UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE ESTATE OF GORDON ("CASEY") POWELL, et al.,

Plaintiffs,

v.

GARY BARNES, et al.,

Defendants.

CASE NO. C16-0352JLR

ORDER DENYING DEFENDANTS' MOTION TO DISMISS BASED ON QUALIFIED IMMUNITY

I. INTRODUCTION

Before the court is Defendants Gary Barnes, Breeann Caraway, Keri Walters, Jeremy Seeley, Tom Talbot, Kevin Browne, Andrew Herbert, Cameron Johnson, and Kelsey Meyer's (collectively, "Defendant Officers") motion to dismiss Plaintiffs' complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). (Mot. (Dkt. # 31).) Defendant Officers contend that they are entitled to the dismissal of Plaintiffs' complaint based on their qualified immunity as government actors. (*See id.* at

2.) The court has reviewed the motion, the parties' submissions related to the motions, the relevant portions of the record, and the applicable law. Being fully advised,[1] the court DENIES the motion.

II. FACTUAL BACKGROUND

On May 9, 2015, Benjamin Price, an inmate at Monroe Corrections Complex ("MCC"), assaulted another inmate, Gordon Powell. (Compl. (Dkt. # 1) ¶ 1.) Several days later Gordon Powell died of brain injuries suffered during the assault. (*Id.* ¶ 33.) Defendant Officers are nine corrections officers employed by the Washington State Department of Corrections ("DOC"), assigned to MCC, and on duty the day of the assault. (*Id.* ¶¶ 6-14.) Plaintiffs the Estate of Gordon ("Casey") Powell ("the Estate"), Stephanie Powell (the sister of Gordon Powell and Personal Representative of the Estate), and Gordon Clay Powell (the father of Gordon Powell) (collectively, "Plaintiffs") allege claims against Defendant Officers under 42 U.S.C. § 1983 and the Eighth Amendment and seek damages related to Gordon Powell's death. (Compl. ¶¶ 40-42.)

Plaintiffs allege that Defendant Officers knew Mr. Price suffered from severe mental illness and that, when unstable or "off baseline," Mr. Price "desired to kill others and to act on those desires." (*Id.* ¶ 1.) Plaintiffs allege that Defendant Officers knew Mr. Price needed to be segregated from other inmates and that "failing to do so posed a grave and imminent threat" to other inmates, including Gordon Powell. (*Id.*) Plaintiffs allege

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[1] No party has requested oral argument regarding Defendants' motion, and the court does not consider oral argument to be necessary for its disposition of the issues presented. Local Rule W.D. Wash. LCR 7(b)(4).

that, despite this knowledge, Defendant Officers "failed to segregate [Mr.] Price and instead permitted him to share common areas with other offenders," including Gordon Powell. (*Id.*)

Mr. Price was serving a 12-year sentence at Stafford Creek after he pleaded guilty to manslaughter. (*Id.* ¶ 18.) On April 18, 2011, while incarcerated there, Mr. Price attempted to strangle another inmate. (*Id.* ¶ 19.) After the incident in 2011, Mr. Price was transferred to MCC and housed in the Special Offenders Unit for mentally ill offenders. (*Id.*) From October 2014, both Mr. Price and Gordon Powell were housed in Pod 2 of the E-Unit of the Special Offenders Unit ("SOU") with approximately 40 other offenders. (*Id.* ¶¶ 24-25.)

Plaintiffs allege that from approximately 2011 through 2014, Mr. Price was periodically noted to be unstable and dangerous. (*Id.* ¶ 20.) In March 2014, July 2014, and February 2015, Mr. Price was removed from the general population and placed in restrictive environments or close observation areas to ensure the safety of other offenders. (*Id.* ¶¶ 20-21.) Plaintiffs allege that these placements were due to Mr. Price's "increasingly apparent" instability, violence, and dangerousness. (*Id.*) Plaintiffs further allege that Mr. Price behaved in a manner indicating he was suffering from paranoid delusions:

> In the weeks, days, and hours leading up to the fatal assault that is the subject of this case, [Mr.] Price would walk around common areas with his fists clenched while opening and closing his eyes rapidly, yell at other offenders randomly for no apparent reason, pound on the walls of his cell with his fists, make delusional statements, and pace back and forth in an aggressive and pre-occupied [sic] state, among other off-baseline behaviors.

(*Id.* ¶ 22.)

The crux of Plaintiffs' complaint is described in paragraph 27 of the complaint:

> As of May 9, 2015, the DOC's officers, including [Defendant Officers] herein, should not have permitted [Mr.] Price to come into close physical contact with other offenders during meal and/or other periods due to his instability and off-baseline behavior and the danger he posed to other offenders. [Mr.] Price needed to be segregated and closely observed until stabilized. Such segregation and close observation is appropriate and required in the case of offenders, such as [Mr.] Price, who pose a significant danger to others.

(*Id.* ¶ 27.) Plaintiffs also allege that Mr. Price displayed "off-baseline" behavior throughout the day of May 9, 2015. (*Id.* ¶ 28.) Plaintiffs contend that Defendant Officers noted that Mr. Price was "slipping" or "off-baseline" on the day of the attack, that Defendant Officers "were explicitly advised," warned, or knew that Mr. Price "posed an imminent danger of serious bodily injury to the other inmates," and should have acted on that information to segregate Mr. Price from the other inmates, but failed to do so. (*Id.* ¶¶ 28, 29-30.)

On March 8, 2016, Plaintiffs filed their complaint asserting claims under 42 U.S.C. § 1983 for Defendant Officers' alleged violation of Gordon Powell's and Plaintiffs' constitutional rights. (*See id.* ¶¶ 40-41.) Ms. Powell, the Personal Representative of the Estate, brings a claim for the deprivation of Gordon Powell's constitutional rights under the Eighth Amendment to the United States Constitution. (*Id.* ¶ 40.) Mr. Powell brings a claim for deprivation of his son's society and companionship in violation of the Fourteenth Amendment of the United States Constitution. (*Id.* ¶ 41.) On July 7, 2016, Defendants filed their motion to dismiss Plaintiffs' complaint based on

the qualified immunity of the Defendant Officers who were involved in the incident. (Mot. at 2.) The court now considers the motion.

III. ANALYSIS

Plaintiffs assert that Defendant Officers violated Gordon Powell's Eighth Amendment right to be free from cruel and unusual punishment. (Compl. ¶¶ 36-37.) Plaintiffs contend that Defendant Officers had a constitutional duty to segregate Mr. Price from the inmate population, including Gordon Powell. (*See id.*) Mr. Powell's claim for loss of the society and companionship of his son, Gordon Powell, is derivative of Plaintiffs' alleged violation of the Eighth Amendment. (*Id.* ¶ 38 ("By the unconstitutional actions and omissions of the individual defendants herein, defendants violated the Fourteenth Amendment right of Gordon Powell, Sr. to the society and companionship of his son.").)

In 1994, long before the attack on Gordon Powell, "the Supreme Court made clear that 'prison officials have a duty to protect prisoners from violence at the hands of other prisoners' because corrections officers have 'stripped [the inmates] of virtually every means of self-protection and foreclosed their access to outside aid.'" *Castro v. Cty. of L.A.*, 833 F.3d 1060, 1067 (9th Cir. 2016) (en banc) (alterations in original) (quoting *Farmer v. Brennan*, 511 U.S. 825, 833 (1994)). The Supreme Court determined that "[a] prison official's deliberate indifference to a substantial risk of serious harm to an inmate violates the Eighth Amendment." *Farmer*, 511 U.S. at 828 (internal quotation marks

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omitted).[2] Nevertheless, here, Defendant Officers assert that they are entitled to dismissal of Plaintiffs' claims under Federal Rule of Civil Procedure 12(b)(6) on grounds of their qualified immunity as government actors. (*See generally* Mot.)

A. Rule 12(b)(6) Legal Standards

A motion to dismiss based on the qualified immunity of Defendant Officers is properly asserted as a motion pursuant to Federal Rule of Civil Procedure 12(b)(6). *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (articulating the overarching standard for Rule 12(b)(6) motions in a case determining qualified immunity); *O'Brien v. Welty*, 818 F.3d 920, 936 (9th Cir. 2016) (holding that when defendants assert qualified immunity in a Rule 12(b)(6) motion to dismiss, dismissal is not appropriate unless the court determines, based on the complaint itself, that qualified immunity applies).

Dismissal is appropriate under Rule 12(b)(6) when a plaintiff's allegations fail "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Plausibility

[2] To prevail on such an Eighth Amendment claim, Plaintiffs must satisfy three requirements, which include both objective and subjective components. First, Plaintiffs must show that Gordon Powell was incarcerated under conditions where the prison official could infer a substantial risk of serious harm. *Farmer*, 511 U.S. at 834-37. This is the "objective" element of the test. *Id.* Second, Plaintiffs must show that the prison official actually made that inference. *Id.* at 837. This is the "subjective" element of the test. *Id.* Finally, Plaintiffs must show that prison officials were deliberately indifferent to a substantial risk of serious harm, i.e., the prison official failed to take reasonable measures to guarantee the safety of the inmate. *Id.* An official exhibits deliberate indifference when he or she is subjectively aware of a risk and fails to act reasonably with an understanding of the risk. *Id.*; *Clouthier v. Cty. of Contra Costa*, 591 F.3d 1232, 1242 (9th Cir. 2010). Mere negligent failure to protect an inmate from harm is not actionable under 42 U.S.C. § 1983. *Farmer*, 511 U.S. at 835.

1 does not equate to probability, but it requires "more than a sheer possibility that a
2 defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. "A claim has facial plausibility
3 when the plaintiff pleads factual content that allows the court to draw the reasonable
4 inference that the defendant is liable for the misconduct alleged." *Id.* "Threadbare
5 recitals of the elements of a cause of action, supported by mere conclusory statements, do
6 not suffice." *Id.* In ruling on a motion to dismiss, courts must "accept all material
7 allegations of fact as true and construe the complaint in a light most favorable to the non-
8 moving party." *Vasquez v. L.A. Cty.*, 487 F.3d 1246, 1249 (9th Cir. 2007).

9 **B. Standards for Determining Qualified Immunity**

10 A court may not grant a Rule 12(b)(6) motion on qualified immunity grounds
11 unless it "can determine, based on the complaint itself, that qualified immunity applies."
12 *O'Brien*, 818 F.3d at 936 (quoting *Groten v. California*, 251 F.3d 844, 851 (9th Cir.
13 2001)). The Supreme Court has delineated a two-pronged inquiry for determining
14 whether a public official is entitled to qualified immunity: (1) the trial court examines
15 the facts alleged in the light most favorable to the plaintiff and determines whether the
16 officer's alleged conduct violated a constitutional right, and (2) the court decides whether
17 that right was clearly established at the time of the alleged violation. *Saucier v. Katz*, 533
18 U.S. 194, 201 (2001). In its discretion, the court may consider the two questions in any
19 order. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

20 Defendant Officers' motion rests entirely on the second prong of the qualified
21 immunity inquiry. (*See* Mot. at 6-15.) "The relevant, dispositive inquiry in determining
22 whether a right is clearly established is whether it would be clear to a reasonable officer

that his conduct was unlawful in the situation he confronted." *Saucier*, 553 U.S. at 202. If an official's alleged conduct violated a clearly established constitutional right of which a reasonable officer would have known, he or she is not entitled to qualified immunity. *Id*. Plaintiffs bear the burden of demonstrating that the right at issue was clearly established. *Romero v. Kitsap Cty.*, 931 F.2d 624, 627 (9th Cir. 1991). Defendant Officers contend that the Eighth Amendment right alleged in the complaint was not sufficiently clear at the time assault and, as a result, Defendant Officers are entitled to qualified immunity from suit.

C. Defendant Officers Are Not Entitled to Dismissal Based on Qualified Immunity

Defendant Officers assert that Gordon Powell's constitutional rights under the Eighth Amendment were not so clearly established under the circumstances alleged to defeat Defendant Officers' qualified immunity from suit. (Mot. at 10-15.) They argue that even assuming Defendant Officers violated a constitutional right, that right was not clearly established at the time of the assault. (*Id.*) Generally, a prison official's housing decision does not violate the Eighth Amendment merely because it increases the risk of harm to a prisoner; the decision is unconstitutionally deliberately indifferent only if "the risk of harm from" the decision to house an inmate with other dangerous inmates "changes from being a risk of some harm to a substantial risk of serious harm." *Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1051 (9th Cir. 2002). Further, a prison official is entitled to qualified immunity for harm that arises from a housing decision if "a reasonable officer in [the defendant's] position" would not have known that the decision

"posed an excessive or intolerable risk of serious injury." *Id.* at 1052 (citing *Farmer*, 511 U.S. at 847 n.9).

In asserting their qualified immunity from suit, Defendant Officers rely primarily on the Ninth Circuit's decision in *Estate of Ford*, 301 F.3d at 1050-53. (Mot. at 10-13.) In *Estate of Ford*, the Ninth Circuit granted summary judgment to defendants on qualified immunity grounds in a case in which the decedent was killed by his cellmate. *Id.* at 1049. The decedent's family alleged prison officials had violated the Eighth Amendment by housing the decedent with an inmate known to be violent. *See id.* at 1048-49. The Ninth Circuit found that the conduct alleged, if proven, would constitute a violation of the Eighth Amendment. *Id.* at 1050. However, the Court held that a reasonable officer would not have known that his conduct in housing the decedent with his attacker was unlawful. *Id.* at 1051. Although prison officials were aware of the attacker's violent past, evidence showed the decedent had requested to be housed with his attacker, had been housed with him previously without incident, and had no history of enemy, gang, or "victim-predator" concerns. The Court held that a prison official is entitled to qualified immunity on a failure to protect claim when, "understanding that he cannot recklessly disregard a substantial risk of serious harm, [he] could know all of the facts yet mistakenly, but reasonably, perceive that the exposure in any given situation was not that high." *Id.* at 1050 (citing *Saucier*, 533 U.S. at 205). The Court emphasized that although *Farmer* had clearly established a right to be free from a risk of inmate assault, no court had yet fleshed out at what point the risk became "sufficiently substantial for Eighth Amendment purposes," and thus the defendants were not on notice

as to when the risk of housing the decedent with his attacker elevated from "a risk of some harm to a substantial risk of serious harm." *Id.*

It is important to note that the qualified immunity inquiry in *Estate of Ford* occurred at the summary judgment stage and relied heavily on the specific facts with which the defendants in that case were presented. *See Warner v. Cate*, No. 112CV01146LJOMJSPC, 2016 WL 4382552, at *11 (E.D. Cal. Aug. 16, 2016), *report and recommendation adopted*, No. 112CV01146LJOMJSPC, 2016 WL 4944125 (E.D. Cal. Sept. 16, 2016). For example, of critical importance to the Ninth Circuit in *Estate of Ford* was the fact that the two inmates had been previously housed together without incident and explicitly asked to be celled together again. 301 F.3d at 1052. Moreover, the guard who celled the two inmates together "had little if any knowledge" of the assailant's history, knew the two had no animosity, and had "little reason to think that [the assailant] was excessively dangerous or that he posed any particular danger to [the victim]." *Id.*

Indeed, the Ninth Circuit was careful to draw the following critical distinction that separates *Estate of Ford* from this case:

> [I]f any of the officers knew that [the assailant] was acting out dangerously with cellmates or that he was a threat to [the victim] but housed [the victim] with him anyway, this would violate the Eighth Amendment. The correctional officers do not argue otherwise, for there is no question that this conduct would touch all the bases established in *Farmer*.
>
> . . . [T]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.

> The parties agree that the Supreme Court settled the law in *Farmer*. So, before the decision to double cell [the assailant] with [the victim] was made, it would have been clear to a reasonable prison official that if he knew about an excessive risk to inmate safety, and inferred from the facts of which he was aware that a substantial risk of serious harm exists, he would violate the law by disregarding it.

Id. at 1050 (internal quotation marks and citations omitted). Although the officers in *Estate of Ford* did not know that the assailant posed a significant danger, the allegations here—which must be accepted as true—are that Defendant Officers did know. (*See* Compl. ¶¶ 20, 22-23, 27-30, 36.) Thus, the court rejects Defendant Officers' argument that they did not have fair notice that their conduct, as alleged, was unlawful. (*See* Mot. at 15.) Plaintiffs' allegations are sufficient to overcome Defendant Officers' assertion of qualified immunity at this stage of the litigation.[3]

The Ninth Circuit recently reiterated the fact-specific nature of the qualified immunity inquiry in *Castro v. County of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016). There, the court found that jail officials were not entitled to qualified immunity after failing to protect the plaintiff from an attack by his intoxicated cellmate in the county jail. *Id.* at 1067. "In rejecting the defendants' argument that the right at issue was not "clearly established" on October 2, 2009, which was the date of the attack, the Ninth Circuit noted

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[3] Defendant Officers also rely upon the Eighth Circuit's decision in *Prosser v. Ross*, 70 F.3d 1005, 1007 (8th Cir. 1995). (Mot. at 9, 14.) This out-of-circuit authority is inapposite. In *Prosser*, there was no evidence that the officers or the victim had any warning concerning the inmate assailant's impending act of violence or his attack on the inmate victim. 70 F.3d at 1007 ("[The victim] himself admitted . . . that the attack took him by surprise. There was no evidence that the two inmates harbored any hostile feelings toward one another; indeed, the two had never had so much as a disagreement."). Here, Plaintiffs allege that Defendant Officers knew that Mr. Price posed a substantial risk of serious harm to other inmates but failed to segregate him nevertheless. (*See* Compl. ¶¶ 20, 22-23, 27-30, 36.)

that "a right is clearly established when the 'contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.* (quoting *Serrano v. Francis*, 345 F.3d 1071, 1077 (9th Cir. 2003)). The Court further explained that the contours of the right at issue were simply "the right to be free from violence at the hands of other inmates," and "required only that the individual defendants take reasonable measures to mitigate the substantial risk [of harm]." *Id.* Indeed, the Court noted that months before the incident in question, it had held that "'a prison official may be held liable under the Eighth Amendment if he knows that the inmates face a substantial risk of serious harm and disregards that risk *by failing to take reasonable measures to abate it.*'" *Id.* (quoting *Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009) (italics in original)). Without evaluating what would constitute "reasonable measures," the Ninth Circuit found that the facts on the record in *Castro* were sufficient to support a finding that the defendants knew of a substantial risk but failed to reasonably mitigate it in housing the plaintiff with his attacker. *Id.* The Court, therefore, concluded that qualified immunity did not bar the claim against the defendant. *Id.*; *see also Phillips v. Cty. of Fresno*, No. 1:13-CV-0538 AWI BAM, 2016 WL 3277174, at *9-10 (E.D. Cal. June 14, 2016) (denying qualified immunity where, on February 14, 2012, inmate was assaulted and killed by another inmate known to be mentally disturbed and potentially dangerous). Taking Plaintiffs' allegations as true, which the court must do when evaluating a motion to dismiss, *Vasquez*, 487 F.3d at 1249, the same is true here.

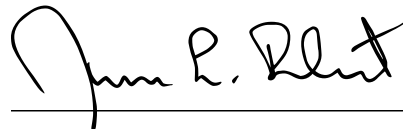
Accordingly, the court rejects Defendant Officers' contention that the law on which Plaintiffs base their claims was not clearly established or that the contours of the

constitutional right underlying Plaintiffs' claims were not sufficiently defined at the time of the incident. Plaintiffs have alleged conduct on the part of Defendant Officers that if established would violate Gordon Powell's Eighth Amendment rights. (*See generally* Compl.) In evaluating Defendant Officers' motion to dismiss, the court must accept those allegations as true. *Vasquez*, 487 F.3d at 1249. Thus, at this stage in the litigation, the court cannot conclude that Defendant Officers are entitled to the dismissal of Plaintiffs' claims under Rule 12(b)(6) on the basis of qualified immunity.[4]

IV. CONCLUSION

Based on the foregoing analysis, the court DENIES Defendant Officers' motion to dismiss Plaintiffs' complaint under Federal Rule of Civil Procedure 12(b)(6) based on qualified immunity (Dkt. # 31).

Dated this 26th day of October, 2016.



JAMES L. ROBART
United States District Judge

[4] The court, however, makes no assessment of whether Defendant Officers may be able to raise the issue of qualified immunity again on a motion for summary judgment under Federal Rule of Civil Procedure 56.