

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION**

JENNIFER STIDHAM,)	
Plaintiff,)	
)	<u>REPORT AND RECOMMENDATION</u>
v.)	Civil Action No. 2:07cv00028
)	
JASON E. JACKSON,)	BY: PAMELA MEADE SARGENT
Defendant.)	UNITED STATES MAGISTRATE JUDGE
)	

The plaintiff, Jennifer Stidham, seeks recovery under 42 U.S.C. § 1983 based on a denial of her constitutional rights by the defendant, Jason E. Jackson. Stidham’s claim stems from an alleged sexual assault committed against her by Jackson, who was, at the time of the alleged assault, a police officer employed by the Town of Coeburn. This matter is currently before the court on the Plaintiff’s Motion For Summary Judgment, (“Motion”) (Docket Item No. 44). This court has jurisdiction in this case pursuant to 28 U.S.C. §§ 1331, 1343 and 1367. The Motion is before the undersigned magistrate judge by referral pursuant to 28 U.S.C. § 636(b)(1)(B). The defendant, Jackson, has not responded to the Motion despite being advised that a failure to respond might result in judgment being entered against him. Neither party has requested oral argument on the Motion. Therefore, the Motion will be decided on the written submissions of Stidham. As directed by the order of referral, the undersigned now submits the following report and recommended disposition.

I. Facts

By sworn affidavit, Stidham claims that, on or about the first of June 2005, she

was pulled over by Jackson as the result of a traffic stop and was issued a summons for speeding and driving with a suspended license. Stidham became quite upset about the citation, and Jackson informed her that if she would meet him back in town about 2:30 a.m., when his sergeant was no longer with him, he “would think of a way to make the tickets go away.”

Approximately one week later, on June 8, 2005, according to Stidham, Jackson came to her residence uninvited between 12:30 and 1:00 a.m. and told the plaintiff that “he would make the tickets disappear if plaintiff would take her clothes off for him and would exchange ‘a favor for a favor.’” Shortly thereafter, Officer Salyers came to Stidham’s door and, after speaking with Jackson, Officer Salyers left the premises. While at Stidham’s residence, Jackson exposed himself, exerted influence and refused to leave the premises despite Stidham’s repeated request that he do so. Jackson told Stidham if she would just pull her pants down and show him her “butt” he would leave. After Stidham refused to pull her pants down, Jackson told Stidham that she could leave her clothes on if she would just bend over. Hoping Jackson would leave, Stidham then bent over with her pants still on. Jackson then proceeded to pull her pants all the way down and sexually assaulted her before abruptly leaving and stating “I’ll be back.”

Jackson was indicted for this and other incidents in Wise County Circuit Court. On or about November 13, 2006, he entered an Alford Plea admitting that the Commonwealth’s Attorney had sufficient evidence for him to be found guilty beyond a reasonable doubt of the crimes charged. Related to his assault on Stidham, Jackson was convicted of indecent exposure and bribery as a public official. He was sentenced to serve eight years in prison. Jackson is currently incarcerated at Dillwyn

Correctional Center in Dillwyn, Virginia. On January 22, 2009, plaintiff's counsel attempted to take Jackson's deposition in this matter. Jackson's court-appointed guardian ad litem, Karen Bishop, was present during this deposition. Jackson refused to answer any questions put to him by plaintiff's counsel. According to Bishop, Jackson was refusing to participate at all in the defense of the case.

II. Analysis

With regard to a motion for summary judgment, the standard for review is well-settled. The court should grant summary judgment only when the pleadings, responses to discovery and the record reveal that "there is no genuine issue as to any material fact and ... the movant is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *see, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). A genuine issue of fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

In considering a motion for summary judgment, the court must view the facts and the reasonable inferences to be drawn from the facts in the light most favorable to the party opposing the motion. *See Anderson*, 477 U.S. at 255; *Matsushita*, 475 U.S. at 587. Although Jackson has not opposed the Motion in this case, the court will view the facts and inferences in the light most favorable to him. In order to be successful on a motion for summary judgment, a moving party "must show that there is an absence of evidence to support the non-moving party's case" or that "the evidence is so one-sided that one party must prevail as a matter of law." *Lexington-*

South Elkhorn Water Dist. v. City of Wilmore, Ky., 93 F.3d 230, 233 (6th Cir. 1996).

To prove a claim under § 1983, one must show that the defendant (1) acted under color of state law and (2) deprived the plaintiff of a constitutional right, privilege or immunity. *See* 42 U.S.C.A. § 1983 (West 2003); *West v. Atkins*, 487 U.S. 42, 48 (1988). This section should be broadly construed. *See Dennis v. Higgins*, 498 U.S. 439, 443 (1991). A public official has acted under color of state law when he has “exercised power ‘possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.’” *West*, 487 U.S. at 49 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

The undisputed facts of this case show that Jackson acted “under color of state law.” “[W]hether a police officer is acting under color of state law turns on the nature and circumstances of the officer’s conduct and the relationship of that conduct to the performance of his official duties.” *Martinez v. Colon*, 54 F.3d 980, 986 (1st Cir. 1995). Furthermore, if a defendant’s actions “are linked to events which arose out of his official status, the nexus between the two can play a role in establishing that he acted under color of state law.” *Rossignol v. Voorhaar*, 316 F.3d 516, 524 (4th Cir. 2003). When Jackson charged Stidham with speeding and driving on a suspended license, he was acting within the scope of his employment as a police officer. By his own statements, Jackson’s appearance at Stidham’s residence related to the charges he had placed against Stidham, in that he was there to see if Stidham would exchange “a favor for a favor,” to make the charges to away.

I also find that the undisputed facts of this case show that Jackson’s actions violated Stidham’s constitutional rights. Stidham’s Complaint alleges that Jackson’s

actions violated both her due process rights and her right to be free from unreasonable seizures. Stidham has cited no case law to the court in support of a finding that a sexual assault by a police officer is an unreasonable seizure under the Fourth Amendment. *See Fontana v. Haskin*, 262 F.3d 871, 878-80 (9th Cir. 2001) (police officer's sexually harassing remarks and inappropriate touching after arrest violated Fourth Amendment). The court, however, has found at least one Fourth Circuit case which has recognized that a sexual assault by a police officer, which did not occur in the course of an attempted arrest or apprehension of a suspect, was a violation of the victim's substantive due process right under the Fourteenth Amendment not to be subjected by anyone acting under color or state law to the wanton infliction of physical harm. *See Jones v. Wellham*, 104 F.3d 620, 628 (4th Cir. 1997).

The court in *Jones* implied that, to qualify as a violation of a person's Fourth Amendment rights, the harm inflicted by the officer must occur in the course of an attempted arrest or apprehension of a suspect. *See Jones*, 104 F.3d at 628. The Fourth Amendment, however, clearly protects against "unreasonable ... seizures." U.S. CONST., amend. IV. In *Graham v. Connor*, 490 U.S. 386, 395 (1989), the Supreme Court held that the Fourth Amendment governs events "in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen." The Fourth Amendment also recognizes the "right of the people to be secure in their persons, [and] houses...." U.S. CONST., amend. IV. In this case, Stidham has shown that Jackson appeared at her home and refused to leave. Stidham also has shown that he forcibly sexually assaulted her against her will. That being the case, I find that such actions, when carried out by a law enforcement officer in relation to his role as officer, amount to a "seizure" under the Fourth Amendment.

The undisputed facts also show that Jackson's actions were "unreasonable." Typically, "[a]ssessing the Constitutionality of police action during a seizure involves 'a careful balancing of "the nature and quality of the intrusion on the individual's Fourth Amendment interests" against the countervailing governmental interests at stake.'" *Fontana*, 262 F.3d at 880 (quoting *Graham*, 490 U.S. at 396). There can be no "countervailing governmental interest," however, to justify sexual misconduct such as occurred here. *Fontana*, 262 F.3d at 880.

Finally, I find the undisputed facts of this case show that Jackson violated Stidham's substantive due process right under the Fourteenth Amendment not to be subjected by anyone acting under color of state law to the wanton infliction of physical harm. *See Jones*, 104 F.3d at 628. The undisputed facts show that Jackson's actions in soliciting sexual favors in exchange for the dismissal of criminal charges and in sexually assaulting Stidham were "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

As supplemented by the above summary and analysis, the undersigned now submits the following formal findings, conclusions and recommendations.

1. There is no genuine issue of any material fact;
2. On or about the first of June 2005, Jackson, while acting as a police officer for the Town of Coeburn, charged Stidham with speeding and driving on a suspended license;

3. When Jackson charged Stidham, he told her that if she would meet him later that night, he “would think of a way to make the tickets go away;”
4. On June 8, 2005, Jackson went to the plaintiff’s residence and told the plaintiff that “he would make the tickets disappear if plaintiff would take her clothes off for him and would exchange ‘a favor for a favor;”
5. While at Stidham’s residence on June 8, 2005, Jackson exposed himself, exerted influence and refused to leave the premises despite Stidham’s repeated requests that he do so. Jackson also pulled down Stidham’s pants and sexually assaulted her;
6. When Jackson assaulted Stidham on June 8, 2005, he acted under color of state law;
7. When Jackson assaulted Stidham on June 8, 2005, he violated her right under the Fourth Amendment to be free from unreasonable seizures; and
8. When Jackson assaulted Stidham on June 8, 2005, he violated her substantive due process right under the Fourteenth Amendment to be free from the wanton infliction of physical harm.

RECOMMENDED DISPOSITION

Based on the above-stated reasons, I recommend that the court grant the Motion and enter summary judgment in favor of the plaintiff as to liability.

Notice To Parties

Notice is hereby given to the parties of the provisions of 28 U.S.C. § 636 (b)(1)(C):

Within ten days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed finding or recommendation to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence to recommit the matter to the magistrate judge with instructions.

Failure to file written objection to these proposed findings and recommendations within 10 days could waive appellate review. At the conclusion of the 10-day period, the Clerk is directed to transmit the record in the matter to the Honorable Glen M. Williams, Senior United States District Judge.

The Clerk is directed to send copies of this Report and Recommendation to all counsel of record.

DATED: This 24th day of March 2009.

/s/ *Pamela Meade Sargent*
United States Magistrate Judge