IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MARGIE M. ROBINSON, as the Personal Representative of the Estate of Christina Dawn Tahhahwah, Deceased, Plaintiff,	)	Case No: CIV-16-869-F
vs.	)	
THE CITY OF LAWTON, OKLAHOMA, et. al., Defendants.	)	

DEFENDANT CITY'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT CITY'S MOTION AND BRIEF FOR SUMMARY JUDGMENT

COMES NOW Defendant, City of Lawton ("Defendant" or "City"), pursuant to LCv.R7.1(I), and submits this Reply in support of its Motion for Summary Judgment. [Doc.95]

I. Reply to Plaintiff's Response to Defendant's Statement of Facts

2. Jessica Carter is the current Emergency Communications Manager for the City of Lawton. Her affidavit serves to verify the content of dispatch recordings kept in the regular course of business for the City of Lawton. Defendant reserved the right to call any witness necessary to authenticate any record and any custodian of records, which would include Jessica Carter. [Doc. 85] As such, her affidavit should not be excluded.

4. Plaintiff fails to note which officers, if any, were relayed any information about Christina making "threats to kill people when she spoke to dispatch". Plaintiff states that Defendant Gordon's testimony should be disregarded by the Court. However, the Court should note that Plaintiff has not asked nor attempted to depose Defendant

Gordon in the two years since Defendant Gordon was named as a party to this suit. Therefore, Defendant Gordon's sworn recitation of her recollection of events should not be excluded by the Court.

6. See ¶ 4.

7. After Christina's grandfather (Edward Jerome Tahhahwah) told dispatch she was in a bipolar state, he told the dispatchers to "just disregard her calls" and to "come pick her up and take her to jail." [Doc. 107-28 at 30]

9. Plaintiff admits that "Adamson was still on scene responding to the [call].[Fact No. 10] Therefore, Adamson had not "left Christina" as incorrectly implied by Plaintiff.

11. Defendant notes that evidence regarding Christina being treated and released by medical professionals within the timeframes in question is circumstantial evidence that would support the very sworn testimony of the officers that Plaintiff is asking the Court to disregard.

15. [Defendant notes that the numbering of Plaintiff's responses appears to be off at this point as the remaining responses appear to relate to different facts in Defendant's Motion]

19. (Apparent response to Fact No. 20) Defendant notes that Edward Tahhahwah stated "well, what kind of charges can I file against her?" [Doc. 107-7, at 77] and "Anna said, okay, I'll file – I'll file trespassing charges against her (Christina)." [Doc. 108, Appendix, Ex.7 at 82: 3-8]

22. (Apparent response to Fact No. 23) See Paragraph 19.

24. (Apparent response to Fact No. 25) Defendant would simply note that Plaintiff has not disputed that any failure or action of Jailer Hallagin was *contrary* to Lawton City Jail Policy and Procedures and his training.

27. (Apparent response to Fact No. 28) Plaintiff makes reference to unidentified officers or jailers making statements on a video but does not identify any Defendant officer or jailer as having made such statements. Furthermore, allegations of verbal harassment …without more simply do not show the invasion of any federally protected right. *Collins v. Haga*, 373 F.Supp. 923 (W.D.Va.1974) cited, with approval by *Coyle v. Hughs*, 436 F. Supp. 591, 593 (W.D. Okla. 1977)

33. (Apparent response to Fact No. 33) Plaintiff has deliberately misstated facts in that the video in question shows Terry Sellers outside of the cell bent down, which would have been him checking the handcuffs as Christina was in a seated position. [Doc. 107-23, video at 2:26]

38. (Apparent response to Fact No. 39) Darla Tosta is on Plaintiff's final witness list [Doc. 83] and Defendants include "all witnesses, including experts, endorsed by Plaintiff, not objected to by Defendants" (which would include Darla Tosta). [Doc. 85]

39. (Apparent response to Fact No. 40) See response to ¶38. Also, Defendant would note that Plaintiff's attorney has improperly attempted to characterize the conversation between McMillion and the trustee as "animated" in an effort to discredit McMillion's testimony/affidavit. However, although Plaintiff's attorney had possession of said video during McMillion's deposition, no questions were asked about the

"animated" conversation. Plaintiff's attorney should not be allowed to now substitute his biased observation for that of a witness he failed to properly question about an incident.

40. See ¶38

42. (Apparent response to Fact No. 43) Defendant would note that a number of records reflecting the content of Defendant City's training have been provided. [See Docs. 95-23 through 95-28, 95-31, 107-24, 107-25, 107-26, and 107-27]

II. Response to Plaintiff's Statement of Disputed or Omitted Material Facts

1. Admitted.

2. Denied as misleading. Christina's contacts with dispatchers, officers, and jailers occurred over the course of two days during multiple shifts. There is no evidence to suggest that every statement made by Christina on the dispatch calls was relayed to the responding officers.

3. Denied. Christina Tahhahwah was placed in her own cell.

4. Defendant does not deny the content of its policy, however, if the officer does not observe behavior that indicates that a person "appears to be mentally ill" at the time of his/her encounter with the person, this provision is not applicable.

5. Irrelevant. This statement is simply an acknowledgement by the City of Lawton that its jail facility is not the equivalent of a mental health facility.

6. Defendant has admitted that a medical and mental health screening was not performed by the booking officer. Plaintiff has pointed to no evidence that other jailers (other than McMillion) were even present during her booking or had any reason to know

or believe that a proper medical or mental health screening had not been performed during booking.

7. Admitted.

8. Admitted but irrelevant. Plaintiff provides no proof that this policy was violated.

9. Denied as irrelevant. That a particular employee does not recall training is not sufficient to prove that the training was inadequate.

10. Denied. Defendant would note that there are cases in which detainees are handcuffed to fixed objects and courts did not determine that it was an excessive use of force. See: *Uzochukwu v. Jones*, No. CIV-11-1512-HE, 2012 WL 6853505, at *3 (W.D. Okla. Dec. 13, 2012), report and recommendation adopted, No. CIV-11-1512-HE, 2013 WL 147910 (W.D. Okla. Jan. 14, 2013)(inmate handcuffed to door); *Petersen v. Farnsworth,* 371 F.3d 1219, 1224 (10th Cir.2004)(handcuffed to bar attached to the booking counter).

11. Irrelevant. (See argument below)

12-13. Admitted.

14. Irrelevant.

15. Denied. Defendant further states that evidence that Christina had labored breathing over 24 hours before she got to the jail does not establish that she had labored or distressed breathing while in the jail. [Doc.95]

16. Denied.

ARGUMENT AND AUTHORITY

Plaintiff relies heavily on *Allen v. Muskogee, Okl.*, 119 F.3d 837 (10th Cir. 1997) as the basis for her argument that the Defendant is not entitled to summary judgment. However, as shown below, Plaintiff's reliance is misplaced as the facts of this case can easily be distinguished from those in the *Allen* case and are more in line with 10th Circuit cases that followed the *Allen* decision.

In *Allen,* the court relied heavily on the expert testimony of plaintiff's expert as a basis for finding that genuine issues of material fact precluded summary judgment for the city. However, in *Allen,* there was specific evidence that the municipality "trained its officers to leave cover and approach armed, suicidal, emotionally disturbed persons and try to disarm them, a practice contrary to proper police procedures and tactical principles. *King v. Glanz,* No. 12-CV-137-JED-TLW, 2014 WL 2838035, at *1 (N.D. Okla. June 23, 2014) citing *Allen* at 843. The court thus further found that "the record contains evidence that the officers were trained to act recklessly in a manner that created a high risk of death," which was "sufficient to support an inference that the need for different training was so obvious and the inadequacy so likely to result in violation of constitutional rights that the policymakers of the City could reasonably be said to have been deliberately indifferent to the need." *Id*. In *Allen,* a police department training coordinator also testified that the officers acted in accordance with their training in approaching the car and trying to take away the gun of a mentally ill suspect and plaintiff's expert, relying principally on this testimony, concluded the officers' training was inadequate. *Id*. at 843.

In the case at bar, Plaintiff's expert, W. Ken Katsaris, states in his report that he reviewed the deposition testimony of several jailers and officers, the training files of each individually named defendant officer and jailer, a number of specific training materials including materials related to mental health, sudden in-custody death, use of force, and the entire Jail Policy and Procedures Manual – yet he makes absolutely no reference to any specific deficiency or inadequacy in any of these policies or training nor does he point to any testimony of any officer or jailer as evidence of allegedly inadequate training. [Doc. 107-1] Mr. Katsaris' report is primarily devoted to discussing the alleged deficiencies in the actions and inactions of dispatchers (who are not even named defendants) and officers and jailers rather than specifically identifying any inadequacy or failure to train on the part of Defendant City.

In fact, Mr. Katsaris actually makes several statements in his report which would indicate that the jailers were, in fact, properly trained. In paragraph 3 of his report, he notes "the required medical history and mental health evaluation…are absolutely required by policy" and further states that Defendant Sellers had "some knowledge of positional asphyxia, through training." [Doc. 107-1] Mr. Katsaris further states that the manner in which Tahhahwah was restrained was "barbaric and not a recognized, *trained* or accepted corrections practice." [Doc. 107-1, emphasis added] He goes on to state that "this repeated risk of death, and/or severe injury to Christina by the absolutely inappropriate, *not trained*, and not recognized handcuffing to the bars procedure, is a reckless disregard to a now, if not before, recognized harm that would come to Christina." [Doc. 107-1, emphasis added] Mr. Katsaris implies that the actions of the jailers fell outside of their

training and fails to identify any specific policy or inadequate training that allegedly led to or caused the actions/inactions of the jailers.

Despite Plaintiff's reliance on *Allen*, the facts of this case are more aligned with the facts in *King v. Glanz,* No. 12-CV-137-JED-TLW, 2014 WL 2838035, at *1 (N.D. Okla. June 23, 2014). In that case, the court noted "in contrast to the evidence in *Allen*, the undisputed evidence here establishes that the [county's] policies properly advised deputies regarding the constitutional constraints on the use of deadly force, provided instructions as to the limited circumstances under which firearms should be drawn, and instructed deputies on the potential for enlisting COPES when dealing with persons who were mentally unstable." *Id.* Despite the Plaintiff's unsupported contention that the City of Lawton has not addressed the "content" of its training, the evidence submitted by the City, and reviewed by Plaintiff's own expert, suggests otherwise. In fact, much like the defendant in *King*, Defendant has produced a number of policies and procedures dealing specifically with the use of force by jailers and police officers, sudden in custody death, and handling individuals who suffer from mental illness. [See Docs. 95-23 through 95-28, 95-31, 107-24, 107-25, 107-26, and 107-27]

Plaintiff focuses her Response on alleged "Inadequate Training on [the] Restraint Chair." [Doc. 108] Mr. Katsaris, in his focus on the restraint procedure, finds it "unbelievable" that the City "had a restraint chair, but….did not use it because they were not trained on it nor was there a policy for its use." [Doc. 107-1] However, this fact actually supports the Defendant's position and shows that the Defendant is not willing to have its employees utilize restraint measures until a proper policy is in place and its

employees have been properly trained in that specific restraint technique. Furthermore, this Court, like the court in King, should not deny summary judgment on the basis of Plaintiff's (and her expert's) reliance on the *absence* of training that allegedly could have assisted the jailers during their encounter with Christina. *Id*. at *6. (See also *Carr v. Castle*, 337 F.3d 1221, 1229 (10th Cir. 2003) (distinguishing *Allen* on the basis that *Allen* "identified (and then dealt with) specific training" that differed from that taught elsewhere in the country, while "Carr (and his experts) rely on the *absence* of specific training for the Officers that assertedly could have helped them during the encounter ... merely demonstrat [ing] the omniscience of hindsight, rather than satisfying the demands of *City of Canton* and hence *Brown."*)(internal citation omitted).

Plaintiff seems to suggest that because the Defendant does not have a specific policy titled "restraint of an inmate who is mentally ill, obese, and presents serious risk of sudden-in-custody death syndrome" – that this necessarily means the City failed to train its officers and jailers. This approach would lead to an absurd outcome – of placing liability on municipalities for simply failing to come up with any conceivable category of plaintiff that may come into contact with an officer or jailer – and also ignores the fact that the Defendant had adequate training on a number of topics that would address each of these issues in totality as evidenced by the record. [See Docs. 95-23 through 95-28, 95-31, 107-24, 107-25, 107-26, and 107-27].

Plaintiff also states, in a conclusory manner, that the "City's inadequate training was the moving force behind the constitutional deprivations" and cites to Dr. Buck Hill's report. [Doc. 108] Dr. Hill's report (which has been challenged by all Defendants)

"concluded that Christina's compromised position led to her death." [Doc. 108] To this end, the Defendant would simply note that Dr. Buck Hill also testified that it almost doesn't matter where her hands were" [handcuffed]. [Doc. 109, Ex. 1] Dr. Hill, like Mr. Katsaris, offers no opinion or evidence to suggest that the Defendant failed to train its employees.

Finally, Plaintiff is correct that "Defendant City may argue that Robinson's Complaint did not identify a Bosh theory." [Doc. 108] Defendant can find no case to suggest that a Plaintiff would be entitled to assert a claim two years after a complaint which was devoid of any mention of such a claim was filed, simply because Plaintiff asserts that the "facts give rise to such a claim." Rule 8, F.R.Civ.P., requires that a complaint contain a short and plain statement of the claim showing that that pleader is entitled to relief. Compliance with this rule is necessary "to give opposing parties fair notice of the basis of the claim against them so that they may respond to the complaint, and to apprise the [C]ourt of sufficient allegations to allow it to conclude, if the allegations are true, that the claimant has a legal right to relief." *Monument Builders of Greater Kansas City, Inc. v. American Cemetery Association of Kansas,* 891 F.2d 1473, 1480 (10th Cir.1989). Defendant has not been given notice of a Bosh claim.

CONCLUSION

WHEREFORE, all premises considered, the City respectfully requests that this Court grant its summary judgment motion and for any other such relief as the Court deems appropriate.

Respectfully submitted this 5th day of September, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of September, 2018, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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