UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

TROY DAVIS, et al. PLAINTIFFS

v. CIVIL ACTION NO. 3:99CV-675-S

BRECKINRIDGE COUNTY, et al. DEFENDANTS

MEMORANDUM OPINION

This matter is before the Court on the motion of several Defendants for summary judgment. The Plaintiffs have sued the Defendants under 42 U.S.C. section 1983 and Kentucky law claiming that their rights were violated during a fire at the Breckinridge County Jail ("Jail"). Defendants Breckinridge County, Breckinridge County Fiscal Court, Louis D. Carmen ("Carmen") and Jerry Malone ("Malone") argue that we should grant them summary judgment because there was not a violation of the Eighth Amendment and because they are entitled to immunity. For the reasons described below, we will grant their motion by separate order entered this date.

FACTS

On October 17, 1998, two Jail inmates at the started a fire in the air duct system. The fire and smoke spread through the system, and the Jail was evacuated. The Plaintiffs suffered smoke inhalation and other ill effects from the fire as did Malone, the Deputy Jailer on duty at the time.

The Plaintiffs allege that the Jail was overcrowded and in disrepair, and they claim that it had failed fire inspections. They list as some the alleged fire code and safety violations:

> . . . use of improper combustible and toxic materials; improper kitchen units; no panic button, staff call station or portable communication devices that would sound an alarm in the control center in case of emergency; confinement areas that did not meet square footage requirements; . . . an outdated key-control system that was in violation of safety and security standards; no smoke evacuation system; and no sprinkler system. (Pla.'s Resp., at 2.)

They further allege that the Defendants did not take any action to alleviate these problems.

On the night of the fire, the Plaintiffs allege that the only jailer on duty, Malone, called the county dispatcher for help. They allege that Defendant Bruce Anthony, not a party to this motion, instructed Malone not to release any inmates from their jail cells until help arrived but that Malone began to manually unlock the cells before help had arrived. They allege, however, that he could not open all of the cells in a timely and safe manner because he was overcome by the smoke. Finally, they allege that Malone was not properly trained.

Regarding the Jail building itself, the Plaintiffs allege that no emergency lights turned on and that no general alarm sounded.

DISCUSSION

Summary judgment may be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). We must consider "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," in the light most favorable to the Plaintiffs. *Id.*; *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). The Plaintiffs may not rely on their pleadings alone, but must demonstrate the existence of a genuine dispute by pointing to specific facts. *Id.* at 586-87, 106 S.Ct. at 1356. Also, we may not weigh evidence or make determinations of credibility. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986).

We note initially that this motion has been filed before the close of discovery and that the Plaintiffs have not deposed any witnesses. Generally, before ruling on a motion for summary judgment, the court must afford the non-moving party "adequate time for discovery, in light of the

circumstances of the case." *Plott v. General Motors Corp., Packard Elec. Div.*, 71 F.3d 1190, 1195 (6th Cir. 1995). However, in order to preserve the argument that it did not have adequate time to conduct discovery, a party must follow the strictures of Fed.R.Civ.P. 56(f) which requires it to submit an affidavit stating the reasons for which it cannot yet present evidence justifying its opposition to summary judgment. *Id*. at 1196.

In this case, the Plaintiffs have not followed Fed.R.Civ.P. 56(f). The initial time for discovery has now passed, and the Plaintiffs have not deposed or noticed the deposition of any witness.[1] In their brief opposing summary judgment, they mention the fact that they wish to take additional discovery, but they do not specify what evidence they believe will be forthcoming. Nor do we see what relevant evidence could likely be discovered which will change our ruling. For these reasons, we find that it is appropriate at this time to rule upon this motion for summary judgment.

1. § 1983

In order for there to be a violation of 42 U.S.C. section 1983, a plaintiff must be deprived of a right secured by the laws or Constitution of the United States by a person "under color of state law." In this case, the Plaintiffs allege that the Defendants violated their Eighth Amendment right to be free from "cruel and unusual punishment." The Defendants, however, claim that there is no genuine issue of material fact as to whether they subjected the Plaintiffs to such punishment. They also argue that they are entitled to immunity which would shield them from liability even if there were a constitutional violation.

The Eighth Amendment prohibition against "cruel and unusual punishment" protects the

[1]A motion by the *Defendants* to extend discovery until January 15, 2001 is pending before the Magistrate Judge.

Plaintiffs from "unnecessary and wanton infliction of pain." *Sanderfer v. Nichols*, 62 F.3d 151, 154 (6th Cir.1995)(citing *Estelle v. Gamble*, 429 U.S. 97, 104-05, 97 S.Ct. 285, 291-92, 50 L.Ed.2d 251 (1976)). To establish that this protection has been violated, the Plaintiffs must show that the Defendants were "deliberately indifferent" to their needs. *Wilson v. Seiter*, 501 U.S. 294, 303, 111 S.Ct. 2321, 2327, 115 L.Ed.2d 271 (1991)(citing *Estelle,* 429 U.S. at 106, 97 S.Ct. at 293). Prisoners have the right not to be "subjected to the unreasonable threat of injury or death by fire." *Hoptowit v. Spellman*, 753 F.2d 779, 783-84 (9th Cir. 1985). However, there is no violation of the Eighth Amendment unless the defendant is "aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists" and he draws "that inference." *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 1979, 128 L.Ed.2d 811 (1994). Even then, a defendant is not liable if he took reasonable steps to avert the harm. *Id.* at 844, 114 S.Ct. at 1982-83. In short, negligent exposure to a risk is not sufficient. *Farmer*, 511 U.S. at 835-36, 114 S.Ct. at 1978.

Thus, in order to find these Defendants liable, the Court must find four things: (1) there was a substantial risk of serious harm from fire; (2) the Defendant knew of this risk; (3) the steps taken by the Defendant to avoid the harm were not reasonable; and (4) the Defendant is not entitled to immunity.

A. Breckinridge County Fiscal Court

The Defendants argue that there is no viable claim against the Breckinridge Fiscal Court because the individual members are not named and have committed no acts which would violate the Plaintiffs' rights. They argue that this is essentially a suit against Breckinridge County, which is separately named. The Plaintiffs failed to address this point in their Response. Therefore, we find that there is are no claims against the Breckinridge County Fiscal Court.

B. Breckinridge County

The Plaintiffs allege that Breckinridge County violated their Eighth Amendment rights by, with deliberate indifference, keeping a custom or policy which ignored the substantial fire safety risk to the Plaintiffs and other inmates in the Jail. The Defendants argue that the Plaintiffs cannot produce any evidence of such a custom or policy and that a county jailer is not a policy maker for the purposes of section 1983 liability.

Initially, we note that in situations such as those alleged in this case, "subdivisions of the state, such as counties and municipalities, are not protected by the Eleventh Amendment." *Lawson v. Shelby County, TN,* 211 F.3d 331, 335 (6th Cir. 2000) (citing *Lincoln County v. Luning*, 133 U.S. 529, 10 S.Ct. 363, 33 L.Ed. 766 (1890)). However, a county can only be held liable if the Constitutional deprivation results from a policy of the county. *Monell v. Dep. Of Social Servs. of New York City*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037-38, 56 L.Ed.2d 611 (1978).

A county policy can be established in two ways. First, it exists when a "decision-maker possessing final authority to establish municipal policy with respect to the action" issues an official proclamation, policy or edict. *Pembaur v. Cincinnati*, 475 U.S. 469, 481, 106 S.Ct. 1292, 1299, 89 L.Ed.2d 452 (1986). Second, it can be shown when there is a deeply-rooted custom or practice by the county and its officials. "Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 167-68, 90 S.Ct. 1598, 1613-14, 26 L.Ed.2d 142 (1970). In either situation, a plaintiff must show that an official who has the power to make policy is responsible for either the affirmative proclamation of a policy or acquiescence in a well established custom. *Jett v. Dallas Independent School District*, 491 U.S. 701, 736, 109 S.Ct. 2702,

2723, 105 L.Ed.2d 598 (1989).

The Plaintiffs argue that the "customs" of Breckinridge County were to fail to train properly jail personnel with regard to fire safety and to fail to meet fire code standards. To back up this claim, they produce the report from an inspection conducted on the Jail in February of 2000. (Pla.'s Resp., Exh. 3). This report notes that the Jail did not have a smoke evacuation system or a sprinkler system at that time. (*Id.* at ¶¶ 76 and 84.) The report also appears to indicate that the Jail was in compliance with all other fire safety requirements. The Defendants concede that the Jail had more inmates than it was designed to hold. However, the Plaintiffs do not dispute that Breckinridge County was in the process of building a new jail which would cure these deficiencies and that there had not been another fire at the Jail in recent years.

These facts fall woefully short of establishing that Breckinridge County, or the Jail, knew that there was a substantial risk that the Plaintiffs could be harmed in a fire. The Plaintiffs have only presented evidence creating a genuine dispute as to whether the County was negligent. That is not sufficient to withstand this motion. Even if it were, the County's decision to build a new jail was a reasonable response to the problem showing that the County was not "deliberately indifferent" to the safety of the Plaintiffs. In fact, the Department of Corrections ruled that the County's decision was a "good faith" effort to comply with the standards. (Pla.'s Resp., Exh. 4.) The County is entitled to a judgment as a matter of law.

C. Louis D. Carmen

Carmen is the head Jailer of the Jail, but was not present at any relevant times during the night of the fire. Thus, it appears to be the Plaintiffs' contention that he violated their Constitutional rights by failing to train the staff properly or to maintain the building safely.

Again, though, there is no evidence to create a genuine dispute as to whether these allegations are true. The report produced by the Plaintiffs indicates that, with the exception of the building's physical shortcomings, the Jail was in compliance with all other fire code requirements. The Defendants claim that the evidence they produced to Plaintiffs establishes that Carmen followed proper procedures and trained Malone and other deputy jailers properly. The Plaintiffs have not produced any evidence which contradicts this fact and have not pointed to any proposed discovery which will reveal such facts. Carmen is entitled to judgment as a matter of law.

D. Jerry Malone

Malone was the Deputy Jailer on duty the night of the fire. He did not have authority to make decisions or to set policy for the County or for the Jail, and so the allegations against him relate to the actions he took on the night of the fire. The Plaintiffs allege that, on the night of the fire, Malone was the lone jailer. In response to the prisoners getting "rowdy and out of control," Malone called the Breckinridge County Police Department for help. Defendant Bruce Anthony ("Anthony") responded, and the jail was "locked down." Later in the evening, two inmates started a fire in the air duct system which the Plaintiffs' allege spread quickly though the Jail. They allege that Malone called the County dispatcher for help, and that Anthony again responded. He allegedly told Malone not to let any prisoners out until backup arrived. However, they allege that Malone began to manually unlock the cells before help arrived because the smoke grew so heavy and thick. The Plaintiffs finally allege that Malone himself was overcome by smoke and so could not get all of the cells open in a timely and safe manner.

Again, no evidence in the record supports these allegations. However, assuming that they are true, there is no question that Malone is entitled to summary judgment. At some point after the

fire started, it is clear that Malone must have become aware of a substantial risk of serious harm to the Plaintiffs. However, the questions then become whether he reacted reasonably to that threat and whether he is entitled to qualified immunity. We find that he is entitled to summary judgment on both questions.

First, no reasonable jury could find that Malone acted unreasonably. Malone quickly called for help, and the record indicates that the local fire department and other officers were contacted to respond. (Pla.'s Resp., Exh. 6.) Although he may have hesitated to release the prisoners from their cells before help arrived – as he was allegedly instructed to do – it is clear that he began to release them before help arrived and in time prevent serious harm. Thus, when it became clear to him that the risk of serious injury was substantial, he acted quickly to abate that risk and to free the prisoners, even though he was himself at risk. This was, beyond question, reasonable behavior on his part.

Additionally, we find that he is entitled to the defense of qualified immunity. Police officers enjoy a qualified immunity from suit in federal courts. They can only be held liable if a plaintiff can satisfy a two step test. First, the plaintiff must allege deprivation of a constitutionally protected right. *Cooper v. Parrish*, 203 F.3d 937, 951 (2000). Second, they must show that the constitutional right is so "clearly established" that a reasonable officer would understand that what he is doing violates the law. *Id*. The question, then, is "whether the agents acted reasonably under settled law in the circumstances . . .." *Hunter v. Bryant*, 502 U.S. 224, 228, 112 S.Ct. 534, 537, 116 L.Ed.2d 589 (1991). The question of immunity is typically one for the court to decide rather than the jury. *Id*. Here, we find that even if a reasonable jury could find that Malone acted unreasonably in relation to the Eighth Amendment, we find as a matter of law that he acted reasonably "under settled law *in the circumstances*." *Id*. (Court's emphasis). Malone reasonably weighed the danger of

releasing prisoners without backup with the risk that the prisoners would be seriously harmed by the fire. He acted in time to avoid serious injury because he saw that the smoke had become heavy and placed himself at risk in the process. The law cannot require any more of him.

2. State Law Claims

The Defendants contend, also, that the Plaintiff's state law claims against them are barred by sovereign immunity according to Kentucky law.

Under Kentucky law, counties are arms of state government entitled to sovereign immunity. *Franklin County v. Malone*, 957 S.W.2d 195, 203 (Ky., 1997). Thus, Breckinridge County is entitled to sovereign immunity from state law claims.

In Kentucky, sovereign immunity also extends to individuals under certain circumstances. In *Malone*, the Kentucky Supreme Court concluded that an individual is entitled to sovereign immunity when the officer "acts within the scope of [his] duties." *Id*. at 202 (citing K.R.S. §44.070 *et seq*.). However, the court reaffirmed its holding that the legislature could not extend sovereign immunity to "state officers or employees who engage in activities outside of the traditional role of government." *Id*. (citing *University of Louisville v. O'Bannon*, 770 S.W.2d 215 (1989)). Thus, the individual Defendants in this case are entitled to sovereign immunity if they acted within the scope of their employment and that employment was within the traditional role of government.

Carmen and Malone were both engaged in duties as jailers, a role which is within the traditional role of government. The allegations against Carmen are that he did not follow proper safety procedures in running the jail. These actions or failures to act are squarely within his duties as Jailer. Therefore, he is entitled to sovereign immunity. The allegations against Malone relate to his decision on when and how to release the prisoners from their cells during a fire. These actions

or failures to act, again, are squarely within his duties as the Deputy Jailer on duty the night of the fire. Thus, he too is entitled to sovereign immunity.

Kentucky has waved its sovereign immunity in limited circumstances which may exist here. This waiver, however, requires that the Plaintiffs file their claims according to a specific procedure and in a particular forum. Because that waiver does not extend to this Court, we do not have jurisdiction to hear the case.

CONCLUSION

The Defendants have established that there is no genuine issue of fact as to several material facts relating to the Plaintiffs' claims and that they are entitled to a judgment as a matter of law. Therefore, we will grant their motion by a separate order entered this date.

This _____ day of _____, 2000.

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CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

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TROY DAVIS — PLAINTIFF

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BRECKINRIDGE COUNTY, et al. — DEFENDANTS

ORDER

For the reasons set forth in the memorandum opinion entered this date and the Court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that the motion of Defendants Breckinridge County, the Breckinridge County Fiscal Court, Louis D. Carmen, and Jerry Malone is **GRANTED**. The Federal claims against these Defendants are hereby **DISMISSED** with prejudice. The state law claims against these Defendants are hereby **DISMISSED** for lack of jurisdiction.

IT IS SO ORDERED this _____ day of _____, 2000.

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CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record