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DISTRICT COURT
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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

DISTRICT OF UTAH
BY: _____
DEPUTY CLERK

CENTRAL DIVISION

ERNESTO BRYCE HARDS,

Plaintiff,

v.

**LIEUTENANT DENNIS GORDON,
CAPTAIN LARRY BUSSIO, CAPTAIN
BRYANT GREEN, OFFICER JACOB
SAVAGE, OFFICER TRAVIS KNORR,
SERGEANT ADAM HOUSE,
SERGEANT ROBERT HILL, OFFICER
THOMAS JUDKINS, SHIFT
COMMANDER JAMES OLIN,
OFFICER PALMER, OFFICER
BLACKBURN, SERGEANT STEELE,
R. WILLIAMS, GRAVEYARD SHIFT
OFFICER ON DUTY ON 1/19/01 OR
1/20/01, AND JOHN DOES 1 THROUGH
10,**

Defendants.

**MEMORANDUM DECISION AND
ORDER**

Case No. 2:03CV-0250 DAK

This matter is before the court on (1) Defendants' Motion for Summary Judgment, (2) Defendants' Opposition to Second Amended Complaint and Motion to Strike, and (3) Plaintiff's Application Seeking Leave of Court to File Plaintiff's Second Amended Complaint. A hearing on the motions was held on April 21, 2004. At the hearing, plaintiff, Ernesto Bryce Hards, was

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represented by C. Michael Lawrence. Defendants were represented by Alain C. Balmanno of the Utah Attorney General's Office. Before the hearing, the court considered carefully the memoranda and other materials submitted by the parties. Since taking the matter under advisement, the court has further considered the law and facts relating to these motions. Now being fully advised, the court renders the following Memorandum Decision and Order.

I. MOTION FOR SUMMARY JUDGMENT

A. Standard of Review

Summary judgment is appropriate if the record before the court shows "there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." Fed. R. Civ. P. 56(c). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "When, as in this case, the moving party does not bear the ultimate burden of persuasion at trial, it may satisfy its burden by pointing to a 'lack of evidence for the nonmovant on an essential element of the nonmovant's claim.'" *Sports Unlimited, Inc. v. Lankford Enter., Inc.*, 275 F.3d 996, 999 (10th Cir. 2002) (quoting *Alder v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998). "[T]he plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Anderson*, 477 U.S. at 257. The court will "view the evidence and draw any inferences therefrom in the light most favorable to the party opposing summary

judgment.”¹ *MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437, 1440 (10th Cir. 1996).

B. Background

Plaintiff, Ernesto Hards, is an inmate at the Utah State Prison. The defendants were all employed at the Utah State Prison during the time period relevant to this lawsuit. From August 2000 to May 2001, the plaintiff was housed in Unit 2, Section 6 of the prison. Unit 2, Section 6 is designated as Security Threat Group (STG) housing. The STG housing is a highly controlled area where only two prison cells are opened at a time to release inmates for recreation.

Plaintiff and his cellmate, Antonio Garcia, were food handlers in the STG housing. Plaintiff and Mr. Garcia are both Hispanic. Plaintiff’s cell, and the cell located next to the plaintiff’s cell,

¹ Plaintiff has failed to properly dispute defendants’ statement of undisputed facts as required under the local rules:

A memorandum in opposition to a motion for summary judgment must begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute must be numbered, must refer with particularity to those portions of the record on which the opposing party relies and, if applicable, must state the number of the movant’s fact that is disputed. All material facts of record meeting the requirements of Fed. R. Civ. P. 56 that are set forth with particularity in the statement of the movant will be deemed admitted for the purpose of summary judgment, unless specifically controverted by the statement of the opposing party identifying material facts of record meeting the requirements of Fed. R. Civ. P. 56.

DUCivR 56-1(c).

Plaintiff’s opposition memorandum does not specifically identify and address any of the numbered statement of facts set forth in defendants’ summary judgment memorandum. Moreover, plaintiff fails to provide citations to the record for many of the facts alleged in his opposition memorandum. Although not required to do so, the court has reviewed the numerous deposition transcripts and other materials submitted to the court in their totality in order to determine whether there is any evidence that would create a genuine issue of fact precluding summary judgment.

were the designated cells for food handlers. Prior to the stabbing, the food handler inmates located in the cell next to plaintiff were caught and disciplined for making "brew" (homemade alcohol) in their cell. As part of their discipline they lost their food handler jobs and inmates Steve Swena and Lance Vanderstappen were hired to replace them as food handlers. Swena and Vanderstappen are members of the Soldiers of the Aryan Culture ("SAC")—a white supremacy gang.

After being hired as food handlers, Swena and Vanderstappen were moved into the cell next to the plaintiff that was designated for food handlers. Before moving Swena and Vanderstappen, prison officials checked the prison's safety concern database to determine whether there were any safety concerns related to the move. Prior to the stabbing, the plaintiff never specifically identified inmates Swena and Vanderstappen as safety concerns, nor had the prison officials identified Swena and Vanderstappen as a safety concern to the plaintiff. As such, the safety concern database did not identify any problems with moving inmates Swena and Vanderstappen to the cell next to the plaintiff.

In the early hours of January 20, 2001 (the morning after Swena and Vanderstappen were moved next to the plaintiff), both the plaintiff's and Swena and Vanderstappen's cell doors were opened at the same time for recreation. Upon the doors opening, Swena and Vanderstappen immediately ran into the plaintiff's cell and stabbed him approximately a dozen times. The plaintiff then used the cell intercom to ask for help and collapsed. Prison officials then responded to secure the area and try to stabilize the plaintiff's bleeding. The plaintiff sustained serious and life-threatening injuries as a result of the stabbing but eventually recovered after being treated at the University of Utah Hospital.

Plaintiff alleges that the defendants showed deliberate indifference to plaintiff's safety and well-being by moving known members of SAC, Swena and Vanderstappen, into the cell next to him. Plaintiff claims that several months before the stabbing he had informed prison officials that he did not want to be moved into Uinta II. Plaintiff further alleges that defendants should have known not to place Swena and Vanderstappen in the cell next to him because of prior problems (e.g., getting punched and/or called a "rat") he experienced with members of SAC. Plaintiff also alleges that the night before the stabbing, he gave two different "kites" (notes) to the guards on duty indicating that his safety was in jeopardy because Swena and Vanderstappen had been moved into the cell next to him. Plaintiff cannot identify the prison guard(s) he gave the kites to and there is no evidence that the subject kites were ever read by any of the defendants.

C. Discussion

The sole issue in this case is whether the defendants' conduct violates the Eighth Amendment's prohibition of "cruel and unusual punishments." U.S. CONST. amend. VIII. The Eighth Amendment has been "interpreted to impose a duty on prison officials to protect prisoners in custody from violence at the hands of other prisoners." *Grimsley v. MacKay*, 93 F.3d 676, 679 (10th Cir. 1996). In order for plaintiff to prevail, he must prove the following:

An Eighth Amendment claim for failure to protect is comprised of two elements. First an inmate "must show that he is incarcerated under conditions posing a substantial risk of serious harm." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Second, the inmate must establish that the prison official has a "sufficiently culpable state of mind," i.e., that he or she is deliberately indifferent to the inmate's health or safety. *Id.* (quoting *Wilson v. Seiter*, 501 U.S. 294, 297 (1991)). The prison official's state of mind is measured by a subjective, rather than an objective, standard. *Farmer*, 511 U.S. at

839. In other words, the official must “both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” *Id.* at 837.

Riddle v. Mondragon, 83 F.3d 1197, 1204 (10th Cir. 1996). “[I]n order to successfully assert a § 1983 claim under the Eighth Amendment for failure to protect, a plaintiff must show personal involvement or participation in the incident.” *Grimsley*, 93 F.3d at 679. In other words, a defendant is not liable unless an “affirmative link” exists between the defendant and the Eighth Amendment violation. *Id.*

In *Verdecia v. Adams*, 327 F.3d 1171 (10th Cir. 2003), the plaintiff asserted his rights under the Eighth Amendment “were violated when the defendants, acting with deliberate indifference to a substantial risk of harm to plaintiff, placed him in a cell with gang members who assaulted him because of his Cuban nationality.” *Id.* at 1173. *Verdecia* involved an inmate that was transferred from the prison’s general population and placed in a cell in the prison’s Special Housing Unit with two inmates who were members of a gang known as the Latin Kings. *Id.* Just two days after the plaintiff was moved, he spoke to a prison official and asked to be moved out of his cell located in the Special Housing Unit. *Id.* The next day, the plaintiff filled out and delivered a transfer form to his case manager indicating he feared an attack from his cell mates. *Id.* Four days later, the plaintiff was attacked by his two cell mates with a razor blade. *Id.* The attack required the plaintiff to be hospitalized and receive 110 stitches. *Id.*

The plaintiff in *Verdecia* alleged “that the series of events leading up to his assault created an obvious risk when he was placed in the cell with two members of the Latin Kings.” *Id.* at 1174. The plaintiff further alleged that defendants “incarcerated him under conditions posing a substantial

risk of serious harm, due to the prior incidents between Cuban inmates and members of the Latin Kings.” *Id.* at 1175. The district court denied the defendants’s motion for summary judgment after finding “that the plaintiff had presented sufficient evidence to create a genuine issue of material fact as to whether defendants Collado and Felz acted with deliberate indifference to a substantial risk of harm to the plaintiff.” *Id.* at 1173.

The Tenth Circuit reversed the district court and granted summary judgment in favor of defendants:

[Plaintiff] has presented facts from which the inference could be drawn that a substantial risk of serious harm exists, but has failed to establish that [defendants] actually drew such an inference. Absent subjective awareness and knowledge of the risk, [defendants] cannot be found to have inflicted punishment in a manner that violates the Eighth Amendment.

Id. at 1176. The court further noted:

The mere showing of simple, or even heightened, negligence does not establish that [defendants] were subjectively aware of the risk. Subjective awareness requires that the defendant “must both be aware of facts from which the inference could be drawn that a substantial risk or serious harm exists, and he must also draw the inference.” *Craig v. Eberly*, 164 F.3d 490, 495 (10th Cir. 2001). This awareness requirement exists because “prison officials who lacked knowledge of a risk cannot be said to have inflicted punishment” in a manner that violates the Eighth Amendment. *Farmer*, 511 U.S. at 844.

Id.

The similarities between the *Verdecia* case and the instant case are apparent. Both cases involve allegations that it should have been obvious to prison officials that the cell transfers they made would result in a substantial risk of serious harm to the plaintiff because of issues relating to race and gang affiliation. Both cases involve allegations by the plaintiff that he informed the prison

officials prior to the attacks that he wanted to be moved for safety reasons. Both cases involve allegations that the plaintiff made requests in writing to be moved from his cell but both plaintiffs were unable to provide any evidence that the written requests were received and read prior to the attacks. *See id.* at 1173 (“there is no evidence that [defendant] received the transfer form before [plaintiff] was attacked.”). Unfortunately, both cases also resulted in the plaintiff being attacked and suffering serious injuries. The court finds no reason to deviate from the holding in *Verdecia* and therefore must grant summary judgment in favor of defendants.

The instant case appears to fall under the Supreme Court’s commentary that “an official’s failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.” *Farmer*, 511 U.S. at 838. The plaintiff may have raised some factual disputes as to the first element (i.e., conditions posing a substantial risk of serious harm) but there is no evidence to support the second element requiring a subjectively culpable state of mind. Plaintiff attempted to provide evidentiary support for the second element through his deposition testimony that he gave two kites/notes to prison guards the night before the stabbing that stated he was in fear of his life because of Swena and Vanderstappen being moved into the cell next to him. However, the plaintiff cannot identify who received the kites nor is there any evidence anyone ever read the kites. Without such evidence, plaintiff cannot prove subjective awareness and knowledge of the risk by the defendants.

The court is deeply troubled by the seemingly unnecessary pain, suffering, and permanent injuries sustained by the plaintiff as a result of the attack by Swena and Vanderstappen. Nevertheless, defendants’ negligence is not enough to support a finding of deliberate indifference

in violation of the Eighth Amendment. “The failure of [defendants] to alleviate a potential risk that should have been perceived, but was not, does not satisfy the deliberate indifference standard of the Eighth Amendment.” *Verdecia*, 327 F.3d at 1177. Accordingly, summary judgment is appropriate in this case.

II. SECOND AMENDED COMPLAINT

After discovery and the briefing for defendants’ motion for summary judgment had been completed, plaintiff attempted to file—without leave of court—a Second Amended Complaint. Defendants then promptly filed an “Opposition to Second Amended Complaint and Motion to Strike.” Approximately two weeks after filing the proposed Second Amended Complaint, plaintiff filed an “Application Seeking Leave of Court to File Plaintiff’s Second Amended Complaint.” Plaintiff’s proposed Second Amended Complaint seeks to drop several defendants from the lawsuit and adds additional factual allegations. The new factual allegations are irrelevant to the court’s summary judgment analysis because the plaintiff is required to identify admissible evidence—not just make new allegations—to survive summary judgment. For the reasons set forth above in the court’s summary judgment analysis, the court finds that granting plaintiff leave to file his Second Amended Complaint would be futile. Therefore, plaintiff’s Application Seeking Leave of Court to File Plaintiff’s Second Amended Complaint is denied. Accordingly, Defendants’ Opposition to Second Amended Complaint and Motion to Strike is moot.

III. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that: (1) Defendants’ Motion for Summary Judgment is GRANTED; (2) Plaintiff’s Application Seeking Leave of Court to File Plaintiff’s Second Amended Complaint is DENIED; (3) Defendants’ Opposition to Second

Amended Complaint and Motion to Strike is MOOT. This case is dismissed with prejudice in its entirety, each party shall bear his own costs. The Clerk of the Court is directed to enter judgment accordingly.

DATED this 4th day of May, 2004.

BY THE COURT:


DALE A. KIMBALL
United States District Judge

United States District Court
for the
District of Utah
May 6, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:03-cv-00250

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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