UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BONITA CLARK-MURPHY, as Personal Representative of the Estate of JEFFREY CLARK, Deceased,

Plaintiff,

v.

BRIAN FOREBACK, JUDITH HOARD and KRISTINE WAKEFIELD,

Defendants.
_____/

Case No. 4:04-CV-103

HON. RICHARD ALAN ENSLEN

OPINION

This matter is before the Court on Defendants' Rule 56(b) Motion for Summary Judgment. Defendants request the Court dismiss Plaintiff's Complaint with prejudice on the grounds that Defendants did not act with deliberate indifference and are entitled to qualified immunity. Defendants also request the Court dismiss Plaintiff's state claims pursuant to *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). For the reasons which follow, the Court will grant summary judgment as to Defendant Judith Hoard, and deny summary judgment as to Defendants Brian Foreback and Kristine Wakefield.

I. Facts

The following statement of facts is a representation of the factual record interpreted in a light most favorable to Plaintiff, who is the non-moving party in this matter. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).[1]

[1]This section focuses on the facts surrounding the involvement of the Defendants in this case.

Before his death on July 4, 2002, Jeffrey Clark was an inmate at Bellamy Creek Correctional Facility ("Bellamy Creek") in Ionia, Michigan. (Pl. Resp., Ex. M; Report of the Office of the Legislative Corrs. Ombudsman at 1 (hereinafter "Om. Report").) Defendants were all employees of the Michigan Department of Corrections ("MDOC") at the time of Clark's death and were employed at Bellamy Creek. (Defs.' Answer to First Am. Compl. at 1.) Between June 29 and July 4, 2002, Bellamy Creek was under a heat alert, meaning the high temperatures exceeded 85 degrees Fahrenheit. (Om. Report at 1.)

On June 29, 2002, while in the prison dining hall, Clark either fell or sat down on the floor. *Id.* at 2. Captain Dyer and Lieutenant Wise took Clark outside and laid him in the shade on the grass. *Id.* Defendant Wakefield came over and offered her assistance. *Id.* While outside, Clark began exhibiting "bizarre behavior," including barking like a dog, crying, staring blankly and tensing up "kind of like a stomach crunch." *Id.* Defendant Wakefield and the other officers kept watch over Clark until Captain Dyer thought Clark was "alert and responsive enough to understand." *Id.* at 3. Defendant Wakefield then ordered a wheelchair and took Clark back to his housing unit. *Id.* After Defendant Wakefield took Clark back to the housing unit, Sergeant Lauters placed Clark in observation cell 4-232. *Id.* Once Clark was in the cell, Defendant Wakefield heard Clark "screaming like a little girl" and "barking like a dog." *Id.* Defendant Wakefield remained in the unit to assure other prisoners that Clark was receiving proper treatment. *Id.*

Defendant Wakefield testified at her deposition that she had no other contact with Clark and was not aware of the issue of water being turned off in his cell until after Clark's death. (Wakefield Dep. at 14.)

Clark was found unresponsive in his cell late on July 3, 2002. (Om. Report at 16.) Various staff attempted to revive Clark, and their actions were videotaped by Defendant Cobb. *Id.* Clark died on July 4, 2002; the autopsy listed dehydration as the cause of death. (Defs.' Mot., Ex. 1, Autopsy Report at 1.) At the time of Clark's death, the temperature in his cell was estimated to be about 90 degrees and the water to his cell was off. (Om. Report at 1). The water to Clark's cell appeared to have been off for at least part of the day every day between June 30 and July 3, 2002. *Id.* at 20-21. The cell was equipped with a "big red light" that is lit whenever the water is turned off. *Id.* at 22.

Defendant Foreback worked on Clark's unit on July 1, 2 and 3, 2002, during the third shift, which is from 10:00 p.m. to 6:00 a.m. (Defs.' Mot. at 5.) On July 1, Defendant Foreback saw that the water was off in Clark's cell. (Foreback Aff. at 2.) Foreback was taking another prisoner to the hospital at the time that Clark was discovered late on the night of July 3, 2002.

Defendant Hoard had two interactions with Clark - the first on June 30 and the second on July 3, after Clark was found unresponsive. On June 30, Defendant Hoard was called to Unit 4, where Clark was currently housed. (Hoard Aff. at 2.) When she tried to talk to Clark, he was "jumping around his cell" and "was barking like a dog" or swearing at Defendant Hoard in response to her questions. (Pl. Resp., Ex. BB, Hoard's Memo. at 1; Hoard Aff. at 2.) Clark also attempted to flood the toilet by placing his foot and then his hand in the toilet and flushing repeatedly and splashing water about his cell. *Id.* Defendant Hoard next saw Clark after he was found unresponsive in his cell on July 3.

On March 3, 2003, Plaintiff Bonita Clark-Murphy, Clark's Personal Representative, filed a Complaint in a related case against Kenneth McKee, Lee Gilman, Aaron Cobb, and Shirley

Whittaker. *See Murphy v. McKee*, 1:03-CV-145 (W.D. Mich.). After McKee, Gilman, Cobb and Whittaker moved for a more definite statement, Plaintiff filed a First Amended Complaint on May 30, 2003, adding nineteen defendants, including the Defendants in this case. The charges against Defendants Fairbank,[2] Wakefield, Thelon, and Hoard were dropped after Plaintiff failed to serve them. Plaintiff then filed this case against Defendants Foreback, Hoard and Wakefield. The First Amended Complaint alleges Defendants subjected Clark to cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments under 42 U.S.C. § 1983. This First Amended Complaint also brought supplemental state claims for gross negligence, battery and intentional infliction of emotional distress. Defendants now move for summary judgment.

II. Standard of Review

Under Federal Rule of Civil Procedure 56(c), summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact. The party moving for summary judgment bears the initial burden of specifying the basis on which summary judgment should be granted and identifying portions of the record which demonstrate the absence of a genuine issue of material fact. *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 800 (6th Cir. 1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). Once this initial burden is met, the non-moving party has the burden of presenting specific facts, supported by the record, showing a genuine issue of material fact. *Bill Call Ford, Inc. v. Ford Motor Co.*, 48 F.3d 201, 205 (6th Cir. 1995) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "The mere existence of a scintilla of evidence in support

[2]This name was misspelled by Plaintiff in her previous complaint. This person is Brian Forebank, not Fairbank. (Defs.' Mot. at 1, n.1.)

of the [non-moving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson*, 477 U.S. at 252.

III. Analysis

A. Deliberate Indifference

Plaintiff brings her claim under 42 U.S.C. § 1983, alleging a violation of the Eighth Amendment of the United States Constitution. Title 42 U.S.C. § 1983 prohibits any person acting "under color of any statute, ordinance, regulation, custom, or usage, of any State" from depriving any United States citizen "of any rights, privileges, or immunities secured by the Constitution and laws." The Eighth Amendment of the Constitution states, "Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*." (emphasis added). A prisoner must show that "prison officials acted with 'deliberate indifference' towards conditions at the prison that created a substantial risk of harm" to prove a violation of his Eighth Amendment right to be free from cruel and unusual punishment. *Brown v. Bargery*, 207 F.3d 863, 867 (6th Cir. 2000) (citing *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)). This test encompasses both an objective and a subjective component. The objective component requires the prisoner to show that the deprivation was "sufficiently serious." *Id.* The subjective component requires the prisoner to show that "prison officials had 'a sufficiently culpable state of mind.'" *Id.* "In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety." *Id.*

A prison official acts with deliberate indifference to a substantial risk of serious harm when she or he knows of and "recklessly disregards" that risk. *Farmer*, 511 U.S. at 837. The test of deliberate indifference is subjective rather than objective. *Id.* at 840-41. Additionally, "the conduct

for which liability attaches must be more culpable than mere negligence; it must demonstrate deliberateness tantamount to intent to punish." *Horn v. Madison County Fiscal Court*, 22 F.3d 653, 660 (6th Cir. 1994). An "official's failure to alleviate a significant risk that he *should have* perceived but did not, while not cause for commendation, cannot...be condemned as infliction of punishment." *Farmer*, 511 U.S. at 838. "Knowledge of the asserted serious needs or of circumstances clearly indicating the existence of such needs, is essential to a finding of deliberate indifference." *Horn*, 22 F.3d at 660. However, an official may be found to have acted with deliberate indifference even if there is no evidence that he acted with a conscious intent to inflict pain. *Id.* A prison guard acts with deliberate indifference when he denies or delays a prisoner's access to medical care. *See Farmer*, 511 U.S. at 832-33, 835; *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976); *Scicluna v. Wells*, 345 F.3d 441, 447 (6th Cir. 2003). Therefore, "a prisoner who suffers pain needlessly when relief is readily available has a cause of action against those whose deliberate indifference is the cause of his suffering." *Boretti v. Wiscomb*, 930 F.2d 1150, 1154-55 (6th Cir. 1991).

In this case, Plaintiff alleges Defendants acted with deliberate indifference by depriving Clark of water, ventilation or medical care. In light of the death that occurred, Defendants have not challenged, for the purposes of their motion, that Plaintiff has established the objective component of her Eighth Amendment claim. (Defs.' Br. at 6.) Therefore, the primary issue is the subjective component and Plaintiff will be allowed to proceed in her claims against those Defendants who were subjectively aware of and deliberately indifferent to Clark's condition, as discussed below.

B. Qualified Immunity

A finding of deliberate indifference is only half the inquiry, however, because a defendant who acts with deliberate indifference may nonetheless be protected by the doctrine of qualified immunity. Qualified immunity protects government officials to the extent that their conduct does "not violate clearly established statutory or constitutional rights." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A clearly established constitutional right is one for which "a reasonable official would understand that what he was doing violates that right." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). Violations include not only actions that have been previously found to be unlawful but also actions which are apparently unlawful under preexisting law. *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987). Under *Saucier* and the most recent Sixth Circuit Court of Appeals decision in *Dunigan v. Noble*, 390 F.3d 486 (6th Cir. 2005), the Court must apply a two-part test when determining whether qualified immunity applies.[3] To rule upon the issue of qualified immunity, the court must first determine, taking the facts "in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier*, 533 U.S. at 201; *Dunigan*, 390 F.3d at 491. "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Saucier*, 533 U.S. at 201. If a constitutional violation could be supported by the parties submissions, the second step is to "ask whether the right was clearly established...in the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 201; *see also Dunigan*, 390 F.3d at

[3]The Court recognizes that there is a split in the Sixth Circuit as to whether to apply the two-part test in *Saucier* or the three step analysis set forth in *Williams v. Mehra*, 186 F.3d 685, 691 (6th Cir. 1999). *See Dunigan*, 390 F.3d at 491, n.2. This Court will follow *Saucier* and *Dunigan* and apply the two-part test set forth in *Saucier*. However, the Court notes that the analysis under *Williams'* three step analysis, in this case, would reach the same result.

492. "In other words, where a constitutional violation exists, an officer's personal liability turns on the 'objective legal reasonableness' of the action *in view of the circumstances the officer confronted assessed in light of 'clearly established' legal rules.*" *Dunigan*, 390 F.3d at 491 (citing *Saucier*, 533 U.S. at 202; *Anderson*, 483 U.S. at 639.)

Defendants argue that they are entitled to qualified immunity because their actions did not violate a clearly established constitutional right. Whether a clearly established constitutional right has been violated is a question of law. *Turner v. Scott*, 119 F.3d 425, 428 (6th Cir. 1997). The Court finds that depriving a prisoner of water, ventilation or medical care during a heat alert violates a clearly established constitutional right and that, as a result, those Defendants who allowed Clark to be deprived of water, ventilation, or medical care are not entitled to qualified immunity. *See Farmer*, 511 U.S. at 832-33, 835; *Estelle*, 429 U.S. at 103-04; *Scicluna*, 345 F.3d at 447. Under *Dunigan* and *Saucier*, the question now becomes which officials deprived Clark of water, ventilation, or medical care and the "objective legal reasonableness" of the actions of these officials considering the circumstances and assessed in light of clearly established legal rules. *Dunigan*, 390 F.3d at 491.

i. Brian Foreback

Defendant Foreback worked on Clark's unit on July 1, 2 and 3, 2002, during the third shift. Defendant Foreback observed that the water was turned off when he began his shift on July 1. (Foreback Aff. at 2.) It is unclear whether the water was turned back on after Defendant Foreback observed that it had been turned off. (*See* Foreback Aff. at 2; Om. Report at 11; Defs.' Mot., Ex. 1, Mich. Dep't of State Police Report, Supp. Sept. 16, 2003, at 15-16.) Defendant Foreback may have had knowledge of and been deliberately indifferent to Clark's need for water or medical treatment.

The next question is whether Defendant Foreback has qualified immunity. The Court has found that there was a violation of a clearly established constitutional right. Upon review of the current record, this Court finds that Defendant Foreback is not entitled to summary judgment because it is not clear that his actions were legally objectively reasonable in view of the circumstances and the clearly established case law.

ii. Judith Hoard

On June 30, 2002, Defendant Hoard was called to Clark's unit and attempted to speak with him while he was in the segregation cell. Clark was acting strangely and attempting to flood his cell. (Hoard Aff. at 2.) Since Clark was flooding his cell, Defendant Hoard has no reason to suspect that the water was turned off in his cell. Furthermore, Defendant Hoard instructed an officer to complete a psychological referral on Clark and checked to make sure it had been completed. (Hoard Aff. at 2.)

In her Response, Plaintiff asserts only that Defendant Hoard was assigned to Clerk's unit on June 30 and July 4, 2002, and was charged with observing and responding to prisoners' needs. (Pl.'s Resp. at 13.) Plaintiff further argues that Defendant Hoard knew of the conditions in Clark's cell. (*See* Pl.'s Resp. at 23-24; Pl.'s Resp., Ex. BB, Hoard's Memo.) However, the memo written by Defendant Hoard is consistent with Defendant Hoard's affidavit and an unsupported assertion is insufficient to rebut a verified affidavit. *Anderson*, 477 U.S. at 248. Defendant Hoard's affidavit and memo show that she first became aware of the conditions in Clark's cell after he was found unresponsive. Furthermore, there is no indication that Defendant Hoard knew of the incident in the dining hall or had any reason to summon medical staff. Therefore, Defendant Hoard could not have

been deliberately indifferent to conditions of which she had no knowledge and summary judgment will be granted in favor of Defendant Hoard.

iii. Kristine Wakefield

Defendant Wakefield witnessed the incident in the dining hall and assisted with caring for Clark after the incident. (Wakefield Dep. at 7-14.) Since Defendant Wakefield witnessed the incident in the dining hall, she may have acted with deliberate indifference to the medical needs of Clark.

The next question is whether Defendant Wakefield has qualified immunity. The Court has found that there was a violation of a clearly established constitutional right. Upon review of the current record, this Court finds that Defendant Wakefield is not entitled to summary judgment because it is not clear that her actions were legally objectively reasonable in view of the circumstances and the clearly established case law.

IV. Conclusion

For the reasons stated above, the Court finds Defendant Judith Hoard is entitled to summary judgment, but summary judgment is not proper as to Defendants Brian Foreback and Kristine Wakefield. Additionally, the Court will not dismiss Plaintiff's state law claims because there remain outstanding federal claims. *See* 28 U.S.C. § 1367(c)(3). A Partial Judgment consistent with this Opinion shall issue.

/s/ Richard Alan Enslen

DATED in Kalamazoo, MI:
February 23, 2005

RICHARD ALAN ENSLEN
UNITED STATES DISTRICT JUDGE