IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JERRY L. BILLINGSLEY,

Plaintiff,

v. No. 02-2920 B

SHELBY COUNTY DEPARTMENT
OF CORRECTION, et al.,

Defendants.

ORDER GRANTING MOTION OF DEFENDANT CITY OF MEMPHIS FOR SUMMARY JUDGMENT AND DENYING MOTION FOR SUMMARY JUDGMENT OF DEFENDANT KIRKLAND

INTRODUCTION AND PROCEDURAL BACKGROUND

This action was brought on December 3, 2002 by the Plaintiff, Jerry Billingsley, against various defendants alleging violations of his constitutional rights in connection with incidents occurring during his incarceration. Before the Court for consideration are the motions of Defendants City of Memphis (the "City") and Jon Kirkland for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

STANDARD OF REVIEW

Rule 56, which states in pertinent part that a

> . . . judgment . . . shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); Canderm Pharmacal, Ltd. v. Elder Pharmaceuticals, Inc., 862 F.2d 597, 601

(6th Cir. 1988). In reviewing a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). When the motion is supported by documentary proof such as depositions and affidavits, the nonmoving party may not rest on his pleadings but, rather, must present some "specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. at 324, 106 S.Ct. at 2553. It is not sufficient "simply [to] show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., 475 U.S. at 586, 106 S.Ct. at 1356. These facts must be more than a scintilla of evidence and must meet the standard of whether a reasonable juror could find by a preponderance of the evidence that the nonmoving party is entitled to a verdict. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986). The "judge may not make credibility determinations or weigh the evidence." Adams v. Metiva, 31 F.3d 375, 379 (6th Cir. 1994).

FACTS

With respect to these Defendants, the Plaintiff alleged in his complaint as follows:

> Approximately December 4th, I was taken to the MED Holding. While there, a Memphis police officer aimed his weapon at me & had it trained on me for about 15-20 seconds. I was chained to my seat & was not a verbal or physical threat of any kind to the officer or anyone else. I tried to report it to the Internal Affairs Division of the Memphis Police Department. I was told by Officer Burton at Internal Affairs that the officer could draw his firearm on me & there's nothing that I can do about it. I spoke with Officer Kirkland's supervisor, which is Captain Newt Morgan. Captain Morgan stated that the latter statement about an officer being able to point his firearm at an inmate was a lie. Then Captain Morgan directed me to Director Crews, who told me he would look into it. I haven't heard from him since our meeting on September of 2002. I reported the incident to Director Crews in person.
>
> When Officer Kirkland drew his weapon, I feared for my life & sometime I still can see Kirkland with his gun drawn & aimed at me.

(Compl. at (unnumbered) 4-5.) Billingsley claims that these Defendants' actions constituted violations of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

ANALYSIS OF THE PARTIES' CLAIMS

Section 1983 Generally.

Section 1983 imposes liability on any "person who, under color of any statute, ordinance, regulation, custom or usage, of any State" subjects another to "the deprivation of any rights, privileges, or immunities secured by the Constitution or laws." 42 U.S.C. § 1983. In order to prevail on such a claim, a § 1983 plaintiff must establish "(1) that there was the deprivation of a right secured by the Constitution and (2) that the deprivation was caused by a person acting under color of state law."[1] Wittstock v. Mark A. Van Sile, Inc., 330 F.3d 899, 902 (6th Cir. 2003). "Section 1983 is not the source of any substantive right, but merely provides a method for vindicating federal rights elsewhere conferred." Humes v. Gilless, 154 F.Supp.2d 1353, 1357 (W.D. Tenn. 2001).

Plaintiff's Claim Against the City.

Local governments such as the City are considered "persons" for purposes of § 1983. Holloway v. Brush, 220 F.3d 767, 772 (6th Cir. 2000). This does not mean, however, that municipalities are "liable for every misdeed of their employees and agents." Alkire v. Irving, 330 F.3d 802, 814-15 (6th Cir. 2003) (quoting Garner v. Memphis Police Dep't, 8 F.3d 358, 363 (6th Cir. 1993)). The Supreme Court has held that "a plaintiff seeking to impose liability on a municipality under § 1983 [must] identify a municipal 'policy' or 'custom' that caused the plaintiff's injury." Board of County Comm'rs of Bryan County,' Okla. v. Brown, 520 U.S. 397,

[1]Whether these Defendants were "state actors" for purposes of § 1983 is not at issue in the instant motions.

403, 117 S.Ct. 1382, 1388, 137 L.Ed.2d 626 (1997) (citing Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694, 98 S.Ct. 2018, 2027, 56 L.Ed.2d 611 (1978)); Pembaur v. City of Cincinnati, 475 U.S. 469, 480-81, 106 S.Ct. 1292, 1298-99, 89 L.Ed.2d 452 (1986); and City of Canton, Ohio v. Harris, 489 U.S. 378, 389, 109 S.Ct. 1197, 1205, 103 L.Ed.2d 412 (1989)). The Sixth Circuit has instructed that

> [i]t is firmly established that a municipality . . . cannot be held liable under § 1983 for an injury inflicted solely by its employees or agents. For liability to attach, there must be execution of a government's policy or custom which results in a constitutional tort. Such a requirement ensures that a [municipality] is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the [municipality]. The "policy" requirement is not meant to distinguish isolated incidents from general rules of conduct promulgated by city officials. Instead, the "policy" requirement is meant to distinguish those injuries for which the [municipality] is responsible under § 1983, from those injuries for which the [municipality] should not be held accountable.

Gregory v. Shelby County, Tenn., 220 F.3d 433, 441 (6th Cir. 2000) (internal citations omitted). "[A]n act performed pursuant to a 'custom' that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law." Brown, 520 U.S. at 404, 117 S.Ct. at 1388 (citing Monell, 436 U.S. at 690-91, 98 S.Ct. at 2035-36).

> A "custom" for purposes of Monell liability must be so permanent and well settled as to constitute a custom or usage with the force of law. In turn, the notion of "law" must include deeply embedded traditional ways of carrying out state policy. It must reflect a course of action deliberately chosen from among various alternatives. In short, a "custom" is a "legal institution" not memorialized by written law.

Doe v. Claiborne County, Tenn., 103 F.3d 495, 507-08 (6th Cir. 1996) (internal quotation marks and citations omitted). A plaintiff must, in order to show a custom or policy, adduce specific facts in support of his claim. Conclusory allegations will not lie. Culberson v. Doan,

125 F.Supp.2d 252, 263-64 (S.D. Ohio 2000). The Supreme Court has consistently held that a municipality may not be held liable solely on the basis of respondeat superior. See Brown, 520 U.S. at 404, 117 S.Ct. at 1388; Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 166, 113 S.Ct. 1160, 1162, 122 L.Ed.2d 517 (1993); Collins v. City of Harker Heights, Tex., 503 U.S. 115, 121, 112 S.Ct. 1061, 1066, 117 L.Ed.2d 261 (1992); Canton, 489 U.S. at 392, 109 S.Ct. at 1206; City of St. Louis v. Praprotnik, 485 U.S. 112, 121-22, 108 S.Ct. 915, 923, 99 L.Ed.2d 107 (1988); Pembaur, 475 U.S. at 478, 106 S.Ct. at 1297-98.

It is not enough for a § 1983 plaintiff to identify conduct attributable to a municipality. Rather,

> [t]he plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the "moving force" behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.

Brown, 520 U.S. at 404, 117 S.Ct. at 1388 (emphasis in original). Thus, to recover, a plaintiff

> must show that his civil rights were violated pursuant to and as a direct result of the [city's] official policy or custom. The burden in this regard requires a showing that the unconstitutional policy or custom existed, that the policy or custom was connected to the [city], and that the policy or custom caused his constitutional violation.

Napier v. Madison County, Ky., 238 F.3d 739, 743 (6th Cir. 2001) (internal citations omitted). In a case alleging failure to train officers or to investigate, a plaintiff must also establish that the municipality's failure "in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants." See Ferguson v. Leiter, 220 F.Supp.2d 875, 884 (N.D. Ohio 2002) (quoting Canton, 489 U.S. at 389, 109 S.Ct.1197); Humes, 154 F.Supp.2d at 1363.

In support of its dispositive motion, the City contends that Billingsley has failed to establish the existence of a custom or policy of permitting officers to unjustifiably point their weapons at individuals posing no threat or of failing to train or supervise officers with respect to such behavior. In answers to interrogatories propounded by the Defendants, the Plaintiff indicated that the factual basis for his claims against the City included "[f]ailure to enforce proper procedures; [f]ailure to enforce public safety; [v]iolation of Plaintiff's civil rights; [e]xcessive assault and battery. [I]mproper detainment" (Def. City of Memphis' Mot. for Summ. J., Ex. at (unnumbered) 2.) In his response to the motion, Plaintiff maintains that in April 2001 he was assaulted by City police officers not named as defendants in this case and was again ignored by the City police department's internal affairs division. It appears to the Court that the Plaintiff seeks municipal liability in part on an "inaction" theory based upon the City's alleged failure to investigate his claims of excessive force. In order to prevail, he must demonstrate:

> (1) the existence of a clear and persistent pattern of [unconstitutional activity];
> (2) notice or constructive notice on the part of [officials];
> (3) [officials'] tacit approval of the unconstitutional conduct, such that their deliberate indifference in their failure to act can be said to amount to an official policy of inaction; and
> (4) that the [officials'] custom was the "moving force" or direct causal link in the constitutional deprivation.

Doe, 103 F.3d at 508; see also Gregory, 220 F.3d at 442; Weaver v. Tipton County, Tenn., 41 F.Supp.2d 779, 789 (W.D. Tenn. 1999). The evidence must show that "the need to act is so obvious that the [officials'] 'conscious' decision not to act can be said to amount to a 'policy' of deliberate indifference to [plaintiff's] constitutional rights." Doe, 103 F.3d at 508 (citing Canton, 489 U.S. at 389, 109 S.Ct. at 1205). "Deliberate indifference" in this context does not

encompass "a collection of sloppy, or even reckless, oversights." Id.

In this case, even viewing the facts in the light most favorable to the Plaintiff, the Court is unwilling to extrapolate from Billingsley's conclusory statements concerning his dissatisfaction with demands for a departmental investigation into two of his interactions with police officers that any of the elements of an inaction claim have been satisfied. There is nothing in the record to show that the City had a "custom" which reflected a deliberate indifference to the rights of its citizens. There may be claims of recklessness in some superiors not inquiring further into allegations against some officers. However, such failure to act in two unrelated cases, even if true, does not reflect a custom of conscious indifference to unconstitutional conduct.

As for the Plaintiff's allegations of civil rights violations, assault and battery, and improper detention, the City, for reasons articulated herein, cannot be held liable on a respondeat superior theory. Nor has Billingsley averred that the City had a custom or policy of permitting officers to train firearms at restrained prisoners for no reason. Finally, to the extent the Plaintiff seeks to lay liability for Kirkland's alleged misdeeds at the door of his superiors, he has failed to make the necessary showing. Supervisory liability is appropriate where "the supervisor encouraged the specific incident of misconduct or in some other way directly participated in it, or at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate." Leary v. Daeschner, 349 F.3d 888, 903 (6th Cir. 2003) (citations and internal quotation marks omitted). Liability "must be based on more than the right to control employees. Likewise, simple awareness of employees' misconduct does not lead to supervisor liability." Id. (internal citations and quotation marks

omitted). There is simply no evidence before the Court to suggest that Kirkland's superiors encouraged, participated in, approved of, or even had prior knowledge of the individual Defendant's alleged actions. Consequently, summary judgment on behalf of the City is warranted.

Claims Against Individual Defendant.

As previously noted, Billingsley has asserted claims against Defendant Kirkland under the Fifth, Eighth and Fourteenth Amendments. The Court will consider each in turn. The Fifth Amendment provides in pertinent part that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law[.]" U.S. Const. amend. V. Similarly, the Fourteenth Amendment prohibits states from such deprivations. See U.S. Const. amend. XIV. It is well settled that the "Fourteenth Amendment's Due Process Clause restricts the activities of the states and their instrumentalities; whereas the Fifth Amendment's Due Process Clause circumscribes only the actions of the federal government." Scott v. Clay County, Tenn., 205 F.3d 867, 873 n.8 (6th Cir.), cert. denied, 531 U.S. 874, 121 S.Ct. 179, 148 L.Ed.2d 123 (2000). It is undisputed in this case that the Defendants were state, rather than federal, actors. Thus, the Plaintiff has no claim under the Fifth Amendment.

The Court now turns to the Plaintiff's claims under the Eighth and Fourteenth Amendments. It is unclear whether Billingsley was a convicted prisoner or a pretrial detainee at the time the incident complained of occurred. Prisoners incarcerated pursuant to a criminal conviction are guaranteed substantive rights under the Eighth Amendment's cruel and unusual punishments clause, while pretrial detainees are protected from the use of undue force by the

Fourteenth Amendment's due process provision. Graham ex rel. Estate of Graham v. County of Washtenaw, 358 F.3d 377, 382 n.3 (6th Cir. 2004). An individual's rights under both are analogous. Id. Thus, the Court will analyze the Plaintiff's claims under the Eighth Amendment. See Smith v. Cochran, 339 F.3d 1205, 1210 n.2 (10th Cir. 2003) (Eighth Amendment, rather than Fourteenth, is the proper vehicle for determining prisoner excessive force claims).

As part of its prohibition of "cruel and unusual punishments," the Eighth Amendment "places restraints on prison officials, directing that they may not use excessive physical force against prisoners and must also take reasonable measures to guarantee the safety of the inmates." Curry v. Scott, 249 F.3d 493, 506 (6th Cir. 2001) (citing Farmer v. Brennan, 511 U.S. 825, 832, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)) (internal quotation marks omitted). A state's punishment of a convicted person cannot be "barbarous" and, as a consequence, the Eighth Amendment prohibits conduct toward an inmate that results in "unnecessary and wanton infliction of pain." Rhodes v. Chapman, 452 U.S. 337, 346, 101 S.Ct. 2392, 2399, 69 L.Ed.2d 59 (1981). Such "pain" may include psychological torment. Robins v. Centinela State Prison, No. 00-55227, 2001 WL 1108916, at *1 (9th Cir. Sept. 19, 2001). In cases alleging excessive force,[2] the core inquiry is "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." Thaddeus-X v. Blatter, 175 F.3d 378, 401 (6th Cir. 1999) (quoting Whitley v. Albers, 475 U.S. 312, 320-21,

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[2]While excessive force claims are generally analyzed under the Fourth Amendment, the amendment, and its objective reasonableness inquiry, applies only to persons whose constitutional rights were allegedly violated at a time when they were "free persons." See Phelps v. Coy, 286 F.3d 295, 299 (6th Cir. 2002), cert. denied, 537 U.S. 1104, 123 S.Ct. 866, 154 L.Ed.2d 772 (2003). There is no question Billingsley was not a free person at the time of Kirkland's alleged action.

106 S.Ct. 1078, 89 L.Ed.2d 251 (1986)). As the Supreme Court noted in Hudson v. McMillian, 503 U.S. 1, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992), "the extent of injury suffered by an inmate is one factor that may suggest whether the use of force could plausibly have been thought necessary in a particular situation, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur." Hudson, 503 U.S. at 7, 112 S.Ct. at 999 (citing Whitley, 475 U.S. at 321, 106 S.Ct. at 1085) (internal quotation marks omitted). The Court may consider other factors, including the need for force, the relationship between that need and the force used, the threat reasonably perceived by the officer and efforts made to temper the severity of the use of force. Id., 112 S.Ct. at 999.

In asserting an Eighth Amendment claim, a plaintiff must establish, by a preponderance of the evidence, both an objective and a subjective component. The objective component requires a showing of a deprivation sufficiently serious to rise to a constitutional level and the subjective component is established by demonstrating a sufficiently culpable state of mind. Brown v. Bargery, 207 F.3d 863, 867 (6th Cir. 2000); Brooks v. Celeste, 39 F.3d 125, 127-28 (6th Cir. 1994), reh'g and suggestion for reh'g en banc denied (Jan. 17, 1995). The objective component is "contextual and responsive to contemporary standards of decency." Hudson, 503 U.S. at 8, 112 S.Ct. at 1000 (citing Estelle v. Gamble, 429 U.S. 97, 103, 97 S.Ct. 285, 290, 50 L.Ed.2d 251 (1976)) (internal quotation marks omitted). With respect to the amount of injury required to constitute a constitutional violation, the Hudson Court instructed as follows:

> When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated. This is true whether or not significant injury is evident. . . . That is not to say that every malevolent touch by a prison guard gives rise to a federal cause of action. The Eighth Amendment's prohibition of "cruel and unusual" punishments necessarily excludes from constitutional recognition *de minimis* uses of physical force,

> provided that the use of force is not of a sort 'repugnant to the conscience of mankind.'"

Id. at 9-10, 112 S.Ct. at 1000 (internal citations omitted); see also Corsetti v. Tessmer, No. 01-1595, 2002 WL 1379033, at *2 (6th Cir. June 25, 2002) ("predicate injury need not be significant, but must be more than *de minimis*").

Billingsley has made no allegation that he was physically injured. Rather, he complains he suffered from fright, depression and sleep disorders for which he "has to have Psychological treatments/therapy." (Pl.'s Mot. in Opp'n of the City of Memphis, and Jon Kirkland's Mot. to be Dismissed at (unnumbered) 2.) Although Kirkland suggests that the *de minimis* nature of the Plaintiff's injury militates a conclusion in favor of summary judgment, such a position is not borne out by the case law of this circuit. In Moore v. Holbrook, 2 F.3d 697 (6th Cir. 1993), the Sixth Circuit rejected the plaintiff's contention that the district court dismissed his claim on the grounds that his injuries were *de minimus* and intimated that to have done so would have constituted error. Moore, 2 F.3d at 701. Instead, the court, interpreting Hudson, stated that "[t]he Court held that the extent of Hudson's injuries provided no basis for the dismissal of his claim. Rather, the proper analysis was whether the force that was applied was in a good faith effort to maintain or restore discipline, or was maliciously and sadistically invoked to cause harm." Id. The court further recognized that "[n]o actual injury needs to be proven to state a viable Eighth Amendment claim." Id. at 700.

Two years later, in Pelfrey v. Chambers, 43 F.3d 1034 (6th Cir.), cert. denied, 515 U.S. 1116, 115 S.Ct. 2269, 132 L.Ed.2d 273 (1995), the Sixth Circuit was presented with an Eighth Amendment excessive force claim by a prisoner alleging that corrections officers without provocation pulled a knife, forced his hands to his sides and cut his hair with the knife, causing

him to feel frightened, intimidated and threatened. Pelfrey, 43 F.3d at 1035. Finding the plaintiff had stated a viable constitutional claim, the court noted the defendant officers' failure to assert the assault occurred in a "good faith effort to maintain or restore discipline" and observed that "it would certainly appear that defendants' actions . . . were designed to frighten and degrade Pelfrey by reinforcing the fact that his continued well-being was entirely dependent on the good humor of his armed guards." Considering the "close nature of the prison environment," the court found the defendants' conduct to be a malicious and sadistic use of force invoked to cause harm. Id. at 1037. See also Parrish v. Johnson, 800 F.2d 600, 604-05 (6th Cir. 1986) (actions of corrections officers in waving knife in plaintiff's face, extortion at knife-point of potato chips and cookies, and taunting had no legitimate penological objective and were not a good faith use of force).

In his affidavit, Kirkland stated thusly:

> 5. I have never pointed or trained by weapon at a citizen unless justified under the circumstances in the line of duty. I have never, nor would I ever unnecessarily or unjustifiably point or train my weapon on an individual that was not a threat to myself or others.
>
> 6. I deny violating any of the Plaintiff's rights.
>
> 7. At all times my actions were taken within the scope of my employment, were taken in good faith, and were reasonable under the circumstances. All of my actions were taken pursuant to and in accordance with the Constitution and laws of the United States and the laws of the State of Tennessee.

(Def., Officer Jon Kirkland's Mot. for Summ. J., Ex. 1 at ¶¶5-7.) While Kirkland makes reference to his practices generally, he does not deny the incident occurred or, if it did, does not explain the surrounding circumstances. As a result, the Court cannot determine whether the force that was applied was in a good faith effort to maintain or restore discipline, or was

maliciously and sadistically invoked to cause harm. Furthermore, viewing the evidence in the light most favorable to Billingsley, a reasonable juror could certainly conclude that waving a gun in the face of a shackled inmate without provocation was malicious and sadistic. Judgment in favor of Kirkland on the Eighth Amendment excessive force claim is not, therefore, proper at this point.[3] See Scott v. Coughlin, 344 F.3d 282, 291 (2d Cir. 2003) (summary judgment based on medical records showing only slight injury without consideration of the other factors improper).[4]

Qualified Immunity.

"[G]overnment officials performing discretionary functions generally are granted a qualified immunity and are 'shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Wilson v. Layne, 526 U.S. 603, 609, 119 S.Ct. 1692, 1696, 143 L.Ed.2d 818 (1999). (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)); see also

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[3]To the extent the Plaintiff asserts an Eighth Amendment claim of cruel and unusual punishment arising from the conditions of his confinement, the claim must fail. The Sixth Circuit has held that, in such cases, which require, unlike those involving excessive force, a showing of *extreme* deprivation, "[a] claim of psychological injury does not reflect the deprivation of the minimal civilized measures of life's necessities that is the touchstone of a conditions-of-confinement case." Wilson v. Yaklich, 148 F.3d 596, 601 (6th Cir. 1998) (quoting Babcock v. White, 102 F.3d 267, 272 (7th Cir. 1996)), cert. denied, 525 U.S. 1139, 119 S.Ct. 1028, 143 L.Ed.2d 38 (1999) (internal citations and quotation marks omitted).

[4]The Defendant cites 42 U.S.C. § 1997e(e) of the Prisoner Litigation Reform Act ("PLRA") in support of his position. The statute strictly prohibits claims of mental or emotional injury absent a prior showing of physical injury. However, as the Plaintiff was not incarcerated at the time the complaint was filed, the PLRA does not apply. See 42 U.S.C. § 1997e(a) ("[n]o action shall be brought with respect to prison conditions under § 1983 . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."); Cox v. Mayer, 332 F.3d 422, 424-25 (6th Cir. 2003) (interpreting statute to mean that, in order for the PLRA to apply, plaintiff must be a prisoner at the time suit is instituted).

Buckner v. Kilgore, 36 F.3d 536, 539 (6th Cir. 1994), reh'g and suggestion for reh'g en banc denied (Nov. 21, 1994). "[E]ven if a public officer has deprived the plaintiff of a federal right, qualified immunity will apply if an objective reasonable official would not have understood, by referencing clearly established law, that his conduct was unlawful." Painter v. Robertson, 185 F.3d 557, 567 (6th Cir. 1999). On the other hand, an official may be held liable for unlawful actions not objectively reasonable at the time the action occurred. Gardenhire v. Schubert, 205 F.3d 303, 311 (6th Cir. 2000), reh'g and suggestion of reh'g en banc denied (Apr. 13, 2000).

This Circuit conducts a three-step inquiry with respect to qualified immunity claims.

> First, we determine whether, based upon the applicable law, the facts viewed in the light most favorable to the plaintiffs show that a constitutional violation has occurred. Second, we consider whether the violation involved a clearly established constitutional right of which a reasonable person would have known. Third, we determine whether the plaintiff has offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights.

Feathers v. Aey, 319 F.3d 843, 848 (6th Cir. 2003), reh'g and reh'g en banc denied (May 6, 2003) (internal quotation marks omitted). "Although the policy of this circuit is to resolve immunity questions at the earliest possible stage of the litigation, summary judgment is not appropriate if there is a genuine factual dispute relating to whether [Kirkland] committed acts that allegedly violated clearly established rights." Dean v. Byerley, 354 F.3d 540, 557 (6th Cir. 2004), reh'g en banc denied (Mar. 10, 2004) (citations and internal quotation marks omitted).

The Court has already found that, based upon the applicable law, the facts viewed in the light most favorable to the Plaintiff show that constitutional violations of his Eighth Amendment rights occurred. Therefore, Billingsley has crossed the first hurdle necessary to survive summary judgment based on qualified immunity. Also, for reasons set forth previously in this opinion, the Plaintiff has

satisfied the second element--a showing that the violations involved clearly established constitutional rights to which a reasonable person would have known. Finally, the Plaintiff has presented evidence that the alleged conduct engaged in by Kirkland was objectively unreasonable in light of clearly established constitutional rights. Accordingly, Kirkland's' motion for summary judgment based on qualified immunity is DENIED.

IT IS SO ORDERED this 24th day of November, 2004.

J. DANIEL BREEN
UNITED STATES DISTRICT JUDGE