IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PANAMA CITY DIVISION

KRISTINA TRIPP, THOMAS McFATTER, et al.,

Plaintiffs,

v. **Case No. 5:23-cv-112-AW-MJF**

TOMMY FORD, SHERIFF OF BAY COUNTY, FLORIDA,

Defendant.
_____/

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

Plaintiffs were inmates in the Bay County Jail when Hurricane Michael struck. After the storm, they faced unsanitary living conditions, lack of air-conditioning, and poor-quality food and drinking water.

Plaintiffs sued Bay County Sheriff Tommy Ford in state court. The Sheriff removed and moved to dismiss. *See* ECF Nos. 1, 6. I granted the motion in part, dismissing the § 1983 claims with leave to amend, and deferring as to the state-law claims. ECF No. 14. Plaintiffs have now amended, ECF No. 17, and the Sheriff again moves to dismiss, ECF No. 20. Having carefully considered the parties' arguments, I now grant the motion in part.

Plaintiffs allege five claims: one state-law negligence claim (Count I) and four § 1983 claims: unconstitutional jail conditions (Count II), deliberate indifference (Count III), failure to protect (Count IV), and failure to train (Count V).[1]

I.

The Sheriff first argues the amended complaint is a shotgun pleading. "The unifying characteristic of all types of shotgun pleadings is that they fail to one degree or another, and in one way or another, to give the defendants adequate notice of the claims against them and the grounds upon which each claim rests." *Weiland v. Palm Beach Cnty. Sheriff's Off.*, 792 F.3d 1313, 1323 (11th Cir. 2015). Here, the Sheriff argues the complaint's "narrative convention" leaves him to parse out factual allegations within paragraphs, depriving him of fair notice. ECF No. 20 at 32. But I cannot say it is "virtually impossible" for the Sheriff to know which allegations of fact are to support which claims. *Weiland*, 792 F.3d at 1325. In short, although the complaint could be more artfully pleaded, I will not dismiss it as a shotgun pleading.

The Sheriff also contends Plaintiffs have not sufficiently pleaded the requirements for class certification. ECF No. 20 at 4. The Sheriff never develops an argument for dismissal on this point, but regardless, the sufficiency of class allegations can be addressed later, if Plaintiffs move for certification.

[1] The earlier order explains the standard for a motion to dismiss, and I incorporate that discussion here. *See* ECF 14 at 1-2, 3 n.2 (discussing *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009)).

II.

Next, the Sheriff raises a *Monell* issue. Plaintiffs sued the Sheriff in his official capacity, meaning the suit is essentially against the entity itself. As the previous order explained, one way an entity can face § 1983 liability is if an official with final policymaking authority violates a plaintiff's constitutional rights. ECF No. 14 at 3-4. But not just any delegation is sufficient. A subordinate becomes the final policymaker only if the delegation is "such that the subordinate's discretionary decisions *are not constrained by official policies and are not subject to review*." *Mandel v. Doe*, 888 F.2d 783, 792 (11th Cir. 1989). This is where Plaintiffs failed the first time. But taking all well-pleaded facts as true, and making all reasonable inferences in Plaintiffs' favor, I conclude Plaintiffs have now alleged enough.[2]

As before, Plaintiffs allege Warden Anglin was "delegated final policymaking decisions over the jail" by the Sheriff in writing. ECF No. 17 at 9. But they now also

[2] Plaintiffs reference *Carnley/Lindsey v. Sheriff Bay County*, 5:17-cv-85-RH-GRJ (N.D. Fla. 2018), in which the Sheriff conceded Anglin had final policymaking authority on matters relating to a workplace sexual assault claim. ECF No. 23 at 6-8. But that is not dispositive, and I reject Plaintiffs' contention that collateral estoppel resolves the issue here. Collateral estoppel precludes relitigation when "the issue at stake is identical to the one involved in the prior litigation." *Grayson v. Warden, Comm'r, Ala. DOC*, 869 F.3d 1204, 1223 (11th Cir. 2017). Anglin's authority to prevent sexual assaults and his authority to handle post-storm operations are not necessarily the same. *See McMillian v. Monroe Cnty., Ala.*, 520 U.S. 781, 785 (1997) (explaining that on the liability of local governments under § 1983 we "ask whether governmental officials are final policymakers for the local government *in a particular area, or on a particular issue*," rather than "in some categorical, 'all or nothing' manner") (emphasis added).

allege that Anglin's decisions were immune from meaningful review, stating that "[a]t the time of the Hurricane, the Sheriff had no involvement in the operation of the jail and delegated the complete and total operation of the jail exclusively to Anglin, who did in fact, make all decisions complained herein" and that "Anglin's decisions regarding the Jail were unreviewed by the Sheriff regarding the Hurricane and were immune from further review." *Id*. at 9-10. At this stage, that is enough. Plaintiffs have plausibly alleged Anglin was the final policymaker and responsible for the challenged actions.[3]

Next, the Sheriff contends Plaintiffs did not exhaust available administrative remedies under the Prison Litigation Reform Act (PLRA). This is not a good argument. Plaintiffs were not incarcerated when they sued, so the PLRA is inapplicable. *See Harris v. Garner*, 216 F.3d 970, 981 (11th Cir. 2000) ("[T]he only status that counts, for purposes of [the PLRA] is whether the plaintiff was a 'prisoner confined in a jail, prison, or other correctional facility' at the time the federal civil action was 'brought,' i.e., when it was filed." (quoting 42 U.S.C. § 1997e)).

[3] Plaintiffs argue other ways of avoiding *Monell*, but I need not reach those issues now.

Finally, the Sheriff contends Plaintiffs fail to state a claim for each § 1983 claim.[4] First, the Sheriff argues that the court should dismiss Count III because "deliberate indifference" is not a standalone claim. ECF No. 20 at 28. The Sheriff is correct, and Plaintiffs do not meaningfully argue otherwise. Deliberate indifference is an element—the requisite state of mind—Plaintiffs must allege for their other § 1983 claims. *See Caldwell v. Warden, FCI Talladega*, 748 F.3d 1090, 1099 (11th Cir. 2014) (noting the elements of failure-to-protect claim are "(1) a substantial risk of serious harm; (2) the defendants' deliberate indifference to that risk; and (3) causation"); *Thomas v. Bryant*, 614 F.3d 1288, 1303-04 (11th Cir. 2010) (noting for unconstitutional condition of confinement, "the relevant state of mind . . . is deliberate indifference"); *Connick v. Thompson*, 563 U.S. 51, 61 (2011) ("[A] municipality's failure to train its employees in a relevant respect must amount to 'deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.'"). Count III will be dismissed.

[4] The parties sometimes refer to the § 1983 claims as Eighth Amendment claims and sometimes as Fourteenth Amendment claims. The Eighth Amendment would protect prisoners serving sentences; the Fourteenth Amendment would protect pretrial detainees. Either way, though, the standard is the same. *Goodman v. Kimbrough*, 718 F.3d 1325, 1331 n.1 (11th Cir. 2013) ("Regardless of the particular taxonomy under which we analyze the case, however, the result is the same, because 'the standards under the Fourteenth Amendment are identical to those under the Eighth.'" (quoting *Goebert v. Lee County*, 510 F.3d 1312, 1326 (11th Cir. 2007))).

Turning to Counts II and IV, I conclude Plaintiffs have stated plausible claims for unconstitutional conditions and failure to protect. Contrary to the Sheriff's argument, Plaintiffs' allegations reflect more than discomforts. Plaintiffs have alleged, among other things, that their cells had standing water with feces and other contaminates, that they were denied sanitary food, and that they had no safe drinking water for some period after the storm. *See, e.g.*, ECF No. 17 at 9, 10, 28. This is enough at this stage. These facts, if proven, could support a conclusion that there was extreme deprivation, sufficient for an unconstitutional-conditions claim, and a substantial risk of harm, sufficient for a failure-to-protect claim. And Anglin's alleged knowing failure to address the conditions, *id.* at 24, while falsely telling family members the inmates were evacuated, *id.* at 16, suffices as deliberate indifference for both claims.

The Sheriff argues at length that these were acts of God—that the Hurricane caused the deprivations. But the allegations here deal with the Sheriff's response to the storm, and the allegations are that the Sheriff knew of the suffering, could have remedied it, and deliberately chose not to. Plaintiffs will ultimately have to prove their claims, of course, but for now, they have alleged enough as to Counts II and IV.

As to the failure-to-train claim (Count V), though, Plaintiffs still fall short. Plaintiffs needed to allege the jail "knew of a need to train and/or supervise in a

particular area and the [jail] made a deliberate choice not to take any action." *Gold v. City of Miami*, 151 F.3d 1346, 1350 (11th Cir. 1998). Notice requires an "obvious" need for training where "jailers face clear constitutional duties in recurrent situations" or "a pattern of constitutional violations exists such that the [jail] knows or should know that corrective measures are needed." *Id.* at 1352 n.12 (quoting *Young v. City of Augusta, Ga. Through DeVaney*, 59 F.3d 1160, 1172 (11th Cir. 1995)). The jail's knowledge of an approaching hurricane does not show an obvious need for training to avoid constitutional violations. And the jail's on-the-spot response after the hurricane (even if it lasted weeks) does not show the jail had notice or made a deliberate choice not to train the officers.

I will dismiss Counts III and V but not Counts II or IV.

III.

That leaves the state-law negligence claim. The Sheriff makes several preliminary arguments, but none has merit. The Sheriff argues generally that "Plaintiffs failed to comply with Fla Stat. § 768.28," but he does not develop this argument. ECF No. 20 at 4. At any rate, Plaintiffs alleged satisfaction of all conditions precedent, specifically including compliance with § 768.28. *See* ECF No. 17 at 2; *Menendez v. N. Broward Hosp. Dist.*, 537 So. 2d 89, 91 (Fla. 1988) ("[C]ompliance with the notice requirements of subsection 768.28(6) is a condition precedent to maintaining a suit against a government entity."). The Sheriff could

thus only deny compliance "specifically and with particularly." *Myers v. Cent. Fla. Invs., Inc.*, 592 F.3d 1201, 1224 (11th Cir. 2010); *see also* Fed. R. Civ. P. 9(c). He did not.

Next, the Sheriff argues Plaintiffs did not satisfy Florida's medical negligence pre-suit requirements. But as Plaintiffs explain, ECF No. 10 at 26-27, they do not allege medical negligence, just ordinary negligence. The allegedly negligent officials are not healthcare providers. *See* Fla. Stats. §§ 766.102, 766.202(4). And the allegations of negligence—involving a complete failure to provide sanitary living conditions, edible food, safe potable water, and any type of medical care—do not rely on a "breach of the prevailing professional standard of care" but only a breach of reasonable care. *See Nat'l Deaf Acad., LLC v. Townes*, 242 So. 3d 303, 309 (Fla. 2018).

Finally, the Sheriff references the statute of limitations in § 95.11(5)(g) but fails to develop any argument. ECF No. 20 at 4. The statute of limitations is an affirmative defense, and the defense must appear clearly on the face of the complaint to support a dismissal at this stage. *See* Fed. R. Civ. P. 8(c)(1); *Hunt v. Aimco Properties, L.P.*, 814 F.3d 1213, 1225 n.8 (11th Cir. 2016). Here, it is not clear on the complaint's face whether and to what extent § 95.11(5)(g) applies.

Sovereign immunity is a closer call, but I find Plaintiffs have alleged enough. Grounded in the doctrine of separation of powers, sovereign immunity only applies

if the state agent's acts were "discretionary" rather than "operational." *Cook ex rel. Est. of Tessier v. Sheriff of Monroe Cnty., Fla.*, 402 F.3d 1092, 1118 (11th Cir. 2005). Under Florida law, a discretionary function is "an exercise of executive or legislative power such that, for the court to intervene by way of tort law, it inappropriately would entangle itself in fundamental questions of policy and planning," while an operational function is "one not necessary to or inherent in policy or planning, that merely reflects a secondary decision as to how those policies or plans will be implemented." *Id.*

Here, Plaintiffs allege the county jail violated its duty of reasonable care and failed to abide by the statutory jail standards. ECF No. 17 at 18. Among other things, they allege the jail did not provide "continuous visual observation" and "reasonable access to toilet, sink, and drinking water facilities," and did not comply with state fire codes and sanitation standards. *Id.* at 18-22. For now, this is enough to allege there were operational deficiencies.

And for many of the same reasons, Plaintiffs have plausibly stated a claim of negligence. To the extent the Sheriff argues Plaintiffs failed to allege "ultimate facts" as to specific breaches, again this is the incorrect standard. But at any rate, Plaintiffs alleged the jail breached its duty of care by negligently maintaining unsafe living conditions and failing to provide edible and drinkable water. *Id.* at 9, 10, 28. And although the Sheriff complains that all Plaintiffs allege the same harms, it is not

implausible that inmates subject to the same jail conditions would have similar injuries.

* * *

The motion to dismiss (ECF No. 20) is GRANTED in part. Counts III and V are DISMISSED for failure to state a claim. The case will proceed as to the remaining claims. The Sheriff must file his Answer as to those claims within fourteen days.

SO ORDERED on February 14, 2024.

s/ *Allen Winsor*
United States District Judge