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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

DARRON BREWER and STEPHEN JOHNSON,	)	
	)	13-2256
Plaintiffs,	)	
v.	)	
KANKAKEE COUNTY SHERIFF TIMOTHY F. BUKOWSKI, KANKAKEE COUNTY, and RYAN KING,	)	
Defendants.	)	

ORDER ON PARTIAL SUMMARY JUDGMENT

The plaintiffs, Darron Brewer and Stephen Johnson, filed this lawsuit alleging that they were sexually assaulted by Ryan King, a former Kankakee County correctional officer, while Brewer and Johnson were detained at Jerome Combs Detention Center, Kankakee County, Illinois.

Sheriff Timothy Bukowski has moved for summary judgment, arguing that there is no evidence that he was deliberately indifferent to the risk that Brewer and Johnson would be sexually assaulted by King, or that his own conduct caused the plaintiffs' injuries.

For the reasons that follow, the motion for summary judgment is granted.

BACKGROUND

Defendant King worked as a correctional officer for the Kankakee County Sheriff's Department from 2006 until 2012. In November 2009, inmate Donald Sampson complained that King asked to see Sampson's penis and displayed his tongue to Sampson. King denied the allegations. The incident was investigated and it was determined that the allegations against King were unfounded.

Two years later, in February 2012, inmate Ricky Stokes complained that King approached Stokes, expressed sexual feelings toward Stokes, and asked to see Stokes's penis. Another inmate allegedly witnessed some sort of sexual contact between King and Stokes, and yet another inmate was allegedly told by Stokes that King wanted to kiss Stokes. King was placed on administrative leave. The Sheriff's Department investigated the matter, and then learned that the FBI was also conducting an investigation because Stokes was a federal detainee. In March 2012, both investigations concluded, resulting in no discipline to King. At that point, Bukowski had some concerns about King's conduct but without proof that King had engaged in wrongdoing Bukowski did not assign King to a duty post where his direct unsupervised contact with inmates would be limited.

Plaintiffs Brewer and Johnson allege that King sexually assaulted and/or harassed them in November 2012. The Sheriff's Department began an investigation, and King was again placed on administrative leave. During the course of the investigation, the Sheriff's Department decided to seek King's termination[1] and refer the matter to the Kankakee County State's Attorney for potential criminal charges. King decided to resign in lieu of termination proceedings.

King denies that he had any sexual contact with the plaintiffs.

ANALYSIS

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Any discrepancies in the factual record should be evaluated in the nonmovant's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)). The party moving for summary judgment must show the lack of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In order to be a "genuine" issue, there must be more than "some metaphysical doubt as to the material facts." *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248.

"Summary judgment is the 'put up or shut up' moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events." *Johnson v. Cambridge Indus., Inc.*, 325 F.3d 892, 901 (7th Cir. 2000). "If a party . . . fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . grant summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it." Fed. R. Civ. P. 56(e).

The complaint alleges that Bukowski is liable pursuant to 42 U.S.C. § 1983 for deliberate indifference to the risk of harm posed by King, and for failure to protect the plaintiffs from being sexually abused. They also sued Bukowski on a *respondeat superior* theory arising from the plaintiffs' state law claims of intentional, willful, and wanton conduct by King.[2] The complaint also alleges claims against King which are not the subject of the pending motion.

[1] In the past, King had been suspended for falling asleep while assigned to master control. His termination was sought based on the allegations of sexual assault by Brewer and Johnson, as well as endangering those in the facility by falling asleep and being inattentive.

[2] "Defendant Bukowski is being sued based on the theory of respondeat superior on the Plaintiffs' state law claims." Compl., d/e 1, ¶7. "The Plaintiffs bring a state law action for negligence and/or willful and wanton conduct against Bukowski in his official capacity under a theory of *respondeat superior*." Compl., d/e 1, ¶14. In their memorandum, however, they deny that they are trying to hold Bukowski liable under *respondeat superior* and claim that it is for his personal involvement and to indemnify King.

Section 1983: Deliberate indifference to a risk of harm

"The [relevant] question under the Eighth Amendment[3] is whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial 'risk of serious damage to his future health.'" *Farmer v. Brennan*, 511 U.S. 825, 843 (1994) (quoting *Helling v. McKinney*, 509 U.S. 25, 35 (1993)). "[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837.

"A finding of deliberate indifference requires a showing that the [defendant] was aware of a substantial risk of serious injury to [the plaintiff] but nevertheless failed to take appropriate steps to protect him from a known danger." *Smith v. Sangamon County Sheriff's Dept.*, 715 F.3d 188, 191 (7th Cir. 2013) (quoting *Butera v. Cottey,* 285 F.3d 601, 605 (7th Cir. 2002)).

Bukowski was aware of the allegations made against King by Sampson (in 2009) and Stokes (in 2012). Those allegations were investigated, and in both cases it was determined that the allegations were unfounded. After King was cleared of the charges made by Sampson, two years passed before a similar allegation was made by Stokes. The Stokes allegation prompted both the Sheriff's Department and the FBI to investigate, and King was cleared of those charges. A jury could conclude that Bukowski was aware of facts indicating that King might pose a risk of sexual assault to the inmates and detainees at JCDC. He knew that King had been accused of wrongful conduct twice in a two-year period, was aware that an investigation was undertaken, and knew that King was cleared of wrongdoing. However, King was cleared of all allegations. Especially after an independent investigation by the FBI, it was reasonable for Bukowski not to draw an inference that King posed a known risk of harm to inmates.

Section 1983: Failure to protect

To prevail on a claim of failure to protect, the plaintiffs must show that they were subjected to a serious risk of harm "'so great' that it is 'almost certain to materialize if nothing is done,'" *Wilson v. Ryker*, 451 F. App'x 588, 589 (7th Cir. 2011) (quoting *Brown v. Budz*, 398 F.3d 904, 911 (7th Cir. 2005)), and that Bukowski "knew of and disregarded that risk." *Wilson*, 451 F. App'x 588, 589 (citing *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)).

The plaintiffs argue that Bukowski was increasingly aware of a threat posed by King yet failed to protect them from the risk of sexual assault. They attempt to distinguish the results of the FBI investigation, which Bukowski characterizes as a finding of "unsubstantiated" allegations, but which actually concluded, "a federal criminal civil rights violation cannot be proven because there is insufficient independent eyewitness corroboration of the allegations." There was a supposed corroborating eyewitness, Ernest Shields. The FBI apparently found his testimony "insufficient."

[3] As pretrial detainees, the plaintiffs' claim of deliberate indifference arises under the Fourteenth Amendment's Due Process Clause, which is governed by the same standards as an Eighth Amendment claim. *Smith v. Sangamon County Sheriff's Dep't*, 715 F.3d 188, 191 (7th Cir. 2013).

The plaintiffs contend that Bukowski failed to protect them by continuing to assign King to an area of the jail where he would have direct, unsupervised contact with inmates. But Bukowski knew that King had been accused of two incidents, two years apart, and had been cleared of wrongdoing in those incidents. Bukowski cannot be said to have known of, and disregarded, a harm so great that it was almost certain to occur.[4]

The plaintiffs also allege that the policies and practices in place at the time did not deter correctional officers from sexually assaulting inmates. This is a red herring. Correctional officers should not need to be informed formally or even informally that they should not sexually assault the inmates. King admits that he knew that sexually assaulting the inmates was not allowed.

The plaintiff has not met his burden on the Section 1983 claims against Bukowski.

State law claims

The plaintiffs also allege state claims against Bukowski. The allegations of the complaint are at odds with the allegations in the memorandum in opposition.

The complaint clearly alleges that Bukowski was sued in his individual capacity under Section 1983, and in his official capacity on the basis of *respondeat superior* on the state law claims. Compl., d/e 1, ¶¶6, 7, 14. However, in their memorandum in opposition to summary judgment, they state that Bukowski is a defendant "for his personal involvement and to indemnify King." Memo., d/e 35, p. 11. "Vicarious liability and indemnification are different." *Cox v. Gillenwater*, 2015 WL 1593091, at *6 (N.D. Ill. Apr. 6, 2015). Plaintiffs' counsel knows this; the complaint alleged an indemnification claim against Kankakee County. See Compl., d/e 1, ¶¶8, 18.

The plaintiffs want it both ways as far as Bukowski is concerned. Generally, claims against a defendant may not be raised for the first time in a memorandum opposing summary judgment. *See Butler v. Chicago Bd. Of Educ*., 2011 WL 941201, at *7 (N.D. Ill. Mar. 15, 2011). This applies to the claim of negligence raised for the first time in the plaintiffs' memorandum. Under the facts presented, there is no evidence from which a jury could conclude that Bukowski's conduct caused the plaintiffs' injuries.

The plaintiffs' memorandum in opposition states that they are not trying to hold Bukowski liable under a *respondeat superior* theory. Yet, they spend much of their argument on the topic, and attempt to distinguish various provisions of the Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/2-204 (the "Act"). The Act states, "Except as otherwise provided by statute, a public employee, as such and acting within the scope of his employment, is not liable for an injury caused by the act or omission of another person." 745 ILCS 10/2-204. The cited section of the Act protects a sheriff from liability caused by the actions of others. *See Payne for Hicks v. Churchich*, 161 F.3d 1030, 1044 (7th Cir. 1998). More

[4] Bukowski testified that when the second allegation occurred, he had the additional concern of a second complaint against the same correctional officer. *See* Bukowski Dep. 27. The plaintiffs argue that by his own testimony, Bukowski was aware of a substantial risk of injury to inmates. However, the question posed to Bukowski was whether he had a concern after the second "allegation surfaced," not after the investigations concluded.

recent district court decisions to the contrary, "*Payne* . . . remains binding precedent, and its reading of the [Act] is straightforward. The sheriff is not liable for an injury caused by another person." *Cox*, 2015 WL 1593091, at *6 .

The court is unpersuaded by the plaintiffs' jumbled argument that blends a section of the Counties Code, 55 ILCS 5/3-6016, *see Cooper v. Sheriff of Will Cnty.*, 333 F. Supp. 2d 728, 735 (finding that "section 3-6016 does not defeat plaintiff's common law claims of *respondeat superior* liability") with attempts to distinguish *Payne* as dicta. The plaintiffs also mix argument about vicarious liability with indemnity, and argue that the provisions of the Act -- an Illinois statute -- do not apply to federal claims.

Summary judgment is granted to Bukowski on the state law claims against him.

CONCLUSION

For the foregoing reasons, the motion for summary judgment [33] is granted. At the conclusion of the case, the clerk is directed to enter judgment in favor of Bukowski and against the plaintiffs. The final pretrial conference is scheduled for January 13, 2016, at 1:30 p.m. by personal appearance.

Entered this 7th day of January, 2016

/s/ Harold A. Baker

HAROLD A. BAKER
UNITED STATES DISTRICT JUDGE