IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

ALYSHA RODRIGUEZ,

Plaintiff,

v. MEMORANDUM AND ORDER

DANIEL J. WINESKI, 05-C-059-S
LAWRENCE G. ESTENSON and
EMPLOYER'S INSURANCE OF WAUSAU,

Defendants.

Plaintiff Alysha Rodriguez commenced this civil action against defendants Daniel J. Wineski, Lawrence G. Estenson and Employer's Insurance of Wausau. She alleges her Constitutional rights were violated when defendant Wineski sexually assaulted her and when defendants Estenson and Wineski failed to report the assault. Defendant Wausau Insurance Company filed a cross-claim against defendant Wineski.

On May 23, 2005 defendant Wineski filed a motion for partial summary judgment which he supplemented on May 27, 2005 to move for summary judgment on all plaintiff's claims pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of facts, conclusions of law, affidavits and a brief in support thereof. This motion has been fully briefed and is ready for decision. Plaintiff's motion for partial summary judgment,

defendant Estenson's motion for partial summary judgment and defendant Employers Insurance Company of Wausau' motion for summary judgment have also been fully briefed and are ready for decision.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding the motions for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff Alysha Rodriguez is an adult female resident of Wisconsin. She was born on March 17, 1982.

At all times material to this action defendant Daniel J. Wineski was employed as a police officer for the City of Whitehall Police Department. Defendant Larry G. Estenson was the Chief of Police for the City of Whitehall Police Department. Defendant Employer's Insurance of Wausau insured the City of Whitehall Police Department.

Plaintiff alleges that on July 23, 1996 defendant Daniel J. Wineski, while on duty as a City of Whitehall Police officer, sexually assaulted her. She further alleges that he threatened her on July 27, 1996. She also alleges that in the spring and summer of 1997 defendant Wineski had inappropriate sexual contact with her. Plaintiff does not allege that she had any contact with defendant Wineski in 1998.

She alleges that in January 1999 she left a letter for her social worker, Dennis Glenzinski, stating that she had been sexually abused by defendant Wineski. She further alleges that a few weeks later she told defendant Larry Estenson that defendant Wineski had sexually assaulted her.

Plaintiff alleges that on February 4, 1999 defendant Wineski came to her home and pushed her against a wall on her porch and said he knew she had told people about him. She alleges he also forced her to hold his gun under her chin with her finger on the trigger and threatened to have her little sister removed from her home.

Wineski was arrested in March 2004 for assaulting plaintiff and was convicted after entering an Alford plea. He was sentenced to prison on November 10, 2004.

Plaintiff filed this civil action on January 31, 2005.

MEMORANDUM

Defendant Wineski seeks to bar all plaintiff's claims that occurred prior to January 31, 1999. The parties agree that the applicable statute of limitations is 6 years pursuant to Section 893.53, Wis. Stats. Gray v. Lacke, 885 F.2d 399 (7th Cir. 1989) cert. denied, 494 U.S. 1029.

Since plaintiff was a minor in July 1996 when she alleges she was sexually assaulted she had two years after her 18th birthday to commence the action. Section 893.16, Wis. Stats. Since plaintiff became 18 on March 17, 2000, this statute does not increase the six year period which did not expire until the summer of 2003, 6 years after the last alleged sexual contact by defendant Wineski.

In Doe v. Archdiocese of Milwaukee, 211 Wis. 2d 312, 346, 565 N.W. 2d 94 (1997), the Wisconsin Supreme Court held that a sexual assault of a minor by an adult accrues at the time of the last incident of sexual assault. The Court specifically stated that the only exceptions allowed by statute are incestuous sexual assault or assault by a therapist. Sections 893.585 and 893.587, Wis. Stats.

In plaintiff's case the six year statute of limitations expired in the summer of 2003 six years after the last alleged incident of sexual conduct in 1997. Her claims arising from the alleged sexual assaults by defendant Wineski are time-barred because she did not file this action until January 31, 2005.

Plaintiff argues that the statute of limitations should be equitably tolled because defendant Wineski threatened her and she was afraid to tell anyone. Equitable tolling is available if the defendant takes active steps to prevent the plaintiff from suing on time. Brademas v. Indiana Housing Finance Authority, 354 F. 3d 681, 687 (7th Cir. 2004).

Plaintiff argues that her fear of Wineski prevented her from suing within the applicable time limit, but plaintiff told people of the assault in January and February 1999. Although defendant Wineski threatened plaintiff in February 1999, her fear of Wineski did not conceal from her the fact that a cause of action had accrued in 1996 and 1997.

She has not alleged that defendant Wineski had any contact with her after February 1999. There was no impediment to her filing suit against him concerning his actions in 1996 and 1997 prior to the expiration of the six year statute of limitations in the summer of 2003. Plaintiff is not entitled to the equitable tolling of the statute of limitations. Accordingly, plaintiff's claims that arise from actions taken prior to January 31, 1999 are time barred. These include her claims of defendant Wineski's sexual misconduct in 1996 and 1997 and defendant Estenson's failure to supervise or discipline Wineski for this conduct.

Plaintiff moved for partial summary judgment on the grounds that "issue preclusion" barred the relitigation of whether the July 23, 1996 sexual assault occurred because defendant had been convicted of that assault in state court after an Alford plea. Since that claim is time barred, plaintiff's motion for partial summary judgment will be denied.

Plaintiff's remaining allegations in her amended complaint are that defendant Wineski pushed her against a wall, made her hold his gun under her chin with her finger on the trigger and threatened her in February 1999 and that both defendant Wineski and Estenson failed to report the 1996 sexual assault. Plaintiff does not claim that Wineski's actions at her home in February 1999 violated her constitutional rights.

Plaintiff claims that she was denied equal protection of the law when defendants Estenson and Wineski failed to report her sexual abuse by defendant Wineski. According to Wisconsin law, Section 48.981, Wis. Stats., law enforcement personnel have a duty to report sexual abuse. Plaintiff may state an equal protection claim by alleging that she had been intentionally treated differently from others who are similarly situated and that there is no rational basis for the treatment. Village of Willowbrook v. Olech, 528 U.S. 562 (2000).

In McDonald v. Village of Winnetka, 371 F.3d 992, 1001 (7th Cir. 2004), the Court held that a plaintiff may bring a "class of one" equal protection claim where he or she alleges that he has been intentionally treated differently from others similarly situated and there is not rational basis for the difference in treatment or the cause of the differential treatment is a "totally illegitimate animus" toward the plaintiff by the defendant.

In McDonald plaintiff claimed that the Fire Department did not follow its policy to rule out all non-arson causes before making an arson determination. The Court held that plaintiff's claim failed because he had not presented evidence that he was treated differently than a similarly situated individual. The Court stated, "The reason that there is a "similarly situated" requirement in the first place is that at their heart, equal protection claims, even "class of one" claims are basically claims

of discrimination." Id, at 1009. See also Lunni v. Grayeb, 395 F.3d 761, 769 (7th Cir. 2005).

In plaintiff's case she alleges that both defendant Estenson and Wineski failed to report her claims of sexual abuse to the proper agency pursuant to section 49.813, Wis. Stats. She alleges that this denied her equal protection of the laws but she has not presented any evidence that either defendant treated her differently than any other alleged victim of sexual abuse. Defendants' failure to follow a state mandatory reporting statute does not state an equal protection claim unless plaintiff shows that she was discriminated against or in other words treated differently than someone similarly situated. Since she has not presented any evidence of a similarly situated individual defendants are entitled to judgement in their favor on this claim.

Plaintiff also claims that defendants Estenson and Wineski conspired to deprive her of equal protection. Since her equal protection rights have not been violated, this conspiracy claim must be dismissed.

Defendant Employer's Insurance of Wausau moves for summary judgment on plaintiff's claims against it and on its cross claim against defendant Wineski. Since all claims against defendant Wineski will be dismissed with prejudice, defendant Employer Insurance of Wausau's motion for summary judgment will be denied as moot.

Rodriquez v. Wineski, et. al., 05-C-59-S

ORDER

IT IS ORDERED that the motions for summary judgment of defendants WIneski and Estenson are GRANTED.

IT IS FURTHER ORDERED that plaintiff's motion for partial summary judgment is DENIED as moot.

IT IS FURTHER ORDERED that defendant Employer's Insurance of Wausau's motion for summary judgment are DENIED as moot.

IT IS FURTHER ORDERED that judgment is entered in favor of defendants against plaintiff DISMISSING her complaint and all claims contained therein with prejudice and costs and dismissing defendant Employer Insurance of Wausau's cross claim against defendant Wineski as moot.

Entered this 6th day of July, 2005.

BY THE COURT:

/s/

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JOHN C. SHABAZ
District Judge