding that the only evidence of excessive force endured by plaintiff were the blows to the groin area. Moving defendants then reason that the infliction of this sole injury which plaintiff failed to claim, and which did not require medical treatment, was minor, and does not constitute excessive force.

Here, the alleged facts, taken in the light most favorable to plaintiff would show that Cherry’s actions constituted excessive force which violated plaintiff’s constitutional right to be free from an unreasonable seizure. When deposed, plaintiff stated that after leaving his sister’s house, he drove to his grandmother’s house, parked, and exited his car. Officer Cherry then pulled up behind his car, without the use of a siren or flashing lights, and began giving plaintiff various and conflicting

directions to follow. For example, initially Cherry instructed plaintiff to put his hands up, then plaintiff was told to put his hands on the car, behind his back, and then he was told to get back into his car. Plaintiff stated that Cherry ran toward him while barking these orders, and while plaintiff stood facing his car with his back to Cherry, Cherry began to choke him. Because he could not breathe, plaintiff attempted to turn sideways, and he saw another officer running toward them yelling, "He's fighting, he's fighting.". The second officer ran up and struck him in the face; then all three fell to the ground. While on the ground, plaintiff felt someone bang his head into the pavement. Plaintiff also recalled falling in and out of consciousness.

Plaintiff's sister, Clareice Taylor, testified that while following plaintiff to their grandmother's house, a police car drove in between her car and plaintiff's car. Upon arriving at her grandmother's house, Ms. Taylor observed plaintiff on the ground and police officers pushing his face into the pavement.

Police Officer Michael Curley and his partner Police Officer Bonita Cannon were on patrol in the area, canvassing the area for suspects who fled from a stolen vehicle earlier in the evening. The police radio transmitted a call from Cherry stating that a vehicle was attempting to elude him. Upon arriving at the location where plaintiff was taken into custody, they observed plaintiff lying on his arms face down on the ground while Officer Randy Webb applied an LVNR. Because other officers were arriving, Officer Curley decided to keep the growing crowd under control. Officer Cannon placed handcuffs on plaintiff's right hand, and heard someone yell, "Gun or he's got a gun." During the ensuing melee, Officer Cannon was hit in the face and knocked to the ground by one of two black male officers who arrived and began pulling and pushing plaintiff, while asking, "You got a gun, motherfucker." (Plaintiff's Ex. 18: pg. 38). When she stood up, she observed Cherry punching

plaintiff in the groin area using both fists, and calling him a “motherfucker.” She yelled at Cherry to stop, and then pushed him away from plaintiff. Once plaintiff was handcuffed, Officers Curley and Cannon turned plaintiff onto his side, and noticed that he was unconscious due to the application of the LVNR. Officers Curley and Cannon observed blood on the ground and on plaintiff’s face. Officer Curley revived plaintiff, and he was taken to a police vehicle and transported to the hospital.

Moving defendants’ argument that any injury received was minor, is unpersuasive. First, and contrary to their contention, in his report, Mr. Tucker quite expressly states that plaintiff “was transported to a hospital with injuries to his head, eyes, back and face.” (Defense Ex. A: pg. 4). Second, the Eighth Circuit has rejected any requirement that an excessive force plaintiff show “significant injury.” Arrington ex rel., Arrington v. City of Davenport, 240 F.Supp.2d 984, 991-92 (S.D.Iowa 2003); see also, Lambert v. City of Dumas, 187 F.3d 931, 936 (8th Cir. 1999); citing, Dawkins v. Graham, 50 F.3d 532, 535 (8th Cir. 1995) (“Assuming without deciding that [a plaintiff bringing an excessive force claim against police officers] must have suffered some minimum level of injury to proceed..., we conclude that the necessary level of injury is actual injury.” However, the *de minimis* use of force is insufficient to support a finding of a constitutional violation. Hunter v. Namanny, 219 F.3d 825, 832 (8th Cir. 2000). Assuming that, at bar, plaintiff must show “actual injury,” the evidence presented here satisfies such a requirement. Lambert, at 937.

The facts presented also permit a finding that the choking of plaintiff while he attempted to comply with Officer Cherry’s directions, and the punches administered to plaintiff after he was held on the ground by means of the LVNR were not only unnecessary, but would have been recognized as unnecessary by a reasonable officer in Cherry’s position. Coleman, 253 F.Supp.2d at 1107; see also, Fontana v. Haskin, 262 F.3d 871, 880 (9th Cir. 2001) (the “[g]ratuitous and completely

unnecessary acts of violence by the police during a seizure violate the Fourth Amendment.”); Adams v. Metiva, 31 F.3d 375, 387 (6th Cir. 1994) (the use of force after suspect was incapacitated by mace would amount to excessive force as a matter of law). Under these circumstances, there is a genuine issue of whether force was needed, and whether such force was excessive under the circumstances. Guite v. Waite, 147 F.3d 747, 750 (8th Cir. 1998).

Limiting consideration to the alleged conduct of defendant Cherry, a submissible claim is clearly asserted.⁵

Municipal and Supervisory Liability

As noted in his third amended complaint, plaintiff alleges that moving defendants are liable for the negligent training, supervision, and retention of the police officers of the Kansas City police department; specifically Officer Cherry. Plaintiff further alleges that moving defendants are liable for failing to train and supervise the police officers, including Cherry. Plaintiff also claims that inappropriate hiring and retention policies, procedures, and practices of the police department are so pervasive that they constitute the policy of the department and were the moving force behind the constitutional deprivations suffered by plaintiff.

A plaintiff may establish municipal liability under § 1983 by proving that his or her constitutional rights were violated by an “action pursuant to official municipal policy” or misconduct so pervasive among non-policymaking employees of the municipality “as to constitute a ‘custom or usage’ with the force of law.” Board of Comm’rs of Bryan Cty. v. Brown, 520 U.S. 397, 403 (1997);

⁵There may be authority that blows to the groin area as alleged here would not be enough to establish an Eighth Amendment violation, but I currently assume it is enough for the Fourth Amendment. Compare, Neal v. Miller, 778 F. Supp. 378 (W.D. Mich. 1991). See also Thompson v. Zimmerman, 350 F.3d 734 (8th Cir. 2003).

see also, Ware v. Jackson County, Mo., 150 F.3d 873, 880 (8th Cir. 1998); citing, Monell v. Department of Soc. Serv., 436 U.S. 658, 691 (1978). Although an allegation of inaction or laxness may not be “officially adopted or promulgated,” inaction or laxness can constitute government custom if it is permanent and well settled. Monell, at 691. “Official policy involves ‘a deliberate choice to follow a course of action **** made from among various alternatives’ by an official who [is determined by state law to have] the final authority to establish governmental policy.” Ware, at 880.

Municipal liability may also be established when it has failed to act on complaints of misconduct by police department employees only if it had a “policy or custom” of failing to act upon prior similar complaints of unconstitutional conduct, which caused the constitutional injury at issue. Andrews v. Fowler, 98 F.3d 1069, 1074-75 (8th Cir. 1996). In other words, the plaintiff must show that city officials had knowledge of prior incidents of police misconduct and deliberately failed to take remedial action. Andrews, at 1075.

Similarly, a supervisor may be subject to individual liability under § 1983 for (1) failing to adequately receive, investigate, or act upon complaints of misconduct by police officers if notice was received of a pattern of unconstitutional acts committed by subordinates; (2) there was a demonstrated deliberate indifference to the offensive acts; (3) there was a failure to take sufficient remedial action; and (4) that such failure proximately caused injury. Andrews, at 1078. A supervisor may also be held individually liable under § 1983 if he directly participates in a constitutional violation or if a failure to properly supervise and train the offending employee caused a deprivation of constitutional rights. Id.

At bar, Karl Zobrist, President of the Board, testified that, pursuant to Missouri Statute, Chapter 84, the Board, as overseers, manage the Kansas City Police Department; specifically, through the Chief of Police, who the Board is tasked with hiring, and, if need be, firing. (Plaintiff's Ex. 3: pg. 4). Mr. Zobrist further testified that the Board has the final authority to approve major policies after reviewing draft policies submitted by the police department. (Plaintiff's Ex. 3: pg. 5). However, in the ordinary course of business, the Board does not see the pre-hire psychological reports of potential officers, unless there is a civil action. (Plaintiff's Ex. 3: pg. 14). Former board member, Stacey Daniels-Young, agreed that as an arm of the State, the Board is the exclusive body that provides the supervision and management of the police department. (Plaintiff's Ex. 4: pg. 6).

Pursuant to statute, the chief of police is responsible to the Board for, among other things, the execution of policy pertaining to police affairs as determined by the Board. Mo. Rev. Stat. 84.500. The chief of police also has the power, subject to approval of the Board, to promote, discipline and suspend police officers. Rs.Mo. 84.500(1). The court's record indicates that Police Chief Richard D. Easley was deposed on July 30, 2003, however, his deposition has not been provided to the court in either support of, or opposition to the instant motion

According to the testimony of Human Resources manager, Otis L. Nichols, Jr., an offer for employment is contingent on the successful completion of a physical and psychological examination. (Plaintiff's Ex. 5: pg. 6). Once the pre-hire psychological exam is given, Mr. Nichols simply checks to see if the recommendation indicates hire or not hire. (Plaintiff's Ex. 5: pg. 47). Both reports are then kept in the police officer's medical file which is a separate file from the personnel file, and is kept in a separate section of the Human Resources Division. (Plaintiff's Ex. 5: pgs. 31-32). Although supervisory personnel have access to an officer's personnel file, no one, other than perhaps the Chief

of Police, is granted access to the medical file which contains the results of the physical and psychological examinations. (Plaintiff's Ex. 5: pgs. 35-36).

James Corwin, Commander of the Administration Bureau, testified that the personnel files of applicants who have passed the written test and have had a background investigation are sent for review by the sergeant, captain, and manager of human resources, and then submitted to him for approval. (Plaintiff's Ex. 6: pg. 50). However, he does not see the pre-hire psychology report; the final decision in that area is left to the civilian manager of Human Resources. (Plaintiff's Ex. 6: pg. 54-55). Moreover, neither the instructors at the Police Academy, nor the supervising sergeant would be apprised of any warnings contained in the psychology report. (Plaintiff's Ex. 6: pgs. 66-68, 102).

The facts in regard to the pre-hire psychology report, as well as several other reports generated in a six month time frame concerning official misconduct by Cherry are undisputed. On May 15, 1998, psychologist, Dr. Roy C. Davis, conducted a pre-hire psychology exam on Cherry. After evaluating several of Cherry's test scores, Dr. Davis concluded that due to Cherry's tendency to be extremely competitive and venturesome, he would need to be cautioned about his tendency to take unnecessary risks during his training, and he would need to be closely supervised in his early career to assure that he did not put himself or others in danger. (Plaintiff's Ex. 10; Normal Personality Traits Profile). Dr. Davis deemed the scores on all of the tests to be invalid due to Cherry's "fake-good" responses. (Plaintiff's Ex. 10: Summary and Recommendations). Yet, other than Cherry's tendency to present himself in an overly favorable light, Dr. Davis found no contraindications to his hire. (Id). Nevertheless, Dr. Davis qualified his recommendation that Cherry be hired with the admonition that Cherry be cautioned and supervised, and that acceptance of Cherry on the force would be with the understanding of the previously noted doubtful test results. (Id).

Despite these caveats Cherry was hired, and only Mr. Nichols had knowledge of Dr. Davis's cautionary recommendation.

On January 10, 2000, Cherry and his partner, Officer Stacey Henderson, responded to a location where other officers were investigating the occupants of a vehicle.⁶ While the other officers detained the occupants, Antwone Wilkes and his cousin, at gunpoint, a dispute ensued between Cherry and Antwone's father, Mr. Andre Wilkes, who attempted to inquire about the detention of his son. According to Mr. Wilkes, as he proceeded to return to his car, Cherry then attempted to handcuff him and shoved his head into his vehicle. Mr. Wilkes told Cherry that since he was not resisting, there was no need for Cherry to manhandle him, but Cherry then punched him in the mouth, and when Cherry attempted to put him in a chokehold, he [Mr. Wilkes], struck him. Mr. Wilkes stated that after he was on the ground and handcuffed, Cherry repeatedly slammed his head into the concrete, and struck him in the face causing injury to his eyes and face. Mr. Wilkes was transported to the hospital and received stitches to his eye, he was also issued a citation; his son, Antwone Wilkes was issued a traffic ticket.

Pursuant to a complaint lodged by Mr. Wilkes and his son, on or about January or February, 2000, an investigation was conducted by the Office of Citizen Complaints ("OCC").⁷ (Plaintiff's Ex.

⁶During a subsequent investigation of the matter, Officer Katherine Kennedy stated that she and her partner, Officer Bertina Hardison, conducted a traffic stop on a vehicle operated by Antwone after he failed to use his turn signal. Officer Kennedy was advised by Officer Scott Simons that the vehicle may match the description of a vehicle used the night before during a disturbance. Eventually, Officer Simons, and his partner, Officer William Norman, and Officer Christopher Smith arrived on the scene.

⁷Although the exact date is not noted, Mr. Zobrist explained that once a complaint is filed with OCC and a preliminary investigation indicates that the complaint should go forward, it is referred to the Internal Affairs Division of the Kansas City Police Department for an in-depth investigation. (Plaintiff's Opposition: pg. 13; par.37). OCC's summary and recommendations

11). The results of a polygraph test administered to Mr Wilkes indicated no deception on his part; polygraph tests administered to the officers involved in the complaint also indicated no deception on their part, with the exception of Cherry's partner, Officer Henderson.⁸ (Plaintiff's Ex. 11: pg. 10).⁹ Based on the information presented by Internal Affairs, OCC determined that the evidence supported the Wilkes claim that the force used against him was excessive. (Plaintiff's Ex. 11: pgs. 9-10). OCC's report also indicated Officer Kennedy's statement that while Mr. Wilkes was under control and on the ground, Cherry repeatedly pushed his head into the pavement, and that Cherry's actions were intentional and unprovoked by Mr. Wilkes. (Plaintiff's Ex. 11: pg. 10).

In a memorandum to the Board dated August 30, 2002, Deputy Chief Commander Dennis Buck noted OCC's recommendation that the complaint was substantiated against Cherry and Officer Henderson, and unsubstantiated against Officer Simon. (Plaintiff's Ex. 12). Nevertheless, Chief Buck stated that no further action would be taken in the matter unless advised to the contrary by the Board. (Id).¹⁰

revealed that the officers involved were interviewed by Internal Affairs as early as March of 2000. (Plaintiff's Ex. 11: pg. 10). Thus, it is very likely that the initial complaint was filed sometime earlier, i.e. January or February of 2000.

⁸The OCC investigator noted however, that although in his formal statement to Internal Affairs dated March 17, 2000, Officer Simon denied hearing any officer using profanity, in the pretest interview for the polygraph examination, he stated that his prior statement to Internal Affairs was not truthful. (Plaintiff's Ex. 11: pg. 10).

⁹Cherry did not submit to a polygraph examination, but provided the Internal Affairs Unit with a formal statement and two supplemental statements; he then resigned on June 12, 2000, (Plaintiff's Ex. 11: pg. 9).

¹⁰No ruling is made as to the evidentiary status of events after the incident in question.

On January 27, 2000, Cherry and Officer Henderson were involved in an incident in which both of their weapons were discharged, and a suspect was shot. (Plaintiff's Ex. 8: pg. 11). Cherry's supervisor, Sergeant Gary Cooley, had concerns about whether Cherry lost control of his gun, and whether he abandoned his partner with the prisoner. (Id; pgs. 12, 14). Pursuant to police protocol, Cherry was debriefed by department psychologist Kay White, who expressed concern about Cherry's emotional stability, and advised Cooley to maintain close supervision of Cherry regarding the shooting incident; yet, she released him to full duty. (Id; pgs. 15-16, 19-20, 22).

Sometime thereafter, Cherry was referred for a Fitness for Duty Exam. (Plaintiff's Ex. 9: pg. 7). In a report dated February 22, 2000, Dr. George A. Harris found that Cherry scored quite high in the areas of aggressiveness, antisocial behaviors, and stimulus seeking tendencies; and, although many police officers score high in these areas, Dr. Harris noted that such individuals had a greater than average tendency to engage in abuse of force. (Id). Dr. Harris also noted his concern as to Cherry's overall truthfulness, and whether he was willing to comply with rules and regulations. (Id). Thus, he suggested that the police department "continue with its careful management of Mr. Cherry," (Id; pgs. 7-8).

Sometime after April 17, 2000, Sergeant Cooley expressed concern that Cherry engaged in deception in his report concerning his actions after a drug arrest. (Plaintiff's Ex. 9: pg. 10). Sometime after May 11, 2000, Sergeant Cooley again expressed concern that Cherry abused the sick leave policy regarding the purported death of a friend, and had Cherry submit to a polygraph examination. (Id).

On May 27, 2000, Cherry pulled a prisoner, Harold D. Tapp, from inside a police vehicle by grabbing him by the shackles which secured the prisoner's legs. (Plaintiff's Ex. 9: pg. 3). Mr. Tapp

claimed injuries as a result of this action by Cherry. (Id; pg. 3-4). Between May 27, 2000, and June 3, 2000, Sergeant Cooley reviewed reports and a videotape of the incident, and concluded that Cherry's use of force was excessive. (Id).

By a memorandum dated June 5, 2000, Captain Lockhart noted that after meeting with Cherry, he advised Cherry that he would recommend that a miscellaneous investigation be conducted regarding his actions against Mr. Tapp. (Plaintiff's Ex. 21). Captain Lockhart also cautioned Cherry that he could be suspended if any similar incidents occurred. (Id).

On June 7, 2000, the incident involving the plaintiff at bar occurred. By a memorandum dated June 8, 2000, Captain Lockhart recommended to Acting Major, Donna Saunders, that Cherry be suspended from duty. (Id). This recommendation was based on Captain Lockhart's review of the pertinent reports regarding the instant incident, as well as Cherry's prior work history as a police officer. (Id). On June 13, 2000, Acting Chief of Police, Michael Hand, approved the recommendation for a miscellaneous investigation; on June 14, 2000, Deputy Chief George Roberts forwarded the report to Internal Affairs. (Plaintiff's Ex. 7: pg. 29).

Pursuant to plaintiff's complaint to OCC, an investigation was conducted which included interviews with plaintiff, his brother, Sean Harris, and police officers Randy Webb, David Easley, Bonita Cannon, Mike Curley, Anthony Rogers, Harold Manney, Chris Smith, Patrick Byrd, Jason White, and Sergeant Cooley. (Plaintiff's Ex. 19). With the exception of Officer Cannon, none of the afore-mentioned officers recalled plaintiff being hit or punched. Officer Cannon, however, stated that when she arrived at the scene she observed Officers Cherry, Webb, and Smith engaged in a struggle with plaintiff. (Id; pg. 5). Officer Cannon also stated that even once plaintiff ceased struggling, Officer Webb continued to apply the LVNR until she asked him to release the restraint. (Id; pg. 6).

Officer Cannon further stated that while Cherry hit plaintiff in the groin, the officers surrounding plaintiff made no attempt to stop him. (Id).

After reviewing the investigative file, OCC concluded that the evidence supported plaintiff's complaint of excessive force, and recommended that the complaint be substantiated against Cherry. (Id; pg. 11). OCC also noted that other officers who responded to the scene had direct contact with plaintiff, and witnessed Cherry's improper conduct. (Id; pg.12). Although their failure to stop Cherry violated the Law Enforcement Code of Ethics and Rules of Conduct, OCC found that the evidence did not conclusively identify which officers witnessed the event. (Id). Therefore, OCC advised the police department to address the matter. (Id).

In a memorandum to the Board dated June 6, 2002, Deputy Chief Buck concurred with OCC's recommendation that the complaint was substantiated against Cherry. (Plaintiff's Ex. 20). However, since Cherry had resigned, Deputy Buck decided that no disciplinary action would be taken in the matter. (Id).

It would appear from the pleadings that plaintiff does not argue that municipal liability lies due to the actions of non-defendant officers employed by the Kansas City Police Department. Rather, plaintiff takes issue with the actions of Cherry, and claims that those actions resulted in a violation of his constitutional rights. In view of the above events, there are genuine questions of fact as to whether moving defendants are liable for failing to supervise Cherry, and, or, for the negligent retention of Cherry. Both of these questions of fact stem from the policy and custom employed by the Board as it pertains to the hiring of police officers, specifically the lack of dissemination of critical elements contained in the psychological and medical files. Here, a reasonable juror could infer from the sequence of events leading up to plaintiff's encounter with Cherry, that but/for the

custom of secreting the cautionary notes of Dr. Davis from the instructors at the police academy and from Cherry's immediate supervisor, Cherry either would not have been hired, or would have been closely supervised and/or terminated. Sergeant Cooley testified that he closely supervised Cherry because he was new to his sector. (Plaintiff's Ex. 8: pgs. 20-21). However, issues arise as to whether if forewarned about the red flags noted in the pre-hire psychological exam, and his concerns about Cherry's conduct in January and April, 2000, Sergeant Cooley would have supervised Cherry more effectively, or implemented disciplinary action sooner, up to and including termination, thereby eliminating plaintiff's chance encounter with Cherry in June of 2000.¹¹

Finally, it bears noting that although OCC found Mr. Wilkes' complaint against both Cherry and Officer Henderson to be substantiated, and Deputy Chief Buck concurred, he did not take any further action. Notwithstanding Cherry's resignation from the force at that time, a distinct issue was still open as to Henderson's actions. Chief Buck's reticent attitude continued when OCC once again determined that plaintiff's complaint against Cherry was substantiated, and specifically advised the Board that it needed to address the actions of the officers who witnessed Cherry's assault, but failed to intervene. In his report, Melvin L. Tucker, a former police chief of four other cities, stated that the protocol time of completion for conducting investigations into allegations of police misconduct in the Kansas City Police Department is thirty (30) days. (Defense Ex. A: pg. 7). After Internal Affairs has completed its investigation and has forwarded the complaint to OCC, OCC then has ten (10) working days to complete the processing of the complaint before its determination is forwarded to

¹¹Issues regarding the speculative nature of causation will probably be reserved for post-trial consideration, if necessary.

the Board which has fifteen (15) days to conduct its review. (Defense Ex. A: pgs. 7-8).¹² However, here, plaintiff filed a citizen's complaint on or about June 8, 2000. Although there is no indication as to whether Internal Affairs commenced its investigation and forwarded the complaint to OCC in a timely manner, OCC's report is dated more than 18 months later than the time plaintiff initially filed his complaint, i.e. January 8, 2002.

It goes without saying that law enforcement personnel provide an important and compelling service for the public, a service that is difficult to perform. By its very nature, the physical, mental, and emotional toll exacted on officers cannot be underestimated. However, it is precisely the psychological toll which seemingly would compel, if not demand, that only those found to be psychologically up to the challenge would be offered employment. It follows that those found to be lacking in sound judgment would be subject to close and consistent scrutiny. There is a question of fact upon which a reasonable juror might find that the custom and policy of non-dissemination of critical information regarding an officer's psychological fitness was a moving force behind the violation of plaintiff's constitutional rights. Defendants' absence of liability is not established.

¹²Mr. Tucker indicates that this time frame is the accepted standard listed in the *Internal Affairs Unit Duty Manual, OCC Investigation Procedure, Section M, pg. 44, "Time Limit for the Investigation"*).

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment (ECF doc.85) is DENIED.

/s/ Howard F. Sachs
HOWARD F. SACHS
UNITED STATES DISTRICT JUDGE

March 5, 2004

Kansas City, Missouri