IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

BRYAN P. WEILER,

Plaintiff,

v.

MEMORANDUM and ORDER
06-C-591-S

BOARD OF REGENTS OF THE UNIVERSITY of WISCONSIN SYSTEM and TRULI G. BERTRAM,

Defendants.

The above entitled case was removed from the Dane County Circuit Court on October 16, 2006. Plaintiff Bryan P. Weiler claims that the defendant Truli G. Bertram violated his Fourth Amendment rights.

On December 29, 2006 defendants moved for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of facts, conclusions of law, affidavits and a brief in support thereof. This motion has been fully briefed and is ready for decision.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure. Supporting and opposing affidavits shall be made on personal knowledge, shall set

forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding the defendants' motion for summary judgment the Court finds that there is no genuine dispute as to the following material facts.

Plaintiff Bryan P. Weiler is an adult resident of Illinois. Defendant Truli Bertram is a police officer for the University of Wisconsin. Defendant Board of Regents of the University of Wisconsin System is defendant Bertram's employer.

On May 15, 2005 at approximately 1:28 a.m. plaintiff was stopped by defendant Bertram on West Johnson Street. She issued him a citation for deviation from lane of traffic and operating a motor vehicle while intoxicated. Officer Bertram took plaintiff to

the University of Wisconsin Police Department in Madison, Wisconsin. Plaintiff refused to submit to an intoximeter test. Officer Bertram transported plaintiff to Dane County Jail where she issued him a Notice of Intent to Revoke Driving Privileges as a result of his refusal to submit to a breath test. Plaintiff remained in jail until 2:00 p.m. that day.

MEMORANDUM

Defendant Board of Regents of the University of Wisconsin moves for summary judgment on the basis of the Eleventh Amendment. Plaintiff agrees that the Eleventh Amendment requires the Board of Regents of the University of Wisconsin System be dismissed as a defendant.

Defendant Bertram moves for summary judgment on the basis of qualified immunity. She argues based on Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), that her stop of plaintiff was not conduct that a reasonable official would understand to be violation of a clearly established constitutional right of plaintiff.

A police officer may stop an individual where the office has a reasonable suspicion that some kind of criminal activity has taken plaice or is about to take place. Terry v. Ohio, 392 U.S. 1, 30 (1968). This suspicion must be based on specific and articuable facts which taken together with rational inference from those facts reasonably warrant that intrusion. Id. at 21.

In her police report and her answer to plaintiff's interrogatory #3 defendant Bertram asserts that prior to her stopping plaintiff he made an acceleration noise, made an unsafe turn and interfered with the turn of another car. In his November 2, 2006 declaration in this case and in his sworn testimony in a previous case plaintiff disputes these facts.

In Morfin v. City of East Chicago, 349 F. 3d 989, 1000, n.13 (7th Cir. 2003), the Court stated as follows:

> When...the arrestee challenges the officer's description of the facts and presents a factual account where a reasonable officer would not be justified in making an arrest, then a material dispute of fact exists. Where there is a genuine issue of material fact surrounding the question of plaintiff's conduct, we cannot determine, as a matter of law, what predicate facts exist to decide whether or not the officer's conduct clearly violated established law.

In this case there are material issues of fact concerning defendant Bertram's stop of plaintiff. These factual disputes concerning defendant's conduct preclude granting summary judgment on the basis of qualified immunity and are beyond the narrow legal issue of qualified immunity which is subject to an interlocutory appeal. See Marshall v. Allen, et al., 984 F. 2d 787 (7th Cir. 1993). Accordingly, defendant Bertram's motion for summary judgment on the basis of qualified immunity cannot be decided as a matter of law at this time nor is it an appealable issue.

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ORDER

IT IS ORDERED that the motion of defendant Board of Regents of the University of Wisconsin System for summary judgment is GRANTED.

IT IS FURTHER ORDERED that defendant Truli G. Bertram's motion for summary judgment on the basis of qualified immunity is DENIED at this time.

Entered this 5th day of February, 2007.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge