2012 IL App (1st) 101978-U

FIFTH DIVISION
February 10, 2012

No. 1-10-1978

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MARIANNE FRICANO,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 06 L 2542
	)	
THE CHICAGO WHITE SOX, LTD., CHISOX	)	Honorable
CORPORATION, SDI SECURITY, INC., TWO	)	Mary Ellen Brewer,
UNKNOWN FEMALE SECURITY OFFICERS,	)	Judge Presiding.
FRANK GUERRA, EARL PARKS,	)	
and FELIX CARRIZALES,	)	
Defendants-Appellees.	)	

JUSTICE JOSEPH GORDON delivered the judgment of the court.

Presiding Justice Epstein and Justice Howse concurred in the judgment.

O R D E R

¶ 1 HELD: Trial court properly granted summary judgment in favor of the defendants because plaintiff was unable to establish a violation of her rights under section 1983 of the United States Code or that the defendants were liable for malicious prosecution, intentional infliction of emotional distress, or false imprisonment and arrest.

¶ 2 This appeal arises from a physical altercation between several individuals in the stands at U.S. Cellular Field following a White Sox baseball game on June 23, 2004. Plaintiff, Marianne

Fricano, was arrested after the fight and charged by indictment with felony aggravated battery and mob action. The charges against her were ultimately dismissed, and she filed suit against the White Sox and several of its security guards who intervened in the fight, alleging section 1983 civil rights violations, malicious prosecution, intentional infliction of emotional distress, and false arrest and imprisonment. The trial court granted summary judgment in favor of the defendants on all counts and Fricano appealed. We now affirm.

¶ 3I. BACKGROUND

¶ 4 Plaintiff Marianne Fricano initiated this action against the Chicago White Sox, Frank Guerra, Earl Parks, and Feliz Carrizales (the known individual defendants), and two unknown female security guards, alleging violations of 42 U.S.C. 1983 for the use of excessive force by the individual defendants and for the White Sox failure to train them, as well as state law claims of malicious prosecution and intentional infliction of emotional distress against all defendants, and false imprisonment and false arrest against the known individual defendants. In her complaint filed on June 20, 2006, Fricao alleged that as she exited a Chicago White Sox game against the Cleveland Indians[1] at U.S. Cellular Field on June 23, 2004, she was attacked by another patron, Megan E. Wolfe, and was subsequently taken into custody by U.S. Cellular Field security guards, all of whom were off-duty police officers. She alleged that she was violently beaten, handcuffed, and manacled to a wall by security guards before being formally arrested by police and held by them until she was able to post bond. Fricano was charged with felony

1 Fricano asserts that the Cleveland Indians are "the arch rival" of the Chicago White Sox. While the two teams maintain a healthy rivalry, this court notes that it is generally accepted, at least among informed baseball followers, that the title of arch rival belongs to the reviled Minnesota Twins, to be shared, during inter-league play, with the Chicago Cubs.

charges of aggravated battery and mob action, however those charges were ultimately dismissed by the State on August 8, 2005.

¶ 5 Discovery depositions were taken of all the identifiable participants in the altercation, as well as of police officers involved in the ensuing arrests, including Hector Esparaza, the arresting officer, David Evans, a Chicago police officer who investigated the incident, and Thomas Lamb, the White Sox director of security. Following the close of discovery, the defendants filed their motion for summary judgment, arguing that there were no genuine issues of material fact as to any of Fricano's claims. In support of their motion, the defendants submitted the depositions of Fricano, Wolfe, Roberto Guerra, the Vicarios, and the known individual defendants, as well as those of Evans, Esperaza, and Lamb. The defendants additionally submitted copies of the White Sox game day security manual and copies of police reports associated with the incident.

¶ 6 In her response to the defendants' motion, Fricano also submitted her own deposition, as well as the deposition testimony of the known individual defendants and Lamb, and White Sox incident reports prepared by the known individual defendants.

¶ 7 The following facts contained in the parties' submissions are not in dispute. On June 23, 2004, Fricano was accompanied by her husband, Richard Vicario, her brother-in-law, Sam Vicario, and Sam Vicario's girlfriend, Rebecca Carlson at a White Sox game at U.S. Cellular field. Following the White Sox loss, Richard and Sam Vicario began yelling obscenities at several Cleveland fans nearby.

¶ 8 The Vicarios were then approached by Roberto Guerra, an off-duty Burbank, Illinois police officer, who was also in attendance with his wife, Megan Wolfe, and two young sons.

Roberto Guerra admonished the Vicarios for their use of profanity in front of his young children. After the men exchanged heated words, a physical altercation ensued between the three men. U.S. Cellular field security guards intervened and began to break up the fight. Among them were White Sox security guards Frank Guerra, Earl Parks, and Felix Carrizales (the known individual defendants). Frank Guerra was an off-duty Illinois state police officer while Parks and Carrizales were off-duty Chicago police officers. There is no indication in the record of any relationship between Frank Guerra and Roberto Guerra. As security guards approached, Wolfe and Fricano began fighting, exchanging several blows before being separated by security guards.

¶ 9 It is further undisputed that the known individual defendants were employed by At Your Service, LLC (AYS), the company which provided security at U.S. Cellular Field. According to the deposition of Thomas Lamb, AYS's security director, AYS only hires off-duty police officers to work as security guards at U.S. Cellular Field, so that it may rely on their police training. Additionally, AYS requires all its security officers to attend a four hour training and orientation session, which includes instruction on how to respond to unruly fans, disturbances, and altercations. Pursuant to written White Sox policies, security guards are prohibited from identifying themselves as police officers at the ball park. Following any incidents at the ball park, AYS employees are required to file White Sox incident reports, rather than formal police reports. Pursuant to the White Sox Day of Game Security Policy/Procedure manual, "while employed by [AYS], [full time law enforcement officers] are primarily guest service/security officers first, and law enforcement officers second."

¶ 10 There is no dispute that following the altercation, Fricano and the Vicarios were taken by

security guards into a security office at U.S. Cellular Field. Police were called and Fricano was preliminary charged with misdemeanor battery. She was later formally charged by grand jury indictment with three felony counts of aggravated battery (of Wolfe) and three counts of mob action.[2] This indictment was based solely on the grand jury testimony of Detective Evans which, in turn, was based on the interviews he and other detectives conducted with Wolfe and others involved. The charges against Fricano were ultimately dismissed on August 8, 2005.

¶ 11 According to the deposition testimony of the known individual defendants, all three of them observed Fricano punch and/or pull Wolfe's hair during the altercation, but none observed its beginning or was otherwise able to identify the initial aggressor. Parks stated in his deposition that he observed Fricano strike Wolfe as he was trying to pull Wolfe away from Fricano and that it was his belief that Fricano pulled Wolfe by the hair. Parks further stated that only after viewing a surveillance video, approximately one year after the incident, did he realize that Wolfe was the initial aggressor in the altercation between her and Fricano.

¶ 12 The guards escorted the Vicarios and Fricano to a security office within U.S. Cellular Field. There, their testimony indicates that the Vicarios threatened security officers, Sam Vicario struck Frank Guerra in the face with a closed fist, and Rich Vicario spat upon Frank Guerra and Carrizales before being handcuffed.

¶ 13 The deposition testimony of the known individual defendants further indicated that once restrained, Fricano was held in the security office until Chicago police officers arrived,

2 The Vicarios were also charged with, and pled guilty to, felony mob action.

whereupon she and the Vicarios were then taken by police officers to the Ninth District police station. Parks, and Carrizales prepared Security Incident Reports about the events, as required by White Sox policies, but did not prepare police reports or formally arrest Fricano. The reports suggest that security officers used necessary force to handcuff the Vicarios who were both combative and spitting, but make no mention of Fricano or the Vicarios being beaten. The known individual defendants all deny subjecting Fricano or the Vicarios to any phyiscal abuse, or witnessing such abuse at the hands of other security guards. The defendants further note that in their depositions, the Vicarios stated that they did not see or hear Fricano being abused, and Fricano conceded that she suffered no physical injuries as a result of allegedly being pounced upon, and did not seek medical treatment.

¶ 14 According to his deposition, Chicago police officer Hector Esperaza received a call from his superiors on July 23, 2004 to come into the ninth district police station to process the arrests of Fricano and the Vicarios. At the station, he interviewed Roberto Guerra and Wolfe, and stated that the only information he received regarding Fricano, including the facts establishing the probable cause for her arrest, came only from those two individuals. Esperaza's deposition further indicated that the information for the arrest of the Vicarios came from Roberto Guerra and Wolfe. He stated that "no information came from any White Sox security officer or employee," and that he received no information from any White Sox employee regarding Fricano. He further stated that while at the station, Fricano was "calm," "laughing," and "giggling" while at the police station and did not mention being abused by security guards.

¶ 15 David Evans testified in his deposition that following Fricano's arrest, he was assigned to

carry out a follow-up investigation of the incident at U.S. Cellular Field. Evans stated that he interviewed the three known individual defendants during the course of his investigation, as well as the Vicarios and Fricano. During those interviews, Evans disclosed that Frank Guerra told him that he saw Fricano hit Wolfe in the face, but did not say how the fight between the two started. Evans further indicated that Carrizales stated that he saw Wolfe's hair being pulled down by Fricano, but that he did not see how the fight started. Parks told him that at one point he saw Fricano punch Wolfe in the face with a fist, but he did not see how the fight started. Evans further testified that no security officer told him how the fight began or told him anything about Fricano in the White Sox security office. With respect to his interview with Fricano, Evans' deposition testimony states that she never told him that she was "abused in any way either verbally or physically by any White Sox officer," and that she never told him that "she was pushed to the floor or treated violently by security officers in the security office."

¶ 16 According to Fricano's version of the events, as contained in her deposition testimony, Wolfe started the fight between them, and Fricano was, at all times, acting in self defense. Fricano denied that she pulled Wolfe down by the hair. She alleges that a U.S. Cellular Field security video supports this contention, however a copy of this video is not contained in the record on appeal.[3]

¶ 17 In her deposition, Fricano further alleged that once in the security office, she observed the Vicarios being beaten by approximately five security guards. Then, she contends, "suddenly and without provocation," Frank Guerra pushed her and shoved her to the floor and told her she

3 Fricano's proposed tender of three copies of this video simply by referencing them in her appellate brief, in lieu of their inclusion as part of the record, may not now be accepted. *Kensington Wine Auctioneers & Brokers, Inc. v. John Hart Fine Wine, Ltd.*, 392 Ill. App. 3d 1, 14 (2009) ("An appellate court may not consider documents that are not part of the certified record on appeal").

was a "piece of dirt" and was "going to rot in hell." Two female security guards then "jumped and pounced upon her chest and leg areas," "violently twisted and pulled her left arm," and manacled her to a metal ring in the wall. Once in police custody, Fricano initially told detectives that she could not recall if she struck Wolfe, but later admitted to doing so in her deposition.

¶ 18 Once the charges against her were dropped, Fricano filed a complaint against the White Sox, SDI Security, Inc., the known individual defendants, two unknown female security guards, and Wolfe.[4] She alleged violations of 42 U.S.C. 1983 (section 1983) by the known individual defendants and the two unknown female security guards, section 1983 violations by the White Sox, and state law claims of malicious prosecution, intentional infliction of emotional distress, false imprisonment, and false arrest against all defendants.

¶ 19 A hearing was held on the defendants' motion for summary judgment on June 15, 2010. Following arguments, the court held that Fricano "clearly failed" to establish state action on the part of the individual defendants and the White Sox, and that she presented no evidence to support her claims of malicious prosecution, intentional infliction of emotional distress, or false imprisonment and arrest. The court therefore granted summary judgment in favor of the defendants on all counts. This appeal followed.

¶ 20II. ANALYSIS

¶ 21 On appeal, Fricano alleges that the trial court improperly granted summary judgment in favor of the defendants on (1) her section 1983 claim against the individual defendants, (2) her

4 AYS was not named as a defendant in this matter. Fricano apparently mistakenly named SDI Security, Inc. as a defendant, and voluntarily dismissed it from this matter on August 17, 2007. Fricano settled her claims with Wolfe in August 2011.

section 1983 claim against the White Sox, (3) her malicious prosecution claim, (4) her intentional infliction of emotional distress claim, and (5) her false imprisonment and false arrest claims.

¶ 22 We review an order granting summary judgment *de novo*. *Stern v. Wheaton-Warrenville Community Unit School District 200*, 233 Ill. 2d 396, 404 (2009). Summary judgment is warranted where the evidence, "when viewed in the light most favorable to the nonmovant, reveal[s] there is no geniune issue of material fact and that the movant is entitled to judgment as a matter of law." *Midwest Trust Services, Inc. v. Catholic Health Partners Services*, 392 Ill. App. 3d 204, 209 (2009). "The suggestion that an issue of material fact exists, without supporting evidence, is insufficient to create one." *People v. Manos*, 326 Ill. App. 3d 698, 704 (2002). For the reasons that follow, we affirm.

¶ 23 A. Section 1983 Claims

¶ 24 Fricano first alleges that the trial court erred in granting summary judgment in favor of defendants on her section 1983 claims against the two unknown female security guards. the known individual defendants, and the White Sox. The defendants, however, contends that summary judgment was proper because the record establishes that none of the defendants were acting under color of law on the night in question and none of them used excessive force against Fricano. For the reasons that follow, we agree with the defendants.

¶ 25 Section 1983 of the United States Code provides that a plaintiff may recover civilly if she is deprived of a constitutional right by a private individual acting under color of law. (42 U.S.C. 1983 (West 2008)). That section states that:

¶ 26 "Every person who, under color of any statute, ordinance,

> regulation, *** custom, or usage, of any State *** subjects, or causes to be subjected, any citizen of the United States *** to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law." 42 U.S.C. 1983.

¶ 27 Thus, "the initial inquiry into a section 1983 action is whether the conduct complained of deprived the plaintiff[] of a right, privilege, or immunity secured by the Constitution or laws of the United States." *Henderson v. Bradford*, 168 Ill. App. 3d 777, 780 (1988). If no such deprivation is found, then a plaintiff's claim fails. If, however, a plaintiff is able to establish that she was deprived of a right, privilege or immunity by an individual, then the next step in our inquiry must be whether that individual acted under color of state law when the plaintiff's rights were violated.

¶ 28 Fricano contends that defendants are liable under section 1983 because they used excessive force against her, in violation of her constitutional rights. The amount of force used against an individual is deemed excessive for section 1983 purposes if was greater than necessary to arrest an individual in light of the circumstances surrounding the arrest. *Catlin v. City of Wheaton*, 574 F.3d 361, 366-67 (7th Cir. 2009). In order to determine whether excessive force was used, a court should look to "the need for an application of force, the relationship between that need and the force applied, the threat reason ably perceived by the responsible officers, the efforts made to temper the severity of the force employed, and the extent of the injury suffered by the prisoner." *DeWalt v. Carter*, 224 F.3d 607, 619 (7th Cir. 2000). With respect to the last factor, while significant injury is not required, a section 1983 claim

nevertheless "cannot be predicated on a *de minimis* use of physical force," which has been defined as force that "is not of a sort repugnant to the conscience of mankind." *DeWalt,* 224 F.3d at 620, *Outlaw v. Newkirk,* 259 F.3d 833, 838 (7th Cir. 2001).

¶ 29 1. Section 1983 Claims against the Unknown Female Security Guards

¶ 30 We first note that Fricano named "two unknown female security officers" as defendants in this matter, alleging that they used excessive force when they jumped and pounced upon her in the security office. Once there has been an opportunity to discover an unknown defendant's identity, there can be no section 1983 liability against that defendant if a plaintiff fails to do so. *Collier v. Rodriguez,* 1996 U.S. Dist. LEXIS 13719 (N.D. Ill. 1996); *Guy v. Lara*, 1999 U.S. Dist. LEXIS 13300 (N.D. Ill. 1999) ("Determining the identity of unknown police officers is a discovery matter"). Once an opportunity for discovery has occurred, claims against unknown officers are "meaningless and uncompensable." *Glover v. Village of Oak Lawn,* 2000 U.S. Dist. LEXIS 18155 (N.D. Ill. 2000).

¶ 31 Here, there is no indication in the record that Fricano made any attempt to ascertain the identities of the unknown officers during discovery. Instead, she asserts that she was unable to do so because of the "Blue Code of Silence," under which, she alleges, their fellow officers refused to identify the unknown female guards pursuant to an unwritten agreement among police. Nothing in the record suggests that any person involved adhered to such a code. Thus, because she had ample opportunity during discovery to ascertain their identities and failed to do so, Fricano's section 1983 claims against the two unknown security officers must fail as a matter of law.

¶ 32 2. Section 1983 Claims Against the Known Individual Defendants

¶ 33 We will next address Fricano's section 1983 claims against the known individual defendants. She alleges that the individual defendants, while acting under the color of law, willfully and maliciously used an excessive degree of force against her when she was thrown to the floor, handcuffed, and manacled to a wall, in violation of her constitutional rights. Defendants, however, assert that because the individual defendants did not use excessive force against her and, moreover, were not performing official police duties, they could not be liable under section 1983. We agree with defendants.

¶ 34 Fricano is unable to establish that either Parks or Carrizales used *any* force against her, let alone excessive force. She stated in her deposition that she was pushed to the ground by a "Hispanic security officer" who she later discovered to be Frank Guerra before being pounced and sat upon by the unknown female security guards. She later confirmed in that deposition that this was the only force used against her by White Sox security officers. Her contentions regarding the alleged beating of the Vicarios have no bearing on our analysis as the Vicarious are not plaintiffs in this matter. Therefore, based on her own deposition testimony that she had no physical contact with them, summary judgment on Fricano's claims of excessive force against Parks and Carrizales was properly entered.

¶ 35 With respect to her section 1983 claim against Frank Guerra, even if he did use force against Fricano, there is no indication in the record that this force was excessive, and even if it were, as shall be discussed, Guerra's conduct, and the conduct of all the individual defendants, was nevertheless insufficient to establish that they acted under color of law as a matter of law.

¶ 36 Fricano argues that the known individual defendants acted under color of state law because they were "active, off-duty, full-time law enforcement officers cloaked with their full police authority and powers and expected to authorize that authority 24 hours a day." In support of this contention, Fricano cites Parks' deposition testimony in which he stated that "[i]f there is a situation for an immediate intervention to save someone's life or great bodily harm whereas if I called the police they would not be there in time to save that person, then I have to act."

¶ 37 Defendants, however, insist that summary judgment was proper because none of the defendants were acting in an official police capacity on the night of the altercation. They argue that the mere fact that the individual defendants were off-duty police officers is insufficient to support a section 1983 claim. We agree with the defendants.

¶ 38 The United States Supreme Court has held that "a public employee acts under the color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law." *West v. Aikens*, 487 U.S. 42, 50, 108 S. Ct. 2250, 2254-55, 101 L. Ed. 2d 40, 50 (1988). While police officers are public employees, they do not always act under the color of state law. *Gibson v. City of Chicago*, 910 F.2d 1510, 1516 (7th Cir. 1990). While a police officer's being off duty does not necessarily preclude him from acting under the color of law, his status as a police officer will not automatically subject him to section 1983 liability. *Greco v. Guss*, 775 F.2d 161, 168 (7th Cir. 1985).

¶ 39 "Whether a police officer is acting under color of state law turns on the nature and circumstances of [his] conduct and the relationship of that conduct to the performance of his official duties." *Hill v. Barbour*, 787 F. Supp. 146, 149 (N.D. Ill. 1992). "Deciding whether a

police officer acted under color of state law should turn largely on the nature of the specific acts the police officer performed, rather than on merely whether he was actively assigned at the moment to the performance of police duties. [Citations]." *Pickrel v. City of Springfield*, 45 F.3d 1115, 1118 (7th Cir. 1995). Thus, in determining whether an off-duty police officer acted under color of state law, "the essential inquiry becomes whether [the defendants'] actions related in some way to the performance of a police duty." *Gibson v. City of Chicago*, 910 F. 2d at1517.

¶ 40 Courts have previously addressed issue of whether off-duty police officers working as security guards act under the color of state law, and determined that they do not. The case of *Herrera v. Chisox Corp.*, 1995 U.S. Dist. LEXIS 14719 (N.D. Ill. 1995) is particularly instructive as it also involves a section 1983 claim against off-duty police officers employed as security guards at a White Sox game. In *Herrera*, the plaintiff was detained by two off-duty police officers working as White Sox security guards after being caught allegedly scalping tickets. He was taken into the White Sox security office, handcuffed to a bench, released, and then subsequently rearrested after allegedly striking one of the security guards. He was then held in the security office until on-duty police arrived and took him into custody. *Herrera*, 1995 U.S. Dist. LEXIS 14719 at 4-7. The plaintiff brought suit under section 1983, contending that the security guards acted under color of law when they detained him because they were able to exercise their police powers 24 hours a day, even when off duty. The court rejected the plaintiff's claims and granted summary judgment in favor of the defendants, finding that the defendants "acted in their individual capacities as privately employed security guards rather than in their official capacity as [police officers]." *Herrera*, 1995 U.S. Dist. LEXIS 14719 at 19. In

support of its conclusion, the court noted that despite their admissions that they were on duty 24 hours a day, the defendants never identified themselves to the plaintiff as police officers or showed him their badges, were not wearing their uniforms but rather were dressed as White Sox security officers, and did not carry or use their service revolvers. Furthermore, the defendants took the plaintiff to a security office within the ballpark rather than a police station, did not assist on-duty police officers with the plaintiff's arrest, and completed a White Sox incident report rather than a police report. *Herrera*, 1995 U.S. Dist. LEXIS 14719 at 16-17.

¶ 41 The *Herrera* court found support for its decision in numerous federal district and circuit court cases which found that off-duty police officers employed as private security guards did not violate section 1983 because they were not acting under the color of state law. See *Robinson v. Davis*, 447 F.2d 753 (4th Cir. 1971) (part time college security guards who were also employed by local police were not acting under color of state law when they requested the presence of certain students at a meeting convened by the college's dean), *Watkins v. Oaklawn Jockey Club*, 183 F.2d 440 (8th Cir. 1950) (off-duty police officer working as a security guard at a race track did not act under color of state law when he escorted the plaintiff off the premises per the track owner's instruction).

¶ 42 Here, the fact that the individual defendants were off duty police officers employed as private security guards for the White Sox is insufficient, on its own, to establish section 1983 liability. The undisputed evidence shows that they did not identify themselves as police officers or display their badges to plaintiff, nor did they wear police uniforms, but instead wore clothing indicating they were part of White Sox security. Moreover, there is no evidence in the record indicating that any of the individual defendants was carrying his service weapon or used his

department-issued handcuffs to restrain her. Like those in *Herrera,* the defendants here brought Fricano to the White Sox security office rather than a police station, filed White Sox incident reports rather than police report, and had no involvement in the State's decision to file criminal charges against Fricano. Thus, because there is no evidence in the record which would indicate that the individual defendants were acting under color of state law, Fricano's section 1983 claim against them must fail as a matter of law.

¶ 43 3. Section 1983 Claims Against the White Sox

¶ 44 We must next address Fricano's contention that the White Sox are liable under section 1983 for the actions of the individual defendants because the team "insinuated state action into their operation" by hiring off-duty police officers as security guards. She argues that because the White Sox utilize only off-duty police officers "who are required to exercise their police authority 24 hours a day," the team is essentially a state actor and is therefore liable for the alleged abuses she suffered at the hands of the individual defendants. We disagree.

¶ 45 "It is well established that there is no *respondeat superior* liability under § 1983. [Citation]. 'A private corporation is not vicariously liable under § 1983 for its employees' deprivations of others' civil rights.' " *Gayton v. McCoy,* 593 F.3d 610, 622 (7th Cir. 2010); quoting *Iskander v. Village of Forest Park,* 690 F.2d 126, 128 (7th Cir. 1982). See also *Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 822 (2007) ("It has long been established that there is no respondeat superior liability under section 1983"). However, a private corporation may be held liable under section 1983 while acting under color of state law if a plaintiff is able to "demonstrate that a constitutional deprivation occurred as the result of an express policy or custom." *Jackson v. Illinois Med-Car, Inc.*, 300 F.3d 760, 766 (2002); citing

Iskander, 690 F.2d at 128.

¶ 46 Courts have repeatedly and consistently held that where there has been no showing of a constitutional violation by individual police officers, their employers, as well, cannot be held liable under section 1983. In the seminal case of *City of Los Angeles v. Heller*, the United States Supreme Court held that if once it was established that an individual officer did not violate section 1983, his department could not be held liable either, holding that "[i]f a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point." 475 U.S. 796, 799, 89 L. Ed. 2d 806, 106 S. Ct. 1571 (1986). See also *Treece v. Hochstetler*, 213 F.3d 360, 364 (2000) ("*Heller* establishes that a city's liability is derivative of its police officer's liability"); *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 597 (7th Cir. 1997).

¶ 47 Here, there has been no constitutional violation on the part of any individual defendant employed by the White Sox. As thoroughly discussed above, summary judgment on Fricano's claims against the individual defendants was proper because she was unable to establish that any of the individual defendants violated section 1983 as a matter of law. Thus, because none of the individual defendants can be held liable under section 1983, her section 1983 claim against the team must fail as a matter of law.

¶ 48 Furthermore, even if Fricano's claims would have sufficiently established the liability of the known individual defendants under section 1983, our outcome with respect to the White Sox would not differ because she cannot establish that the team acted under color of state law.

¶ 49 "When a plaintiff brings a section 1983 claim against a defendant who is not a

government official or employee, the plaintiff must show that the private entity acted under the color of state law. This requirement is an important statutory element because it sets the line of demarcation between those matters that are properly federal and those matters that must be left to the remedies of state tort law." *Rodriguez*, 577 F. 3d at 822-23.

¶ 50 In order for a section 1983 plaintiff to establish state action on the part of a private entity, she must establish that the state either (1) directs or controls the actions of the private party; or (2) delegates a public function to a private entity. *Wade v. Byles*, 83 F.3d 902, 905 (7th Cir. 1996). In the first instance, state action will only be found if the state "exerts coercive power over the private entity or provides significant encouragement" to that private entitry. *Cornish v. Correctional Services Corp.*, 402 F.3d 545, 549 (5th Cir. 2005). In making this determination, a court will look to whether the private party and the government are so entwined in the joint activity that the state effectively controls the private entity's actions. *Hu v. American Bar Association*, 568 F.Supp.2d 959, 963 (N.D. Ill. 2008), citing *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 296, 121 S. Ct 924, 148 L. Ed. 2d 807 (2001).

¶ 51 To succeed under the first theory, a plaintiff must establish the existence of "a conspiracy or agreement on a joint course of action in which the private party and the state have a common goal." *Stewart v. Harrah's Illinois Corp.*, 2000 U.S. Dist. LEXIS 10413 (N.D. Ill. 2000). "In order to establish the existence of a conspiracy, a plaintiff must show that the state actor and the private entity 'reached an understanding' to deprive him of his constitutional rights." *Stewart*, 2000 U.S. Dist. LEXIS 10413 (quoting *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1352 (7th Cir. 1985)).

¶ 52 Under the second theory, a plaintiff may also establish state action by demonstrating that the private entity is performing a *public function* which would otherwise be exclusively reserved to the state. This is a "rigorous standard that is rarely satisfied." *Hu*, 568 F.Supp.2d at 963.

¶ 53 Here, Fricano is unable to establish that the State effectively controlled or directed the White Sox, or that a conspiracy existed between the two which would constitute joint activity for section 1983 purposes. She has not alleged, nor can we find anything in the record indicating the existence of an agreement between them whereby the police would arrest anyone the White Sox wanted arrested, or that such an agreement was followed when she was detained and subsequently arrested. In fact, the White Sox director of security, Thomas Lamb, explicitly stated in his deposition without challenge that there was no such agreement between the White Sox and the Chicago Police Department. Moreover, the record clearly indicates that Fricano's arrest was based on the accounts of Wolfe and Roberto Guerra, and was not effectuated at the behest of the White Sox or any other defendant.

¶ 54 Moreover, Fricano is unable to satisfy the rigorous standard set forth in the second prong of the test for state action because there is no evidence of any delegation of any public function, by the state to the White Sox. She has cited no authority, statutory or otherwise, which would indicate a delegation of police authority to the team. The mere fact that White Sox security guards detained her does not transform the team into a state actor. *Wade*, 83 F.3d at 905, *Herrera*, 1995 U.S. Dist. LEXIS 14719 at *4. For this reason, the cases she cites in support of her contention are unpersuasive. Unlike the case at bar, in *Scott*, *Stokes*, and *Payton*, the defendant-employers each received specific and direct government delegation of police powers,

thus cloaking them "with virtually the same power as public police officers." *Payton v. Rush Presbyterian-St. Luke's Medical Center*, 184 F.3d 623 (7th Cir. 1999) (hospital security guards appointed as "special policemen" by city ordinance were subject to liability under section 1983 because they were given "virtually the same power as public police officers."). See also *Scott v. Northwestern University School of Law*, 1999 U.S. Dist. LEXIS 2815 (N.D. Ill. 1999) (a private university's police force which was granted statutory authority to make arrests satisfied the "public function" test by virtue of that statutory authorization), *Stokes v. Northwestern Memorial Hospital*, 1989 U.S. Dist. LEXIS 8543 (N.D. Ill. 1989) (the City of Chicago appointed "special policemen" via city ordinance, requiring them to wear badges and follow police regulations, and granting them the power to guard and protect private property with the same powers as regular police). Unlike these cases, there is no indication anywhere in the record that the White Sox received any grant of authority permitting their security forces to behave like police officers. Thus, Fricano is unable to establish state action on the part of the White Sox, and summary judgment was therefore proper.

¶ 55 As discussed above, because her underlying section 1983 claims against the individual defendants failed, Fricano's claims for failure to train and for encouraging the use of excessive force must also fail. See *Padula v. Leimbach*, 656 F.3d 595, 605 (7th Cir. 2011).

¶ 56B. Malicious Prosecution

¶ 57 Fricano next alleges that the trial court improperly granted summary judgment on her malicious prosecution claims, insisting that the known individual defendants had no probable cause for her apprehension and detention. We disagree.

¶ 58 A plaintiff claiming malicious prosecution must allege facts showing "(1) the

commencement or continuance of an original criminal or civil judicial proceeding by the defendant; (2) the termination of the proceeding in favor of the plaintiff; (3) the absence of probable cause for such proceeding; (4) the presence of malice; and (5) damages resulting to the plaintiff. " *Swick v. Liautaud*, 169 Ill. 2d 504, 512 (1996).

¶ 59 "In Illinois, suits for malicious prosecution are not favored. [Citations.] Public policy favors the exposure of crime, and the cooperation of citizens possessing knowledge thereof is essential to effective implementation of that policy. [Citation.] Persons acting in good faith who have probable cause to believe crimes have been committed should not be deterred from reporting them by the fear of unfounded suits by those accused." *Reynolds v. Menard, Inc.*, 365 Ill. App. 3d 812, 819 (2006), quoting *Rodgers v. Peoples Gas, Light & Coke Co.*, 315 Ill. App. 3d 340, 345-46 (2000).

¶ 60 Consequently, an individual who unwittingly gives a prosecuting officer false information of another's involvement in a crime is not liable for malicious prosecution "unless the person takes an active part in instituting criminal proceedings, by requesting, directing, or pressuring the prosecuting officer into instituting the proceedings." *Allen v. Berger*, 336 Ill. App. 3d 675, 678 (2002). The presence of malice is also a necessary element of a malicious prosecution claim. "In order to support an action for malicious prosecution there must be both malice and want of probable cause, and they must concur.[Citations.] Malice may be inferred from want of probable cause when the circumstances are inconsistent with good faith by the prosecutor and where the want of probable cause has been clearly proved." *Turner v. Chicago*, 91 Ill. App. 3d 931, 937 (1980); *Reynolds v. Menard, Inc.*, 365 Ill. App. 3d 812, 822 (2006)

¶ 61 Here, Fricano's malicious prosecution claim must fail because the undisputed evidence in the record indicates that Wolfe and Robert Guerra, rather than any of the defendants, commenced criminal proceedings against her. Fricano admits this in both her amended complaint and in her response to defendants' motion for summary judgment, asserting in both that "Megan E. Wolfe and Roberto [Guerra] commenced both civil and criminal proceedings against [Fricano]." Neither is named as a defendant in this action. The deposition testimony of the arresting officer, Hector Esparza, further indicates that Wolfe and Roberto Guerra alone were responsible for the charges filed against Fricano. He indicated that "the only information [he] received regarding [Fricano] came from Robert Guerra and Megan Wolfe," whose statements "suppl[ied] the probable cause for the arrest of [Fricano]." Esparza further stated that Fricano's arrest was based solely on the incident in the stands and that he obtained no information with respect to that event from "any White Sox Security officer."

¶ 62 Moreover, nothing in the record indicates that following Fricano's arrest, either Frank Guerra, Carrizales, or Parks gave knowingly "false and exaggerated" statements to police, as Fricano suggests, or that the statements they did make were given maliciously. David Evans, a police officer who investigated the case, stated in his deposition that he interviewed Frank Guerra, Swiderski, Carrizales and other officers following Fricano's arrest. He indicated that Frank Guerra told him that he only "saw [Fricano] hit [Wolfe] in the face," but did not say how the fight between the two started. Evans further indicated that Carrizales stated that from his vantage point, about 150-200 feet away, "he saw [Wolfe's] hair being pulled down by [Fricano], but that he did not see how the fight started." Evans also stated that Parks told him "he saw at one point [Fricano] punch [Wolfe] in the face with a fist," but he also did not see how the fight

started." Fricano has not cited no evidence which would cast any doubt on the veracity of these statements. She does not dispute the fact that she struck Wolfe during the altercation, or that her striking Wolfe was the basis for the criminal charges against her. While she alleges that Carrizales's testimony that she pulled Wolfe down by her hair is refuted by the security video, as stated above, the record indicates that her arrest and subsequent prosecution was based on her striking Wolfe without legal justification, not pulling her hair. Moreover, even if Carrizales' statement was false, Fricano has failed to allege how his statement could create an inference of malice.

¶ 63 Consequently, there is no support in the record to substantiate Fricano's claim that "[b]ut for the actions of the Defendants, *** Fricano would not have been arrested and prosecuted."

¶ 64C. Intentional Infliction of Emotional Distress

¶ 65 Fricano next contends that the court improperly granted summary judgment in favor of defendants on her intentional infliction of emotional distress ("IIED") claim. Without alleging any specific facts, she generally claims that the defendants' actions were "done to intentionally and maliciously cause severe emotional distress" to her, and that they knew or should have known this. Defendants, however, argue that summary judgment was proper because there is no evidence of any outrageous conduct on the part of the defendants or that Fricano suffered severe emotional distress. We agree with defendants.

¶ 66 In order to succeed on a claim of IIED, a plaintiff must satisfy three elements: "First, the conduct involved must be truly extreme and outrageous. Second, the actor must either *intend* that his conduct inflict severe emotional distress, or know that there is at least a high probability that

his conduct will cause *severe* emotional distress. Third, the conduct must in fact cause severe emotional distress." *McGrath v. Fahey*, 126 Ill. 2d 78, 86 (1988) (Emphasis in original).

¶ 67 "Conduct is of an extreme and outrageous character where recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" *Doe v. Calumet City*, 161 Ill. 2d 374, 392 (1994). "[M]ere insults, indignities, threats, annoyances, petty oppressions, or other trivialities," however, do not amount to extreme or outrageous conduct. Restatement (Second) of Torts § 46, Comment *d*, at 73 (1965).

¶ 68 In order to sustain an IIED claim, the emotional distress suffered by a plaintiff "must be so severe that no reasonable person could be expected to endure it." *Adams v. Sussman & Hertzberg, Ltd.*, 292 Ill. App. 3d 30, 38 (1997). The "infliction of such emotional distress as fright, horror, grief, shame, humiliation and worry is not sufficient to give rise to a cause of action." *Adams*, 292 Ill. App. 3d at 38.

¶ 69 Here, Fricano is unable to satisfy any of the elements of her IIED claim. Her brief merely makes the bald assertions that defendants "knew or reasonably should have known that their actions had a high probability of causing severe emotional distress to her," but does not cite anything in the record which would support such a claim. Fricano has failed to provide any evidence that any of the defendants acted in an extreme and outrageous manner, or that their actions caused her severe emotional distress.

¶ 70 As discussed at length above, there is no indication in the record that the conduct of and of the defendants was extreme or outrageous. Nor has Fricano alleged sufficient facts to suggest that suffered severe emotional distress. She claims that as a result of her arrest and the criminal

proceedings, she had anxiety and trouble sleeping and eating. Fricano did not allege that she sustained any physical injuries, and admitted that she has never been hospitalized or treated for these symptoms. For that matter, the record indicates that once she arrived at the police station following the altercation and her alleged beating, officers described Fricano's demeanor as "calm" and observed her "laughing" and "giggling," further suggesting the defendants' conduct was not extreme or outrageous and that the distress Fricano suffered was not severe. These allegations are insufficient, as a matter of law, to sustain a claim for IIED.

¶ 71 Moreover, courts have repeatedly held that the type of emotional distress suffered by Fricano, namely stress and trouble sleeping or eating, is insufficient to sustain a claim for IIED. See *Adams*, 292 Ill. App. 3d at 38. In *Adams*, the court upheld a judgment notwithstanding the verdict in favor of the defendants on the plaintiff's IIED claim, finding that although the plaintiff suffered "shame, humiliation and worry as a result of [the defendant's] request that the plaintiff be charged with criminal trespass," there was no evidence to show that his distress was severe. Although "plaintiff stated that he was afraid; that he was fearful about his career and what his colleagues, friends and loved ones would think and hear about his being charged with a criminal act that he did not commit; and that he cried when his mother arrived at the police station to post bail," there was no evidence to suggest severe emotional distress, "*i.e.*, that he was hospitalized, sought and received psychiatric treatment, or even was prescribed medication." *Adams*, 292 Ill. App. 3d at 38-9.

¶ 72 Similarly, in *Khan*, the plaintiff filed a complaint for IIED against American Airlines and two of its employees after the employees gave him a stolen ticket, arrested him for possessing that stolen ticket, and turned him over to the police. The plaintiff alleged that as a result of the

incident, he had "problems sleeping, refrain[ed] from discussing the incident with his spouse, fear[ed] that he will again be arresed, [and] has reoccurring nightmares of being arrested." *Khan v. American Airlines*, 266 Ill. App. 3d 726, 733 (1994). The trial court dismissed his claim for failing to plead facts to support a claim of IIED and the appellate court affirmed, holding that the evidence did not demonstrate that "the distress the plaintiff suffered as a result of the conduct was such that no reasonable person could be expected to endure it or that there was a high degree of probability that severe emotional distress would follow the conduct of the defendants." *Khan*, 266 Ill. App. 3d at 733.

¶ 73 Most recently in *Johnson*, the plaintiffs sued their employer for IIED after it hired private investigators to investigate its employees. *Johnson v. K Mart Corp.*, 311 Ill. App. 3d 573 (2000). The plaintiffs alleged that they suffered stress and distrust after the investigators disclosed private facts about them to their employer. Affirming summary judgment in favor of the defendants, the appellate court held that "feelings of stress and distrust neither satisfy [the severe emotional distress] requirement nor constitute a question of fact regarding the severity of emotional distress suffered by plaintiffs." *Johnson*, 311 Ill. App. 3d at 581. See also *Farrar v. Bracamondes*, 332 F. Supp. 2d 1126 (N.D. Ill. 2004) ("Stress, nervousness, anxiety, and sleeplessness that do not require medical treatment are not severe emotional distress").

¶ 74 Here, as in the aforementioned cases, there is insufficient evidence of severe emotional distress, as a matter of law, to support a claim of IIED. Her symptoms, even if true, simply do not satisfy this requirement. Thus, summary judgment in favor of the defendants on Fricano's IIED claim was proper.

¶ 75D. False Imprisonment and False Arrest

¶ 76 Fricano next claims that the trial court improperly granted summary judgment on her claims of false imprisonment and false arrest against Frank Guerra, Earl Parks, and Felix Carrizales. We disagree.

¶ 77 The elements of false arrest and false imprisonment are the same. *Ross v. Mauro Chevrolet*, 369 Ill. App. 3d 794 (2006). An individual is liable for false imprisonment or arrest only when "the plaintiff was restrained or arrested by the defendant, and that the defendant acted without having reasonable grounds to believe that an offense was committed by the plaintiff." *Meerbrey v. Marshall Field & Co.*, 139 Ill. 2d 455, 474 (1976). "Put another way, to succeed on a claim for false imprisonment, a plaintiff must show that he was restrained unreasonably or without probable cause." *Reynolds*, 365 Ill. App. 3d at 837. An arrest procured or caused by a private person is treated the same as an arrest by that private person. In such instances, "[m]erely giving information to the police is insufficient in itself to constitute participation in an arrest." Instead, a "private defendant is subject to liability only if he either (1) directed the officer to arrest the plaintiff; or (2) procured the arrest by giving information that was the sole basis for the arrest." *Randall v. Lemke*, 311 Ill. App. 3d 848, 852 (2000).

¶ 78 Here, Fricano's complaint does not allege that she was falsely imprisoned by defendants at U.S. Cellular Field, but instead she asserts that because of the defendants' "wrongful allegations" against her, her "liberty was unreasonably restrained against her will." The defendants assert that none of the known individual defendants made knowingly false statements to police, and Fricano has failed to submit any evidence negating those assertions or indicating that any of the defendants' statements contributed to her arrest or charging. As stated above, the record clearly indicates that Chicago police arrested Fricano based solely on the testimony of

Wolfe and Robert Guerra. There is no indication whatsoever that the statements of any of the defendants provided the sole—or any—basis for Fricano's arrest. Moreover, the record indicates that the defendants had reasonable grounds to detain Fricano. There is no dispute that while none of the defendants witnessed the start of the altercation between Fricano and Wolfe, they all observed Fricano strike Wolfe in the face, thus providing them with reasonable grounds to restrain her in the security office and to believe that she committed the criminal offense of battery.

¶ 79III. CONCLUSION

¶ 80 For the foregoing reasons, we affirm the trial court's grant of summary judgment in favor of the defendants on all counts.

¶ 81 Affirmed.