IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
BATESVILLE DIVISION

SHAWANNA NELSON **PLAINTIFF**

v. **No. 1:04CV00037 JJM**

CMS, ET AL. **DEFENDANTS**

BRIEF IN SUPPORT OF ADC DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff Shawanna Nelson, a former inmate of the Arkansas Department of Correction (hereinafter "ADC"), filed this lawsuit pursuant to 42 U.S.C. §1983. Plaintiff raises several claims against the ADC Defendants, in which she alleges her constitutional rights have been violated. Specifically, Plaintiff alleges in her Complaint and Amended Complaint, the following: (a) Max Mobley failed to see to it that "proper policies and customs" were implemented to protect inmates in labor from enduring extreme pain and mental anguish; (b) Max Mobley failed to ensure that proper fetal monitoring equipment was in the infirmary; (c) Larry Norris failed to see to it that "proper policies and customs" were implemented with respect to restraints of female inmates who are in labor; (d) Patricia Turensky inflicted injury upon Plaintiff by refusing to remove the shackles while Plaintiff was approaching the end stages of labor; (e) Ms. Turensky refused to consider the pain Plaintiff might be in; and (f) Ms. Turensky interfered with access to appropriate medical care in retaliation for the grievances filed against her.

ADC Defendants dispute Plaintiff's allegations that they were deliberately indifferent to Plaintiff's health and safety. Plaintiff is unable to meet her burden of establishing a prima facie case; therefore, ADC Defendants are entitled to a dismissal of

the claims against them. In addition, Plaintiff has failed to properly exhaust her administrative remedies as to each of the named defendants as required under the Prison Litigation Reform Act, 42 U.S.C. § 1997(e). For these reasons, Plaintiff's Complaint should be dismissed in its entirety.

II. STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue as to a material fact, and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c). The Court views all evidence in the light most favorable to the nonmoving party. *See Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994). When the sufficiency of the complaint has been challenged, however, the plaintiff then bears the burden of showing that there is a genuine issue of material fact left for trial and must fulfill that burden by providing specific facts beyond those produced in the pleadings. See *Pourmehdi v. Northwest Nat'l Bank*, 849 F.2d 1145, 1146 (8th Cir. 1988); see also Fed. R. Civ. P/ 56(e).

Rule 8 of the Federal Rules of Civil Procedure states: "A pleading which sets forth a claim for relief ... shall contain... (1) a short and plain statement of the claim *showing that the pleader is entitled to relief* ...." (Emphasis added). Rule 12(b) (6) of the Federal Rules states that defenses may be made by motion for failure to state a claim upon which relief can be granted. When analyzing a 12(b)(6) claim, the complaint's factual allegations are accepted as true and viewed in the light most favorable to the plaintiff. *Hanten v. The School District of Riverview Gardens*, 183 F.3d 799 (8th Cir. 1999) (citing *Gordon v. Hansen*, 168 F.3d 1109, 1113 (8th Cir. 1999)). "The complaint should be dismissed 'only if it is clear that no relief can be granted under any set of facts

that could be proved consistent with the allegations.'" *St. Croix Waterway Association v. Meyer*, 178 F.3d 515 (8th Cir. 1999) (citing *Frey v. City of Herculaneum*, 44 F.3d 667, 671 (8th Cir. 1995)).

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts that would demonstrate an entitlement to relief. *Gordon v. Hansen*, 168 F.3d 1109, 1113 (8th Cir. 1999)(citing *Springdale Educ. Ass'n. v. Springdale Sch. Dist.*, 133 F.3d 649, 651 (8th Cir. 1998)). "At the very least, however, the complaint must contain facts which state a claim as a matter of law and must not be conclusory." *Briehl v. General Motors Corp.*, 172 F.3d 623, 627 (8th Cir. 1999) (citing *Frey v. City of Herculaneum*, 44 F.3d 667, 671 (8th Cir. 1995)). Because Plaintiff has failed to state a claim upon which relief can be granted, his Complaint should be dismissed and the ADC Defendant's Motion for Summary Judgment should be granted.

III. ARGUMENT

A. Plaintiff Has Failed to Exhaust Her Administrative Remedies as Required by the PLRA.

ADC Defendants adopt the failure to exhaust argument presented by Separate Defendant CMS. (See DE 44, pp. 7 – 11). ADC Defendants state that Plaintiff has failed to fully exhaust her administrative remedies, not only as to all party defendants, but also as to each of the separate grievances, which will be addressed separately.

On September 26, 2003, Plaintiff files Grievance # MCP-03-2970 in which she voices several complains: not being transported to the hospital until her contractions were four minutes apart; restraints being placed on her at the hospital; and having natural

child. (Ex. F). Grievance # MCP-03-2970 mentions Patricia Turensky by name. No other individuals are either mentioned or referenced in Grievance # MCP-03-2970. On October 9, 2003, Defendant Turensky completes an Inmate Grievance Investigation Worksheet regarding Grievance # MCP-03-2970. On October 11, 2003, Warden Maples responds to Plaintiff's Grievance. Plaintiff appeals Warden Maples response on October 15, 2003. On January 15, 2004, Deputy Director Larry May responds to Plaintiff's grievance appeal and states that he has found no evidence to substantiate her allegations.

On the same date that Plaintiff receives Deputy Director May's denial of her first grievance, Plaintiff files her second grievance, # MCP-04-204, in which she complains about Cpl. Ashby & Cpl. Turensky not opening the barracks door when she requested them to do so. (Ex. G). Warden Maples responded to Plaintiff's grievance the following day, in which he determined the issue to be of a medical nature and referred it to the Medical Administrator. Warden Maples also informed Plaintiff that if she didn't agree with his decision, that she could appeal his decision to Max Mobley within ten days. Plaintiff did not appeal Warden Maples decision. (Ex. G).

On February 7, 2004, after Defendant Turensky issues a Major Disciplinary (Ex. H) to Plaintiff for washing her clothes in a mop sink, insolence to a staff member, and failure to follow orders, Plaintiff files her third grievance (MCP-04-488), alleging harassment and retaliation by Officer Turensky. (Ex. I). On February 22, 2004, Warden Maples responded to Grievance MCP-04-488, in which he found no merit to Plaintiff's grievance. Warden Maples also informed Plaintiff that if she didn't agree with his decision, that she could appeal his decision to Deputy Director Larry May within ten days. Again, Plaintiff did not appeal Warden Maples decision. (Ex. I).

Administrative Directive 04-01: Inmate Grievance Procedure – identifies the grievance procedure to be followed by all ADC inmates. (Ex. L). (AD 04-01 supersedes AD 97-08, which also identified the inmate grievance procedure). According to AD 04-01, in order for an inmate to completely exhaust a grievance, he or she must comply with the Procedures set forth in the policy. (Ex. L, pp. 3 – 13). The final set of the grievance procedure is to appeal a Warden's Decision to the Deputy Director within the timeframe allotted, which is ten (10) days. In addition, Section IV. N – Prison Litigation Reform Act Notice places the inmate on notice with regard to their requirement to completely exhaust prior to filing a Section 1983 claim. (Ex. L).

Plaintiff has not asserted that she was either unaware of the ADC's grievance procedure policy, that she was unable to comply with it for any reason, or that she was prevented by the defendants in complying. With regard to the three grievances filed by the Plaintiff regarding security concerns, the only grievance Plaintiff appealed to the Deputy Director level was Grievance #MCP-03-2970, in which she presents allegations against Defendant Patricia Turensky. (Ex. F). Plaintiff's other two grievances were not appealed to the Deputy Director level, therefore were not fully exhausted and can therefore not be considered with regard to this lawsuit. With regard to Grievance #MCP-03-2970, Plaintiff clearly did not identify or reference the other ADC Defendants, Larry Norris or Max Mobley; nor did she identify separate medical defendant CMS; therefore, pursuant to 2006 case law cited in CMS' brief, Plaintiff's claim must fail.

B. <u>ADC Policies Related to Restraints and Pregnant Inmates</u>

In her Amended Complaint, Plaintiff alleges ADC Defendants Larry Norris and Max Mobley violated her constitutional rights by failed to see to it that "proper policies

and customs" were implemented to protect inmates in labor. (See Amended Complaint). Plaintiff does not specifically allege the ADC policies are unconstitutional on their face, or that they were unconstitutionally applied as to her; therefore, ADC Defendants will briefly address both.

The ADC has in place a variety of policies and procedures which have been approved by the Arkansas Board of Correction and implemented department-wide. With regard to the use of restraints such as handcuffs, security belts and leg irons, the BOC originally adopted policies beginning in 1979. The policy, or Administrative Regulation, pertaining to restraints is AR 403. (Ex. N). AR 403 details the purpose of the policy, the applicability of the policy, defines the policy as well as the procedures to be followed in applying said policy. (Ex. N). With regard to the procedures, AR 403 states that restraints may be used when escorting/moving inmates. The need for said policy is clearly one of security.

With regard to transporting inmates, the ADC also has in place an Administrative Directive 95-21, which references AR 403, which relates to the organizations responsibilities for transporting inmates. (Ex. P). According to AD 95-21, inmates are to be placed in restraints when transported outside an ADC unit. (Ex. P).

Administrative Regulations are approved by the Board of Correction. Prior to said approval, they are reviewed by the Legislature. Once the Board has given its approval, the ADC management team implements directives to carry out the AR's. (Ex. Q, p. 13). The AR's are general. Administrative Directives are more specific. (Ex. Q).

In addition to Administrative Directives and Regulations, each unit of the ADC may implement Post Orders which outline procedures for a variety of activities. One

such Post Order at the Newport Complex is the Hospital Security Post Order. (Ex. M). The Hospital Security Post Order provides special instructions on how and when inmates are to be transported to the hospital, as well as the use of restraints and firearms for the use of officers upon leaving the unit. The Post Order, effective in 2003, stated that all inmates leaving the unit were to be in restraints. Reference was also made to pregnant inmates, and read as follows: "Pregnant inmates in the final states of labor will not be restrained while in the delivery room giving birth, or at any time the physician in charge determines that such application would be a health risk to the unborn child or the health of the inmate." (Ex. M).

Plaintiff testified in her deposition that the officer who with her at the hospital (Defendant Turensky) removed the shackles from the Plaintiff's leg when she was asked to do so by the physician, and that this occurred prior to her being moved to the deliver room. (Ex. B, p. 44, 80). Based upon the Plaintiff's own testimony, it is clear that Defendant Turensky followed the Post Order with regard to the restraints. Plaintiff has not provided, nor will she be able to provide, evidence that Defendant Turensky violated ADC's policies or procedures as they related to this Plaintiff.

Dr. Hergenroeder, in his deposition, was asked about restraints being used with females in labor, especially during delivery. Dr. Hergenroeder testified that when the women are placed upon the delivery table, their legs are placed in the stirrups, and then their legs are strapped in place. He said this is done in order to have the women solid against the stirrup. He further stated the reason was that when a woman pushes during delivery, she may pull her leg out of the stirrup unless it's held in position there, and that it is restrained there for the patients own safety. He also said that if this wasn't done, that

the female could end up dislocating her hip, and all kinds of other bad stuff. (Ex. O, pp. 80 – 81). The restraints referred to were not the leg shackles used by the ADC. Dr. Hergenroeder was also asked about whether or not he could recall any instances in which he asked for the officer to remove the shackles form the inmate and the officer refused. He said no, he did not, and that if that had happened, he would, have brought it to someone's attention. (Ex. O, pp. 113-114).

With regard to a possible claim that the ADC policies are unconstitutional, ADC Defendants would state that Plaintiff has offered no proof that it is. ADC policies and procedures are implemented for the safety and security of all inmates, and those referenced are neither unconstitutional, or unconstitutionally applied to Plaintiff Shawanna Nelson.

C. The Plaintiff's § 1983 Claim For Monetary Damages Against the Defendants In Their Official Capacity Is Barred By Sovereign Immunity Under The Eleventh Amendment To The United States Constitution.

The Plaintiff seeks jurisdiction of this Court pursuant to 42 U.S.C. § 1983 and an award of monetary damages against ADC Defendants Larry Norris, Max Mobley, and Patricia Turensky in their individual and official capacities. In their official capacities, ADC Defendants Norris, Mobley, and Turensky are not subject to a § 1983 lawsuit for monetary damages. ADC Defendants, as Plaintiff admits in his Complaint, are or were employees of the ADC. 42 U.S.C. § 1983 provides in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunity served by the Constitution and laws, shall be

> liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.] (Emphasis added)

The United States Supreme Court has determined that neither states nor state officials acting in their official capacities are "persons" within the meaning of 42 U.S.C. § 1983. *Will v. Michigan Department of State Police, et al.*, 491 U.S. 58 (1989). The Court reasoned in *Will* that a state official is in effect acting on behalf of the state and therefore is immune from liability under the Eleventh Amendment to the Constitution. In *Will,* the Court explained that "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. . . . As such, it is not different from a suit against the state itself." *Id*. at 71.

In reaching the conclusion that states are not "persons" for § 1983 purposes, the Court further explained:

> Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it *does not provide a federal forum for litigants who seek a remedy against a state for alleged deprivations of civil liberties.* The Eleventh Amendment bars such suits unless the state has waived its immunity... or unless congress has exercised its undoubted power under § 5 of the Fourteenth Amendment to override that immunity ... *Id*. (emphasis added).

The Eleventh Amendment to the United States Constitution provides "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign states." In *Alabama v. Pugh*, 438 U.S. 781 (1978), the United States Supreme Court stated:

> There can be no doubt, however, that suit against the state and its board of correction is barred by the Eleventh Amendment, unless Alabama has consented to the filing of such a suit. *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ford Motor Co. v.*

> *Dept. of Treasury*, 323 U.S. 459 (1945); *Morechester County Trust Co. v. Ralley*, 302 U.S. 292 (1937). Respondents do not contend that Alabama has consent to this suit, and it appears that no consent could be given under Article 1, Section 14, of the Alabama Constitution, which provides that: "the state of Alabama shall never be made a defendant in any court of law or equity." *Pugh* at 782.

ADC Defendants are clearly not "persons" subject to liability making the present action in fact a lawsuit against the State of Arkansas. The Eleventh Amendment to the United States Constitution bars suits brought in federal court by an individual against a state. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996). This bar is absolute and can only be overcome in two circumstances: (1) if a state waives its sovereign immunity and consents to being sued in federal court, or (2) if Congress, through legislation, abrogates the state's immunity in order to effectuate the provisions of the Fourteenth Amendment to the United States Constitution. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985). A state employee acting in his or her official capacity enjoys the same Eleventh Amendment protection against suit as does the state itself. *Will*, 491 U.S. at 71.

At all times relevant to this case, ADC Defendants Norris, Mobley, and Turensky were employees of the ADC. For purposes of this suit and all others, ADC Defendants Norris, Mobley, and Turensky, as state employees, are entitled to the protection of the Eleventh Amendment. Considering these facts, the Plaintiff's § 1983 action against ADC Defendants Norris, Mobley, and Turensky, in their official capacity, is barred.

D. <u>ADC Defendants are Entitled to Qualified Immunity</u>

Government actors are entitled to immunity from suits for damages unless **their actions** violated clearly established law of which a reasonable government official would

have been aware. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Eighth Circuit has established a three-pronged inquiry to be made when qualified immunity is asserted: "(1) whether the plaintiff has asserted a violation of a constitutional or statutory right; (2) if so, whether that right was clearly established at the time of the violation; and (3) whether, given the facts most favorable to the plaintiff, there are no genuine issues of material fact as to whether a reasonable official would have known that the alleged **action** indeed violated that right." *Yowell v. Combs*, 89 F.3d 542, 544 (8th Cir. 1996). Qualified immunity must be granted for the official unless the Court determines that each of these three elements have been satisfied. *Mays v. Rhodes*, 255 F.3d 644, 647 (8th Cir. 2001).

The doctrine of qualified immunity was established in order to offer government officials protection from personal liability while performing their official functions. The doctrine was based upon twofold rationale which provides in pertinent part as follows:

> a. The injustice, particularly in the absence of bad faith, of subjecting to liability, an officer, who is required, by the legal obligations of his position, to exercise discretion;
>
> b. The danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required for the public good. *Wenpz v. Klecker*, 721 F.2d 244, 247 (8th Cir. 1983). *Scheuer v. Rhodes*, 416 U.S. 232, 241-42 (1974).

An officer may not be held liable if, at the time he committed the act giving rise to the suit, no reasonable person in his position would have realized that **his conduct** violated clearly established federal law. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

"To provide its fullest and best use, qualified immunity ideally is addressed by summary judgment ...." *Rellegert v. Cape Girardeau County, Mo.*, 924 F.2d 794 (8th Cir.

1991). This qualified immunity "gives ample room for mistaken judgments but does not protect the plainly incompetent or those who knowingly violate the law." *Ludwig v. Anderson*, 54 F.3d 465 (8th Cir. 1995) (quoting *Malley v. Briggs*, 745 U.S. 335, 341 (1986)). In deciding whether an official is protected by qualified immunity the court will determine "whether **the official's action was objectively legally reasonable** in light of the legal rules that were clearly established at the time the action accrued." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (emphasis added).

ADC Defendants Larry Norris and Max Mobley are not alleged to have violated any written policies. They are accused of not having issued "proper" policies. They are entitled to the protection afforded by qualified immunity because there is absolutely no evidence in this case that they did not comply with all applicable laws. **They acted "objectively reasonable" in their positions**. Their actions did not violate Plaintiff's clearly established statutory or constitutional rights.

With regard to ADC Defendant Patricia Turensky, while Plaintiff's Complaint alleges she did not comply with the ADC policies, Plaintiff's own deposition testimony contradicts her pleadings. Plaintiff clearly testified that when asked to remove the restraints by hospital personnel, Defendant Turensky complied. Defendant Turensky is entitled to the protection afforded by qualified immunity because there is absolutely no evidence in this case that she did not comply with all applicable laws. **She acted "objectively reasonable" in their positions**. Her actions did not violate Plaintiff's clearly established statutory or constitutional rights.

When reviewing a qualified immunity argument and testing whether the law was "clearly established", **the Court must not be "too generalized"** otherwise it would be

difficult to determine the "objective legal reasonableness" standard. *Mahers v. Harmer*, 12 F.3d 783 (8th Cir. 1993) *citing Anderson v. Creighton*, 483 U.S. 635, 639 (1987). In other words, the test must be applied to the specific facts of the case, i.e. **whether Plaintiff had a clearly established right not to be shackled to the hospital bed upon arrival to the hospital.** The answer to this question is NO. For these reasons, Plaintiff's Complaint should be dismissed.

CONCLUSION

ADC Defendants dispute Plaintiff's allegations that they were deliberately indifferent to Plaintiff's health and safety. Plaintiff is unable to meet her burden of establishing a prima facie case; therefore, ADC Defendants are entitled to a dismissal of the claims against them. In addition, Plaintiff has failed to properly exhaust her administrative remedies as to each of the named defendants as required under the Prison Litigation Reform Act, 42 U.S.C. § 1997(e). For these reasons, Plaintiff's Complaint should be dismissed in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Christine A. Boozer, Assistant Attorney General, do hereby certify that on this 22nd day of November, 2006, I electronically filed the forgoing with the Clerk of the Court using the CM/ECF system. Notification will be sent electronically to the following CM/ECF participants:

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