UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Re: Case No. 14-2195, *Lamont Heard, et al v. Tom Finco, et al*
Originating Case No. : 1:13-cv-00373

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Linda M. Niesen
Case Manager
Direct Dial No. 513-564-7038

cc: Ms. Tracey Cordes

Enclosure

Mandate to issue

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 14-2195

UNITED STATES COURT OF APPEALS
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FILED
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LAMONT BERNARD HEARD, et al.,	)	
	)	
Plaintiffs-Appellees,	)	
	)	
v.	)	ON APPEAL FROM THE UNITED
	)	STATES DISTRICT COURT FOR
TOM FINCO, Deputy Director of Michigan Department of Corrections, et al.,	)	THE WESTERN DISTRICT OF MICHIGAN
	)	
Defendants-Appellants.	)	
	)	

O R D E R

Before: SUHRHEINRICH, SUTTON, and COOK, Circuit Judges.

Defendants Tom Finco, Deputy Director of the Michigan Department of Corrections (MDOC); Mike Martin, Special Activity Coordinator of MDOC; and Brad Purves, Dietician and Food Service Manager, filed this interlocutory appeal from the district court's August 15, 2014 order reinstating the plaintiffs' Eighth Amendment claim that was filed under 42 U.S.C. § 1983. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Plaintiffs Lamont Bernard Heard, William M. Johnson, Jamero T. Moses, and Anthony Lee Nelson, Muslim prisoners proceeding pro se, filed this civil rights action alleging, in part, that the defendants violated their First and Eighth Amendment rights by depriving them of adequate nutrition during their 2011 and 2012 Ramadan fasts by serving them a total of 1,000 to 1,500 calories per day. The defendants moved to dismiss the complaint or for summary judgment. A magistrate judge recommended granting the defendants' motion for summary

judgment, reasoning, in part, that the plaintiffs' First Amendment claims were barred by qualified immunity because there was no clearly established federal law that entitled the plaintiffs to the 2,900 calories a day allegedly mandated by MDOC policy. The magistrate judge did not address whether the defendants were entitled to qualified immunity on the plaintiffs' Eighth Amendment claim arising from the 2011 and 2012 Ramadan fasts, where they allegedly received only 1,000 to 1,500 calories per day.

The district court adopted in part and rejected in part the report and recommendation. It determined that the defendants were not entitled to qualified immunity on the plaintiffs' First Amendment claim because a reasonable prison official should have known that a diet consisting of 1,000 to 1,500 calories a day was inadequate to sustain a prisoner's health over a thirty-day period. And it dismissed the plaintiffs' Eighth Amendment claim because the plaintiffs were offered the same nutritionally adequate diet as the general prison population but chose to participate in the Ramadan fast.

The plaintiffs moved for reconsideration of their Eighth Amendment claim, arguing that they were deprived of adequate nutrition based on their participation in the Ramadan fasts and that they never chose to give up adequate meals but were deprived of them when they were not allowed to take a mid-day meal from the cafeteria to eat after sunset. The district court granted the plaintiffs' motion, concluding that the plaintiffs could only obtain adequate nutrition by violating their religious beliefs. It thus reinstated the plaintiffs' Eighth Amendment claims.

The defendants filed this interlocutory appeal, arguing that they are entitled to qualified immunity on the plaintiffs' Eighth Amendment claim, that the district court defined the constitutional issue too generally, and that there is no clearly established law dictating the number of calories that a prisoner must have per day during a thirty-day period. The defendants do not appeal the denial of qualified immunity on the plaintiffs' First Amendment claims, asking us only to reverse and "remand with instructions to dismiss Plaintiffs' Eighth Amendment claim." Appellants' Br. 16. The plaintiffs contend that the defendants did not raise a qualified-immunity argument below and that their clearly established Eighth Amendment rights were violated by the denial of adequate nutrition during the 2011 and 2012 Ramadan fasts. The

plaintiffs also move to dismiss the appeal for lack of subject-matter jurisdiction and for the appointment of counsel.

The plaintiffs move to dismiss this appeal for lack of subject-matter jurisdiction, arguing that the district court never ruled on whether the defendants were immune from suit on their Eighth Amendment claim. Qualified immunity shields government officials from civil damages so long as their conduct does not violate a clearly established statutory or constitutional right of which a reasonable person would have known. *Stanton v. Sims*, 134 S. Ct. 3, 4 (2013) (per curiam). A district court's denial of qualified immunity on purely legal grounds is immediately appealable. *Mitchell v. Forsyth*, 472 U.S. 511, 526–27, 530 (1985). This is so even when the denial of qualified immunity is implicit. *See, e.g.*, *Summers v. Leis*, 368 F.3d 881, 887 (6th Cir. 2004); *In re Montgomery Cty.*, 215 F.3d 367, 370, 374 (3d Cir. 2000); *Heggs v. Grant*, 73 F.3d 317, 321 (11th Cir. 1996); *Musso v. Hourigan*, 836 F.2d 736, 740–41 (2d Cir. 1988). Here, the defendants moved for summary judgment or dismissal claiming that they were shielded by qualified immunity. The district court reinstated the plaintiffs' Eighth Amendment claim without expressly deciding the issue of qualified immunity. Because the district court allowed the claim to proceed, it implicitly rejected the defendants' qualified-immunity argument. *See Summers*, 368 F.3d at 887. Thus, we have jurisdiction to decide whether the facts alleged by the plaintiffs establish a prima facie violation of their clearly established Eighth Amendment rights.

We review de novo a district court's order denying qualified immunity. *Range v. Douglas*, 763 F.3d 573, 588 (6th Cir. 2014). To determine whether government officials are shielded by qualified immunity, a court must decide (1) whether the facts as alleged by the plaintiff establish that a constitutional violation occurred and (2) whether the right was clearly established at the time of the violation. *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014). A right is clearly established when its contours are sufficiently clear that a reasonable official would have understood that what he was doing violated that right. *Id.* at 2023. Clearly established law should not be defined at a high level of generality. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011). The focus should be on whether the law provided fair warning.

The defendants argue that there is no clearly established law requiring that prisoners receive a specific number of calories per day, here between 1,000 and 1,500 calories. But it is clear that a prisoner has the clearly established right to a nutritionally adequate diet. *See Farmer v. Brennan*, 511 U.S. 825, 832 (1994). And it is clear that a diet consisting of 1,000 to 1,500 calories per day can violate that right. *Welch v. Spaulding*, No. 14-2050, 2015 WL 5729466, at *4–5 (6th Cir. Sept. 30, 2015). For reasons of their own, the defendants did not submit evidence about the 2011 and 2012 Ramadan fasts, instead accepting that the prisoners were only given between 1,000 and 1,500 calories per day during those years. That number of calories, the prisoners allege, caused dizziness, weakness, dehydration, hunger pains, and loss of weight. These allegations establish a genuine issue of material fact regarding whether the plaintiffs' restricted diets during the Ramadan fasts violated a clearly established right of which a reasonable officer would have known. *Id.*; *see Byrd v. Wilson*, 701 F.2d 592, 595 (6th Cir. 1983) (per curiam). While it is not clear to us whether the plaintiffs can receive relief on both their First and Eighth Amendment claims, at this point both can go forward.

The plaintiffs also move for the appointment of counsel. The appointment of counsel in a civil proceeding is a privilege—not a right—that is warranted only in exceptional circumstances. *Lavado v. Keohane*, 992 F.2d 601, 605–06 (6th Cir. 1993). Since the filing of the plaintiffs' motion and after merits briefing was completed, counsel has entered an appearance and filed pleadings on the plaintiffs' behalf. Counsel has not requested appointment, and that request is now moot.

Accordingly, the district court's order is **AFFIRMED**, the plaintiffs' motions to dismiss and for the appointment of counsel are **DENIED**, and this case is **REMANDED** to the district court.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk