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IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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PP.  
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JA.MI~ STUART NABOZNY;

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Plaintiff,

L.

V.

O&R

MARY.PODLESNY, WILLIAM DAVIS  
THOMAS BLAUERT, STEVEN KELLY and  
ASHLAND PUBLIC SCHOOL-DISTRICT,

95-C-086-S

Defendants.

:Plaintiff Jamie' Stuart Nabozny commenced this .civil action pursuant to 42 U.S.C. si 1983 claiming that the defendants Mary' " Fodlesny, Willi&'Daks, Thomas Blauert, Steven Kelly and Ashland Public School District violated ,his'. Fourteenth Amendment due process and equal protection rights and rights under state law: In his complaint he .alleges that.when he was a student at the Ashland', Middle, and High Schools he was sexually harassed and physically assaulted by.other students..

On 'August .+5\_, 1995 defendants filed a .motion for, summary . . judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting .pr.op.osed. findings 'of ' fact, conclusions of. law, affidavits and a brief in support. thereof. This motion has been. fully briefed and is ready for decision.-

On a motion,forsummary judgment'the question.is whether any genuine 'issue of material fact remains following the submi,,ssion by

Copy of this document has been

mailed to the following: Atty N

Randolph & Yamashita

this 5<sup>th</sup> day of Oct., 1995

By J. Bowa

Secretary to Judge John C. Shabaz

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).

#### F A C T S

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

Plaintiff Jamie Nabozny, a homosexual, is an adult resident of the State of Minnesota. Defendant Ashland Public School District owns and operates the Ashland Middle School and the Ashland High School in Ashland, Wisconsin. At all times material to this action defendant Mary Podlesny was the principal at Ashland Middle School

and defendant William Davis was the principal at Ashland High School. Defendant Thomas Blauert was the assistant principal at Ashland High School. Defendant Dr. Steven Kelly was the school superintendent of the Ashland School District from July 3, 1993 to the present.

Plaintiff was a sixth, seventh and eighth grade student at Ashland Middle School from 1987-1990. Plaintiff was a ninth, tenth, and eleventh grade student at Ashland High School from 1990 until 1993 when he dropped out: 'When a student in these schools he was sexually harassed and, physically assaulted by other students.

In his affidavit plaintiff states that he was hit, -kicked, spit upon and thrown to the ground by other students when he attended the Ashland Middle School. He further states that at high school three boys pushed him to the floor, beat him and urinated on him and on another occasion a number of his peers stopped him, in the hallway and beat and kicked him in the stomach repeatedly.

Plaintiff reported incidents of harassment and assault to defendant Podlesny, when he was in the seventh and eighth grade. On at least one occasion defendant Podlesny convened a meeting with plaintiff, his parents three alleged perpetrators and one of their parents. The alleged perpetrators denied plaintiff's accusations but were advised by defendant Podlesny to stop their harassment of plaintiff.

Plaintiff reported incidents to defendants Davis and Blauert, when he was in the ninth, tenth and eleventh grades. When plaintiff was in the ninth grade defendant Davis had a meeting with

plaintiff, his parents, two alleged perpetrators and one of their parents. The alleged perpetrators denied plaintiff's accusations. Plaintiff's guidance counselor rearranged his classes to help him avoid, the students who were harassing him.

When plaintiff was in the ninth grade a math teacher whose name plaintiff does not remember called him a "fag." Plaintiff did not report this incident to school district officials.

In both Ashland Middle School and Ashland, High School the School District assigned guidance counselors to plaintiff. Ms. Peterson, plaintiff's guidance counselor when he was in the sixth and seventh grades, took some action on plaintiff's complaints of harassment by other students including disciplining the offenders. Mr. Nowakowski became plaintiff's guidance counselor in the seventh grade. He was also a homosexual and showed sympathy and interest in plaintiff's complaints of harassment. Plaintiff got along well with Mr. Nowakowski.

In high school Ms. Hansen and Mr. Reader were plaintiff's guidance counselors. Ms. Hansen showed interest and concern and helped plaintiff deal with problems concerning his homosexuality. Upon a referral by Ms. Hansen plaintiff complained to Police Liaison Officer. Dan Crawford of the Ashland County Police Department and action was taken against the offending students.

In some cases discipline against the perpetrators, by school officials lessened the alleged harassment of the plaintiff. In

tenth grade the plaintiff received permission to use the home economics bathroom to avoid the students who harassed him in the

other bathrooms.' When in the eleventh grade plaintiff, reported that he was being harassed on the school bus, and the School District referred his parents to the school bus company which re-assigned seating.

Plaintiff dropped out of Ashland High School in December 1992. He earned his G.E.D. or high school general equivalency diploma, in Minnesota.

The School District has a policy since at least 1987 which prohibits non-discrimination on the basis of sexual orientation and promotes equal educational opportunity regardless of a student's sexual orientation.

Plaintiff has not filed a statutory claim against either the School District or the individual defendants with the clerk of the School District.

M E M O R A N D U M

Plaintiff **claims** that the defendants violated his Fourteenth Amendment due process rights by not protecting him from assaults and harassment by other students. The parties agree that Steven Kelly should be dismissed as a defendant in this action because he was not the Superintendent of schools during the time material to this action.

The Fourteenth Amendment Due Process Clause does not impose an affirmative duty upon the state to protect its citizens absent a special relationship. D&Shaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 195, 102 S.Ct. 998; 102 L.Ed. 2d 249 (1989). A state's failure to protect an individual against private

violence does not constitute a violation of the Due Process Clause. Id., at 197. The Court found that there were certain exceptions to this rule where the state has restrained an individual's freedom to act on his or her own behalf through incarceration, institutionalization or other similar restraint of liberty. Id. at 200. The Court has imposed an affirmative duty to protect incarcerated prisoners and involuntarily committed mental patients. *SmEstelle*, 429 U.S. 97 (1976); *Younabera v. Romero*, 457 U.S. 307 (1982).

In *Lo v. Alton v. Unit School District 11*, 909 F.2d 267 (7th Cir. 1990); the United States Court of Appeals for the Seventh Circuit held that the state does not have an affirmative duty to protect school children. The Court found that compulsory school attendance does not restrain children or their parents from acting on their own behalf.

Only where the state has exercised its power so as to render an individual unable to care for himself or herself may an affirmative duty to protect that individual exist. But beyond the case of incarcerated prisoners and involuntarily committed mental patients, the Supreme Court has never recognized such a duty.

*Alton*, at 282.

A special relationship did not exist between plaintiff and the defendants. Accordingly, the defendants did not have an affirmative duty to protect plaintiff from private violence;

A state can be liable for constitutional violations perpetrated by third parties under a state-created danger theory.

*Reed v. Gardner*, 906 F.2d 1122, 1123 (7th Cir. cert..

denied, 114 S.Ct. 389 (1993). Liability under this theory arises if the state's affirmative acts work to an individual's detriment in terms of exposure to danger. D.R. by L.R. v. Middle Bucks Area Vocational Technical School, 972 P. 2d 1364, 1374 (3d Cir. 1992).

In Middle Bucks plaintiff female students in a graphic arts class at a vocational school were physically, verbally and sexually molested by male students in the same class. The Court addressed the issue of whether the school defendants were liable under 42 U.S.C. § 1983 stating "We turn to that important and complex issue in this most wrenching factual setting." Id. at 1367. The Court found that no special relationship existed between the students and the defendant school officials and that the defendant school officials did not violate a constitutional duty by creating or exacerbating the danger posed by other students.

"The facts in plaintiff's case are also compelling because he was verbally harassed and beaten by other students because of his sexual orientation. There is nothing in the record, however, to indicate that the defendants created or exacerbated this danger by either their actions or inactions. Accordingly, the defendants cannot be held liable under a state-created danger theory;

Plaintiff argues that the defendants should be liable under 42 U.S.C. § 1983 because they had a custom, policy, practice or policy which caused him constitutional harm by other students. In Stoneking v. Bradford-Area School District, 882 F. 2d 720, 725 (3d Cir. 1989), the Court held that after DeShanev a school district may be liable under the Fourteenth Amendment due process clause if,

with deliberate indifference to the consequences, it established **and** maintained a policy, practice or custom which directly caused a student constitutional harm by a school employee. In Doe v. Bd. of Education of Hononesah School District 207, 833 F. Supp: 1366, 1379 (N.D. Ill. 1993); the court held that a school district was liable under the Fourteenth Amendment due process clause where it had a policy, practice or custom which fostered a climate facilitating sexual abuse of minor students by a school employee.

Plaintiff is not claiming he was sexually harassed or physically abused by a school employee. Only one incident occurred where an unidentified teacher called plaintiff a "name" on one occasion and <sup>-z-</sup> this was not reported to the school authorities.\* Rather plaintiff is claiming that the defendants had a policy, practice or custom which facilitated the sexual harassment, and abuse he received at the hands of other students; , , ,

Plaintiff has not presented any cases involving student, against student contact to support his application of liability of school officials for a policy, custom or practice that facilitated abuse by other students, and not school employees. In D.R. by L.R. v. Middle Bucks; 972 F.2d at 1376, the **Court** held, "Thus, liability may not be predicated upon a **Stoneking II** type theory because private actors committed the underlying violative acts. See also Elliott v. New Miami Board of Education, 799 F. Supp. 818 (S.D. Ohio 1992).

Defendants are not liable for any custom, policy or practice which might have caused actions by private actors. Even had such

liability existed it. was not clearly established at the time, defendants conduct occurred, and defendants would be entitled to qualified immunity. See Harlow v. Fitzerald, 457 U.S. 800,(1982). Defendants' motion for summary judgment on plaintiff's Fourteenth Amendment due process claim will b& granted.

Plaintiff claims that the defendants violated his Fourteenth Amendment equal.protection rights. The equal protection clause of the Fourteenth Amendment .requires that the state not deny any .person equal protection of the laws based upon gender.. There is .absolutely,nothing in the record ta 'indicate that plaintiff was :.. treated'differently'by the 'defendants because of,& gender.

.Plaintiff &&ek that the defendants' failure-to investigate ."plaintiff',s sexual harassment complaint and p&&h third parties the same. as they,did in cases of,sexual harassment reported by, females .,violated his equal protection rights. Plaintiff cites no case law to support the application-'of the. equal protection clause to this .' alleged inequitable application ,of' defendants' discrimination policy. ,If such behavior rises to the level of an Equal'Protection violation, ,defendants are entitled to qualified immunity because ,,' the right was not clearly established: Harlow v. Fitzerald;457 U.S. 800\*(1982)..:

'Defendants cla'im 'that.plaintiff's state law negligence claim brought .in 'this.court based..on diversity juris'diction should be dismissed because plaintiff failed to file the required statutory claim. wis.,Stats. S, 893.80(1:)(b) provides that as.a prerequisite to a suit against a,school district a claim containing the address

of the claimant and an itemized statement of the relief sought be filed with the clerk, of the school district. Said claim must be filed prior to suit, and contain a dollar demand for damages. Prejudice to defendants is irrelevant to the strict requirement of filing a claim for a sum certain under §893.80(1)(b). Yotvat v. Roth, 95 Wis- 2d 35?, 361, 290 N.W. 2d 52+(Wis. App. 1980). Plaintiff's failure to comply with this statutory condition precedent requires the dismissal of his state claims.

O R D E R

IT IS ORDERED that defendants' motion for summary judgment is

GmEDJ

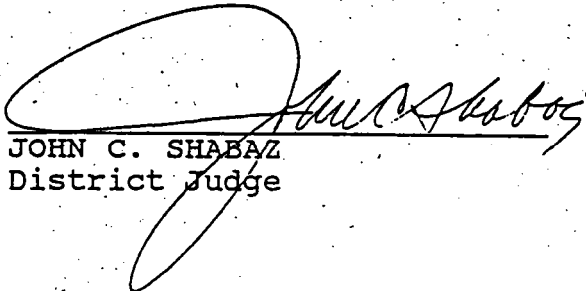
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IT IS FURTHER ORDERED that judgment be entered in favor of defendants against plaintiff KMISSING his complaint and all claims contained therein with prejudice and costs.

, Entered this 5th day of October, 1995:

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BY THE COURT:

  
JOHN C. SHABAZ  
District Judge

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WISCONSIN 5 CT - 5 IS, &

JIMIE STUART NABOZNY,

JUDGMENT IN A CIVIL CASE

Plaintiff,

Case No.: 95-C-086-S

v.

MARY PODLASKY, WILLIAM DAVIS,  
THOMAS BLAT, STEVEN KELLY and  
ASHLAND PUBLIC SCHOOL DISTRICT,

Defendants.

This action came for consideration before the court with District Judge Joseph C. Shabaz presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGE JIMIE STUART NABOZNY ENTERED IN FAVOR OF THE DEFENDANTS AGAINST THE PLAINTIFF DISMISSING HIS COMPLAINT AND ALL CLAIMS CONTAINED THEREIN WITH PREJUDICE AND COSTS.

Approved as to form this 5th day of October, 1995.

JOHN C. SHABAZ  
DISTRICT JUDGE

Copy of this document has been provided to: Randolph

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this 5th day of Oct., 1995

By C. Wilson

Deputy Clerk

Joseph W. Skupniewitz, Clerk

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by Deputy Clerk

Date