

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

HARVEY HARRISON,

Plaintiff

v.

CORRECTIONAL MEDICAL SERVICES)

a/k/a SPECTRUM BEHAVIORAL)

SERVICES,)

Defendant)

Docket No. 02-104-P-H

***RECOMMENDED DECISION ON DEFENDANT’S MOTION FOR
PARTIAL SUMMARY JUDGMENT***

The defendant moves for partial summary judgment in this action alleging negligence and intentional infliction of emotional distress, seeking judgment on any claim of direct or vicarious liability for damages resulting from any sexual contact between the plaintiff and Nanci Porter, the defendant’s former employee, and on the plaintiff’s claim for punitive damages. I recommend that the court grant the motion in part.

I. Summary Judgment Standard

Summary judgment is appropriate only if the record shows “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.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could

resolve the point in favor of the nonmoving party.” *Navarro v. Pfizer Corp.*, 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must “produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue.” *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). “As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party.” *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

II. Factual Background

The following undisputed material facts are appropriately set forth in the parties’ respective statements of material facts submitted pursuant to this court’s Local Rule 56.

The plaintiff was a prisoner in the Maine Correctional Center (“MCC”) from April 1998 through January 2000. Defendants’ [sic] Statement of Undisputed Material Facts (“Defendant’s SMF”) (Docket No. 14) ¶ 1; Plaintiff’s Reply to Defendant’s Original Statement of Material Facts (“Plaintiff’s Responsive SMF”) (Docket No. 19) ¶ 1. During his incarceration, a substance abuse treatment program known as the KEY Maine program was instituted at MCC; the plaintiff applied and was accepted into the program. *Id.* ¶¶ 2-3. Nanci Porter, a counselor in the program, was assigned to

counsel the plaintiff. *Id.* ¶ 4.¹ During a meeting in May 1999 Porter initiated sexual contact, including oral sex, with the plaintiff. *Id.* ¶ 5. Around the same time, May 6, 1999, rumors of an inappropriate “budding relationship” came to the attention of Amy Boyd, director of the KEY Maine program, who then met with Porter. Plaintiff’s Response to Defendant’s Motion for Partial Summary Judgment, Statement of Material Facts (“Plaintiff’s SMF”) (Docket No. 15) ¶ 20; Defendants’ [sic] Reply Statement of Facts Pursuant to Local Rule 56(d) (“Defendant’s Responsive SMF”) (Docket No. 17) ¶ 20. Porter was cautioned to observe appropriate boundaries with prisoners. *Id.* ¶ 21. On another occasion, a few weeks after the first, Porter again initiated sexual contact, including oral sex, with the plaintiff. Defendant’s SMF ¶ 9; Plaintiff’s Responsive SMF ¶ 9.

The plaintiff did not object to these sexual encounters, although he was “nervous . . . thinking [he] was going to get busted” as a result and knew that the sexual contact was not right. *Id.* ¶¶ 6-8, 10. After the second encounter, the plaintiff told Porter that he did not wish to have a sexual relationship with her. *Id.* ¶ 11. Porter reacted by berating the plaintiff and threatening to contact the foster parents of his children, causing the plaintiff to fear that he would not be able to see his children. *Id.* ¶ 12. Porter also told the plaintiff that no one would believe him if he exposed her to the authorities. Plaintiff’s SMF ¶ 26; Defendant’s Responsive SMF ¶ 26. A week after the second sexual encounter, a third encounter, including oral sex, took place. Defendant’s SMF ¶ 13; Plaintiff’s Responsive SMF ¶ 13.

The sexual encounters between Porter and the plaintiff all occurred on weekends, when Boyd typically was not working. *Id.* ¶ 14. The plaintiff believes that Porter intended to conceal from Boyd her sexual contact with him. *Id.* ¶ 16. The plaintiff did not file a grievance or otherwise complain

¹ Neither party includes in its statement of material facts any assertion that Porter was an employee of the defendant. The parties have proceeded to address the motion on the assumption that Porter was so employed, and under the circumstances I will do so as well.

after the first sexual encounter with Porter only because he did not think that he would be believed. Defendant's SMF ¶ 27.²

The rules established by the defendant for substance abuse counselors, including those employed in the KEY Maine program, prohibited personal contact of any kind, including sexual contact, with prisoners. *Id.* ¶ 19; Plaintiff's Responsive SMF ¶ 19. When the plaintiff reported Porter's conduct to Boyd, Boyd told him that Porter's conduct was unethical. *Id.* ¶ 20. Boyd had Porter barred from the MCC. *Id.* Porter was forced to resign. Plaintiff's SMF ¶ 30; Defendant's Responsive SMF ¶ 30.

Porter was not a managerial level employee of the defendant. Defendant's SMF ¶ 25; Plaintiff's Responsive SMF ¶ 25. She was not a licensed therapist and had only recently obtained her license as a registered alcohol addiction counselor. Plaintiff's SMF ¶ 9; Defendant's Responsive SMF ¶ 1; Affidavit of Eric Haram, Exh. [1] to Plaintiff's SMF, ¶ 4.

III. Discussion

A. Liability

The defendant contends that the plaintiff's consent to the sexual contact bars his claim and that it cannot be liable for Porter's conduct because that conduct was beyond the scope of her employment by the defendant. Defendants' [sic] Motion for Partial Summary Judgment, etc. ("Motion") (Docket No. 13) at 3-13. The plaintiff responds that consent is not available as a defense under the circumstances of this case, Porter's conduct was within the scope of her employment and, in the alternative, the defendant is liable for Porter's conduct as a result of its own negligence and because it aided Porter in committing the alleged tort. Plaintiff's Response to Defendant's Motion for Summary Judgment ("Plaintiff's Opposition") (Docket No. 15) at 7-12.

² The plaintiff did not respond to this paragraph of the defendant's statement of material facts. It is therefore deemed admitted because (*continued on next page*)

Section 892C of the Restatement (Second) of Torts provides as follows:

(1) Except as stated in Subsection (2), consent is effective to bar recovery in a tort action although the conduct consented to is a crime.

(2) If conduct is made criminal in order to protect a certain class of persons irrespective of their consent, the consent of members of that class to the conduct is not effective to bar a tort action.

Restatement (Second) of Torts § 892C (2002). Apparently conceding that the evidence submitted by the defendant establishes that the plaintiff consented to the sexual contact at issue,³ the plaintiff contends that consent does not bar his claims because the alleged activity of Porter was a crime under Maine law that is defined so as to protect prisoners. Plaintiff's Opposition at 7-8. The Maine criminal statute in effect at the relevant time provided, in relevant part:

2. A person is guilty of gross sexual assault if that person engages in a sexual act with another person and:

* * *

E. The other person, not the actor's spouse, is in official custody as a probationer or a parolee, or is detained in a hospital, prison or other institution, and the actor has supervisory or disciplinary authority over the other person

17-A M.R.S.A. § 253(2)(E) (version effective until January 31, 2003). The defendant contends that the exception provided by the Restatement should apply only to children and that adult felons "ought not be treated as children in the eyes of the law." Defendants' [sic] Reply Memorandum of Law in Support of Motion for Partial Summary Judgment ("Defendant's Reply") (Docket No. 16) at 2. The case law cited by the defendant in support of its position is inapposite. It is apparent on the face of 17-A M.R.S.A. § 253(2)(E) that that statute makes the subject conduct criminal in order to protect a class of individuals who are in custody or detained and are assaulted by a person having some authority over them. Limiting the scope of section 892C of the Restatement to children would import

it is supported by the record material cited by the defendant in support of the statement. Local Rule 56(e).

³ The defendant correctly points out, Motion at 3-4, that transference, a phenomenon that might obviate consent as a matter of law, (continued on next page)

into that provision limiting language not consistent with the clear intent of the section. This court should not recognize such a restriction of the Restatement language on the basis of the policy argument made by the defendant.⁴

The defendant argues in the alternative that the plaintiff has not submitted sufficient evidence to allow a reasonable factfinder to conclude that Porter had supervisory or disciplinary authority over him and therefore may not avoid the consequences of his consent. Defendant's Reply at 4-5. The plaintiff's statement of material facts includes assertions that Porter, reacting to the plaintiff's statement that he did not wish to have a sexual relationship with her, threatened him by throwing a chair across the room and telling him that she would expose confidential information to the foster parents of his children, that no one would believe him if he exposed her to the authorities and that she wielded significant power over what happened to him in prison. Plaintiff's SMF ¶¶ 24-26. The defendant contends that these allegations are not supported by the record citations provided by the plaintiff. Defendant's Responsive SMF ¶¶ 25-26. This contention is correct for allegations other than that Porter threw a chair across the room and told the plaintiff that no one would believe him. There is no support for the allegation that she suggested to the plaintiff that "she wielded significant power over what happened to him in prison." The only support offered for the allegation that Porter threatened to contact the foster parents of the plaintiff's children is a citation to paragraph 25 of the unverified complaint, which is denied by the defendant, Answer of Defendant Correctional Medical Services, Inc. (Docket No. 6) ¶ 25. This factual assertion accordingly cannot be considered in connection with a motion for summary judgment. Fed. R. Civ. P. 56(e) (party opposing summary judgment may not rest upon mere allegations in his pleading).

see, e.g., Simmons v. United States, 805 F.2d 1363, 1365 (9th Cir. 1986), is not suggested by the evidence in this case.

⁴ The Maine Law Court has not adopted or addressed section 892C in any reported decision. The defendant nonetheless assumes that the Law Court will apply the section when a case presenting the appropriate factual circumstances arises. Based on the Law (continued on next page)

The court must still consider an issue not addressed by the defendant: whether the defendant has submitted undisputed factual allegations sufficient to establish the plaintiff's consent. The plaintiff admits that he "expressed no objection to the sexual contact initiated by Porter" on the occasion of the first such event, Defendant's SMF ¶ 6, Plaintiff's Responsive SMF ¶ 6, but also qualifies his response with the assertion that he "failed to do so because he was too scared to object," Plaintiff's Responsive SMF ¶ 6.⁵ The plaintiff admits that he "did not object to the second sexual encounter with Porter." Defendant's SMF ¶ 10; Plaintiff's SMF ¶ 10. The defendant offers no evidence concerning possible consent to the third encounter. For that reason alone, the defendant's motion for summary judgment on the basis of consent must be denied.

The defendant next argues that it may not be held vicariously liable for Porter's misconduct because that conduct occurred outside the scope of her employment. Motion at 4-7. The plaintiff responds that the conduct was within the scope of Porter's employment and, even if it was not, the defendant is nonetheless liable because it was negligent or reckless and because Porter was aided in accomplishing the tort by the existence of her employment, citing section 219(2) of the Restatement (Second) of Agency. Plaintiff's Opposition at 8-12.⁶ Under Maine law, sections 219 and 228 of the Restatement (Second) of Agency set forth the standard for the scope-of-employment inquiry. *McLain v. Training & Dev. Corp.*, 572 A.2d 494, 497-98 (Me. 1990). "A master is subject to liability for the torts of his servants committed while acting in the scope of their employment." Restatement (Second) of Agency § 219(1) (2002).

(1) Conduct of a servant is within the scope of employment if, but only if:

Court's application of numerous sections of the Restatement (Second) of Torts in the past, I agree.

⁵ Consent that is obtained under duress is not a defense to a crime. 17-A M.R.S.A. § 109(3)(C).

⁶ The plaintiff suggests that this issue is one that must be presented to the jury, citing *Springer v. Seamen*, 821 F.2d 871, 881 (1st Cir. 1987). Plaintiff's Opposition at 9. However, I have no difficulty in concluding that the answer to the question whether Porter's actions were within the scope of her employment "is clearly indicated," thus making resolution of the issue appropriate for the court. *Springer*, 821 F.2d at 881.

- (a) it is of the kind he is employed to perform;
- (b) it occurs substantially within the authorized time and space limits;
- (c) it is actuated, at least in part, by a purpose to serve the master, and
- (d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.

(2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

Id. § 228. Sexual contact with the plaintiff cannot reasonably be said to be the kind of conduct that Porter was employed to perform; indeed, it was specifically prohibited by the defendant. Defendant's SMF ¶ 19; Plaintiff's Responsive SMF ¶ 19. Nor could Porter's sexual contact with the plaintiff reasonably be construed to be actuated by a purpose to serve the defendant.

The conclusion that Porter's alleged conduct was not within the scope of her employment by the defendant does not end the inquiry, however.

- (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
 - (a) the master intended the conduct or the consequences, or
 - (b) the master was negligent or reckless, or
 - (c) the conduct violated a non-delegable duty of the master, or
 - (d) the servant purported to act or speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Restatement (Second) of Agency § 219(2) (2002). Here, the plaintiff relies on subsections (b) and (d). Plaintiff's Opposition at 11-12.

As evidence that subsection (b) bars summary judgment, the plaintiff offers the asserted facts that the defendant was not licensed to provide substance abuse counseling, Porter's license as a substance abuse counselor was invalid, another counselor employed by the defendant in the same program was subsequently discharged for violating the sexual boundaries of a client and one of the two counselors was abusing alcohol. *Id.* The defendant responds that these allegations require expert

testimony to the effect that the defendant deviated from the applicable standard of care, which testimony has not been offered, and that the allegations have no causal nexus to the conduct alleged to have injured the plaintiff. Defendant's Reply at 5-7. The defendant cites no authority in support of its argument that expert testimony is required on this point, and I am not persuaded that it is. The point at issue is not whether malpractice occurred but rather whether the defendant was itself so reckless or negligent that it may be held liable for Porter's conduct, even though it was not within the scope of her employment. Expert testimony is not required on this point. In the factual context of this case, the defendant may be held liable under section 219(2)(b) if it failed to remedy or prevent inappropriate sexual conduct by Porter of which its management-level employees knew, or in the exercise of reasonable care, should have known. *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1074 (10th Cir. 1998). The evidence proffered by the plaintiff does not even address this standard; there is no showing that the defendant knew or should have known of Porter's conduct before any of the three occasions on which it occurred. Nor is there any showing that Porter's conduct should have been foreseeable as a result of her licensing status. If the plaintiff's claim in this regard could reasonably be construed as one of negligent retention and supervision of Porter, his evidence also fails to meet the threshold for such a claim.

To establish a claim of negligent retention and supervision, the plaintiff must present evidence that: (1) the employer knew or had reason to know of the employee's particular incompetence, unfitness, or dangerous attributes, (2) the risk of harm to others created by these qualities could have been reasonably foreseen by the employer, and (3) the employee's dangerous characteristics or unfitness and the employer's negligence was the proximate cause of the injury.

McAllister v. Greyhound Lines, Inc., 1997 WL 642994 (D. N.J. Oct. 7, 1997), at *4 (citations omitted). The plaintiff's proffered evidence is insufficient to allow a reasonable factfinder to conclude that even one of these elements was present at the relevant time in this case.

The defendant contends that subsection (d) of section 219(2) is not applicable in this case because Porter lacked the power to discipline the plaintiff or otherwise to dictate the conditions of his confinement. Motion at 13. The defendant has not provided any evidence to support either assertion. Even if that were not the case, this argument addresses only the apparent authority alternative of subsection (d), which is independent of the alternative that allows liability to be imposed when the tortfeasor was aided in the tortious conduct by her agency relationship with the defendant. That alternative is applicable in this case. In *Costos v. Coconut Island Corp.*, 959 F. Supp. 25 (D. Me. 1997), this court held that a jury could find an employer liable for an employee's sexual assault on the plaintiff on the grounds that the employee was aided in accomplishing the tort by virtue of his employment, *id.* at 27. In that case, the plaintiff was a guest at a hotel or residential facility when the manager, the defendant's employee, entered her room with a master key and sexually assaulted her. *Id.* at 26. For purposes of summary judgment, the instant case is not factually distinguishable from *Costos*, the relevant holding of which was affirmed by the First Circuit. *Costos v. Coconut Island Corp.*, 137 F.3d 46, 48-49 (1st Cir. 1998). This case law is dispositive. The defendant is not entitled to summary judgment on this basis.

B. Punitive Damages

The defendant seeks summary judgment on the plaintiff's claim for punitive damages, contending that the plaintiff cannot establish any of the bases for imposition of punitive damages against an employer on a theory of vicarious liability that are authorized by section 909 of the Restatement (Second) of Torts. Motion at 14-16. The plaintiff does not dispute the defendant's assumption that this section of the Restatement, as yet unaddressed by the Maine Law Court, applies to his claims rather than Maine's common-law standard for the availability of punitive damages as set forth in *Gayer v. Bath Iron Works Corp.*, 687 A.2d 617, 622 (Me. 1996), and several other cases.

Plaintiff's Opposition at 12-13.

Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,

(a) the principal or a managerial agent authorized the doing and the manner of the act, or

(b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or

(c) the agent was employed in a managerial capacity and was acting in the scope of employment, or

(d) the principal or a managerial agent of the principal ratified or approved the act.

Restatement (Second) of Torts § 909 (2002). The plaintiff argues that “[i]t cannot reasonably be argued that Ms. Porter was not unfit, and it certainly cannot be argued, at least to a summary judgment standard, that the program was not complicit in her behavior via its own negligent direction and supervision.” Plaintiff's Opposition at 13. This argument appears to invoke only subsection (b) of section 909. While the plaintiff may make such an argument, it is the evidence in the summary judgment record that controls. Comment *b* to section 909 states that “[i]t is . . . within the general spirit of the rule to make liable an employer who has reckless employed or retained a servant or employee who was known to be vicious, if the harm resulted from that characteristic.” Here, all that the evidence proffered by the plaintiff shows, even with the benefit of reasonable inferences, is that the defendant employed Porter without ensuring that she had a valid license as a substance abuse counselor. It cannot reasonably be said that her sexual assaults on the plaintiff resulted from the lack of such a valid license or that her tortious conduct was reasonably foreseeable given the circumstances presented in the summary judgment record. All of the other evidence submitted by the plaintiff deals with events that occurred, from all that appears, after the fact and accordingly cannot provide a basis for concluding that the defendant was reckless in employing or retaining Porter at any time before it acted to bar her from the prison premises.

On the showing made, the defendant is entitled to summary judgment on the plaintiff's claim for punitive damages.

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion for partial summary judgment be **GRANTED** as to any claim for punitive damages and otherwise **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 17th day of March 2003.

David M. Cohen
United States Magistrate Judge

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