IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIE C. SIMPSON,

Plaintiff,

OPINION and ORDER

10-cv-153-bbc

v.

CYNTHIA THORPE, PETER ERICKSEN,
STEVEN SCHMIDT, JANE LAGORE,
WILLIAM POLLARD, MICHAEL SCHULTZ,
SARAH COOPER and DAVID LONGSINE,[1]

Defendants.

- -

Plaintiff Willie Simpson, a prisoner incarcerated at the Wisconsin Secure Program Facility, is proceeding on claims that defendants, various prison officials, failed to protect him from harm while he was previously incarcerated at the Green Bay Correctional Institution by (1) placing him in two-person cells even though his cellmates threatened him with harm because of his HIV status; and (2) placing him in general population despite threats from white supremacist inmates. Now before the court is defendants' motion for

[1] I have amended the caption to include the first names of defendants as provided in the parties' summary judgment materials and to correct the spelling of defendant Ericksen's name.

summary judgment, dkt. #49, which the parties have completed briefing. After considering the parties' submissions, I conclude that plaintiff has raised disputed issues of material fact with respect to his claims that defendants Peter Ericksen and William Pollard failed to protect him from white supremacist inmates by placing him in general population. Plaintiff's remaining claims are unsupported by the evidence and must be dismissed.

From the parties' proposed findings of fact and supporting materials, I find that the following facts are undisputed, unless otherwise noted. (I note that plaintiff attempted to dispute several of defendants' proposed findings by stating that the record did not support defendants' assertion. However, in most of these instances defendants provided evidence that clearly supports their factual positions and plaintiff does not provide any evidence to dispute them. In those instances, I have accepted defendants' proposed findings of fact.)

UNDISPUTED FACTS

A. Parties

Plaintiff Willie Simpson is a prisoner in the custody of the Wisconsin Department of Corrections. He is HIV positive.

Seven of the eight defendants are employed at the Green Bay Correctional Institution: Peter Ericksen is the security director, David Longsine is a sergeant in the segregation unit, Steven Schmidt is the psychologist service unit supervisor, Jane Lagore is a crisis intervention

worker, Michael Schultz is a captain in the segregation unit, Sarah Cooper is a corrections program supervisor and William Pollard is the warden. The eighth defendant, Cynthia Thorpe, is employed by the Wisconsin Department of Corrections as health services nursing coordinator.

B. Prison Policies

Prison security officials are responsible for housing unit and cell assignments. A single-cell restriction is known as a "red tag." Single-cell restrictions are made individually by each institution after assessment by appropriate personnel of the inmate's issues or needs. An inmate may be provided a single cell in response to a request from health services, psychological services or security. As the security director, defendant Ericksen has the authority to order a single cell.

The Green Bay prison has a number of inmates living in the institution who are HIV positive. Being HIV positive does not automatically guarantee an inmate a single-cell assignment. However, inmates are not permitted to harass another inmate because of his medical status. If an HIV-positive inmate has a complaint about threats, he can file an inmate complaint or write directly to the security director.

Inmates who are in the segregation unit are housed in single cells. All movement of the inmates outside of their cell is controlled, with the inmate in full restraints with a

two-guard escort.

When an inmate reports to Psychological Services Unit staff that he is at risk of harm from other inmates, unit staff attempt to gather details and report to the security department. A report from an inmate who he believes that he is at risk of harm from another inmate would not typically be a mental health reason for a single cell.

C. Incidents Involving Plaintiff

Plaintiff tends to bleed when he brushes his teeth or shaves. He tells his cellmates that he is HIV positive to warn them from coming into contact with his blood.

Plaintiff has a history of being in violent altercations with other inmates. He was found guilty of adult conduct reports for fighting on August 17, 2000 and March 4, 2002, and received adult conduct reports for battery on June 20, 2005, May 3, 2006 and September 9, 2007.

On December 26, 2006, while plaintiff was incarcerated at the Green Bay Correctional Institution, he filed an inmate grievance about the risk of attack by his cellmate or other prisoners in general population because he is HIV positive. That grievance was dismissed but forwarded to defendant Ericksen for "information and review."

In March 2007, while plaintiff was incarcerated at the Columbia Correctional Institution, he filed an inmate grievance complaining about being double-celled, stating, "I

have bleeding gums and pose a risk of exposing any celly I'm celled with. That person I'm celled up with may attack me because he doesn't want to be in the cell with a person with HIV and AIDS out of fear of exposure of this disease and violence will occur." The institution complaint examiner dismissed the complaint, stating, "It is not medically necessary or the department's policy to single cell individuals with this type of medical condition. If he is truly sharing his medical information with his cellmates, he is the one putting himself at risk, not the institution or HSU staff." Plaintiff appealed this decision to defendant Cynthia Thorpe, who dismissed the complaint.

In February 2010, plaintiff was transferred to the Green Bay Correctional Institution. At Green Bay, plaintiff was harassed and threatened by inmate Jeromy Tapp because plaintiff is black and HIV positive. (Defendants dispute this proposed finding for lack of foundation. However, plaintiff can certainly testify about what happened to him personally. Also, drawing all reasonable inferences in plaintiff's favor as I must while considering defendant's motion, I can infer that when plaintiff states that he was threatened "because" of his race and HIV status, he is describing the nature of the harassment and threats even though he does not provide specific quotations from Tapp.)

Plaintiff submitted a psychological services request dated February 25, 2010, stating that he was HIV positive with "anxiety panic disorder with psychotic thoughts. I bleed when I brush my teeth and when I shave. I pose a serious risk of exposure to my cellmates. I have

been having thoughts of violent confrontation and panic attacks from being celled with another prisoner as a consequence of him learning my health condition, fear of exposure and then harassment. To avoid any violent confrontation or exposure please or harassment please authorize a single cell and I have addressed this with security by way of request."

Defendant Schmidt responded to plaintiff's request on March 5, 2010, informing him: "I have reviewed your file and note that records show you have made similar statements, some considered threats, about your health issues. This risk you pose to other inmates due to poor health status is an issue you should direct to either [the Health Services Unit] or security. [The Psychological Services Unit] will not recommend a red tag for these reasons."

Defendant Lagore saw plaintiff on March 11, 2010 in the Psychological Services Unit. Plaintiff told Lagore that he needed a "red tag" due because he is HIV positive, which causes him anxiety and would eventually lead to a fight with his cellmate. Lagore told plaintiff that he should raise his concerns with the Health Services Unit or security. She discussed relaxation techniques with him.

On May 14, 2010, plaintiff got into an altercation with fellow inmate Jeromy Tapp in the bath house. At the conduct report hearing, Tapp admitted that he initiated the fight but claimed that it was not racially motivated. (Plaintiff states that Tapp admitted that he attacked plaintiff because he is black and HIV positive, but this is not established by the

record of the hearing. However, defendant Ericksen has previously averred that the fight "was with an obvious white supremacist, obvious by way of tattoos on his face and neck and reputation.")

The investigation of this fight (Conduct Report 2152535) revealed that other inmates stated that plaintiff has a reputation for approaching inmates with whom he has a problem, typically white supremacists, and saying things such as "I'm going to infect you with HIV and you're going to die a slow death like me." Plaintiff disputes this, stating that he has never threatened fellow inmates in this way.

At the disciplinary hearing on Conduct Report 2152535, held on May 26, 2010, plaintiff was found guilty of fighting, received a disposition of 180 days' disciplinary separation and was placed in segregation.

Plaintiff was in segregation between June 2010 and August 2010. While plaintiff was in segregation, he yelled and made comments to other inmates. An inmate named James Kittinger and others in a white supremacist gang threatened plaintiff because he is black and HIV positive. Defendants Longsine and Schultz told plaintiff that he should not engage in arguments with other inmates while in segregation in order to avoid escalating problems between prisoners.

On June 15, 2010, plaintiff submitted an inmate grievance, GBCI-2010-12485. Plaintiff stated: "I am in seg for fighting with a white racist inmate. There are 3 white racist

on the wing I'm on . . . make threats to attack me when I return to general population." The institution complaint examiner investigated this claim and found that plaintiff was "hollering back and forth with other inmates," he had not raised this issue with the unit staff and he was currently in a safe environment in segregation. The examiner advised plaintiff not to engage in verbal arguments with other inmates while in segregated status, to avoid escalating problems with other inmates. On June 16, 2010, the examiner recommended that the complaint be dismissed. Relying on the findings and recommendation of the institution complaint examiner, defendant Warden William Pollard dismissed this complaint on June 22, 2010. Carbon copies of the decision were sent to defendants Schultz and Cooper.

Also on June 15, 2010, plaintiff submitted a "Interview/Information Request" form to defendant Ericksen, stating that white supremacist inmates were "threatening to attack me and kill me once I get out of segregation because I'm HIV Pos. a Moor and because I fought their leader named Jeromy Tapp, I ask you to protect me from a violent confrontation with these inmates & their organization."

On August 25, 2010, plaintiff was returned to general population. He was placed in the same cell hall as inmate Kittinger. Defendants Pollard and Ericksen approved this placement. On August 26, 2010, plaintiff was released from his cell and directed by prison security guards to go to breakfast in the dining hall. There, plaintiff got into a violent altercation with other inmates and was injured. (The parties dispute precisely what

happened in this incident. Defendants state that plaintiff attacked two other inmates by filling his socks with rocks and striking the other inmates with his rock-filled socks. Plaintiff states that he was only defending himself from an attack by the white supremacist gang.

Plaintiff was issued Conduct Report 2193166 for battery and possession, manufacture and alteration of weapons as a result of this incident. The conduct report contained allegations that plaintiff went to the table where other inmates were sitting and started swinging two white socks filled with rocks at the inmates, who did not fight back. A disciplinary hearing was held at the Green Bay prison on September 7, 2010, at which plaintiff was found guilty of the charges and given a disposition of 360 days of disciplinary separation.

On November 23, 2010, plaintiff was transferred to the Wisconsin Secure Program Facility from the Green Bay Correctional Institution and housed in segregation. Plaintiff is currently serving his sentence of disciplinary separation at the Wisconsin Secure Program Facility. Inmates in segregation status at the Wisconsin Secure Program Facility are single-celled. At the present time, it is anticipated that plaintiff will be single-celled in segregation until at least September 3, 2011.

OPINION

The Eighth Amendment to the United States Constitution requires the government

to "provide humane conditions of confinement; prison officials must . . . 'take reasonable measures to guarantee the safety of the inmates.'" Farmer v. Brennan, 511 U.S. 825, 832, (1994). To state an Eighth Amendment failure to protect claim, a prisoner must allege that (1) he faced a "substantial risk of serious harm" and (2) the prison officials identified acted with "deliberate indifference" to that risk. Id. at 834; Brown v. Budz, 398 F.3d 904, 909 (7th Cir. 2005). Under the deliberate indifference standard, a prison official may be held liable under the Eighth Amendment "only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." Farmer, 511 U.S. at 847.

A. Threats from Cellmates

In his first set of claims, plaintiff asserts that defendants failed to protect him by continuing to place him in two-person cells even though he was threatened with harm because his cellmates did not want to be housed with an HIV-positive inmate. Specifically, plaintiff brings the following claims: (1) defendant Ericksen did not put plaintiff in a single cell after he filed an inmate grievance about a possible confrontation with his cellmate; (2) defendant Thorpe dismissed plaintiff's inmate grievance about his fear of a confrontation with his cellmate; and (3) defendants Schmidt and Lagore declined to "red tag" plaintiff when he met with them in the Psychological Services Unit. (Plaintiff also states that various

other prison officials denied his requests to be red tagged, but he was not allowed to proceed on claims against these officials so I will not consider these claims.) Defendants argue that their motion for summary judgment should be granted on these claims because plaintiff fails to show that he faced a substantial risk of serious harm from his cellmates.

With respect to plaintiff's claim against defendant Ericksen, the only evidence that plaintiff has adduced regarding potential attacks from cellmates is his December 26, 2006 inmate grievance. The relevant portion of that complaint states that "staff is forcing me to cell up with another inmate knowing I am HIV Pos. so that inmate will attack me because he doesn't want to be in a cell with someone HIV Pos." That grievance was dismissed but forwarded to defendant Ericksen for "information and review." There are two problems that doom this claim. First, plaintiff fails to propose any findings of fact indicating whether Ericksen followed up on the complaint, which would be necessary to determine whether he was deliberately indifferent. Because plaintiff fails to establish the existence of an essential element on which he bears the burden of proof at trial, summary judgment for defendants is proper. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

In addition, even had plaintiff set forth such facts, he fails to show that Ericksen was aware of a "substantial risk of serious harm." "[I]n order to infer callous indifference when an official fails to protect a prisoner from the risk of attack, there must be a 'strong likelihood' rather than a 'mere' possibility that violence will occur." Pinkston v. Madry, 440

F.3d 879, 889 (7th Cir. 2006) (some internal quotations omitted) (quoting Watts v. Laurent, 774 F.2d 168, 172 (7th Cir. 1985)). Plaintiff's vague assertion that he would be attacked because he notified his cellmate of his HIV status at best indicates only a possibility that violence will occur.

Plaintiff's claims against defendants Thorpe, Schmidt and Lagore suffer from a similar problem. Plaintiff states that Thorpe dismissed his grievance that stated, "I have bleeding gums and pose a risk of exposing any celly I'm celled with. That person I'm celled up with may attack me because he doesn't want to be in the cell with a person with HIV and AIDS out of fear of exposure of this disease and violence will occur." As for Schmidt and Lagore, plaintiff alerted them to having anxiety over a *possible eventual* confrontation with his cellmate after he told the cellmate that he was HIV positive. As with the claim against defendant Ericksen, plaintiff's claims against these defendants fail because he presents only vague assertions that an attack might happen in the future, with nothing concrete on which to base those assumptions other than the fact that his cellmates do not like being celled with an HIV-positive cellmate. Notably, he does not point to any threats made by his cellmates. Because plaintiff fails to show that defendants Ericksen, Thorpe, Schmidt or Lagore were aware that plaintiff's cellmates posed a "substantial risk of serious harm," I will grant defendants' motion for summary judgment on the claims involving plaintiff's cellmates.

B. Threats from White Supremacist Inmates

In his second set of claims, plaintiff asserts that defendants Ericksen, Pollard, Schultz, Cooper and Longsine failed to protect him from white supremacist inmates. Plaintiff's version of events is as follows: he was harassed, threatened and, on May 14, 2010, attacked by inmate Jeromy Tapp. Plaintiff was found guilty of fighting and placed in segregation.

While plaintiff was in segregation, members of a white supremacist gang threatened him. He then submitted an "Interview/Information Request" form to defendant Ericksen and an inmate grievance, both stating that white supremacist gang members were threatening to kill him once he got out of segregation because he is black and HIV positive.
The institution complaint examiner recommended that the complaint be dismissed, and defendant Warden Pollard dismissed it.

On August 25, 2010, plaintiff was returned to general population with the approval of defendants Pollard and Ericksen, and he was placed in the same cell hall with at least one of the white supremacist inmates. On August 26, 2010, plaintiff went to breakfast in the dining hall, where he was attacked and injured by white supremacist inmates.

Considering the facts set forth by plaintiff, I will grant defendants' motion for summary judgment as it pertains to defendants Schultz, Cooper and Longsine. Plaintiff does not propose any facts indicating how Longsine was involved in any of the incidents at issue in this case. As for Schultz and Cooper, plaintiff states that they received a copy of

defendant Pollard's rejection of plaintiff's inmate grievance in which he complained about being threatened by white supremacist inmates while in segregation. The problem is that plaintiff does not explain how these defendants acted with deliberate indifference; he alleges that defendants Pollard and Ericksen approved his release into general population, not Schultz and Cooper. Without any proposed findings of fact indicating how Schultz and Cooper were personally involved in failing to protect plaintiff from harm, plaintiff's claims against these defendants do not survive summary judgment.

That leaves defendants Ericksen and Pollard. Unlike plaintiff's vague assertions about the threats posed to him by his cellmates discussed above, plaintiff states that he alerted both Pollard (though his inmate complaint) and Ericksen (through his "Interview/Information Request" form) about *specific* threats that white supremacist inmates would attack him upon his release to general population, but that they released him to general population anyway.

Defendants do not dispute that Ericksen and Pollard approved plaintiff's release into general population. However, they contend that Ericksen or Pollard were unaware of a serious threat to plaintiff. In their brief they state, "A review of Simpson's social services file reveals no correspondence or Interview/Information Requests (form DOC 761) from Simpson to *any* GBCI staff during the period of his incarceration at GBCI that is at issue in this lawsuit, alleging that he was at risk of harm from other inmates or that other inmates were make threats against him." (Emphasis in original). Dfts.' Br., dkt. #50, at 12-13.

However, this is contradicted by plaintiff's proposed findings indicating that on June 15, 2010, he submitted both an inmate grievance about the threats that was ultimately reviewed by Pollard and a DOC 761 "Interview/Information Request" about the threats to Ericksen. This statement is contradicted also by defendant's own evidentiary materials, which include the inmate grievance and Pollard's dismissal. Oddly, in defendants' response to plaintiff's proposed findings, they no longer dispute whether plaintiff submitted these documents, but they do not withdraw their argument that plaintiff never informed them of a serious threat. In any case, the summary judgment record is clear that both Ericksen and Pollard received documents from plaintiff detailing the threats.

Next, defendants argue that plaintiff's claims fail because he is the one who instigates fights with other inmates. They state that plaintiff "is at risk of violence when—and only when—he decides to initiate violence" and that "[plaintiff] puts other inmates at risk by threatening to expose them to HIV, spitting on them, and fighting with them." Dfts.' Br., dkt. #50, at 10. Their description of the August 26, 2010 incident is that plaintiff "filled a pair of socks with rocks and violently attacked other inmates during dinner in plain view of numerous inmates and staff." Id.

The court of appeals has stated that "prison officials cannot reasonably be required to protect an inmate who intentionally instigates a violent altercation with another prisoner." Clark v. Johnson, 181 Fed. Appx. 606, 607 (7th Cir. 2006) (unpublished). The problem for

defendants is that regardless whether plaintiff has a history of being involved in fights, he disputes defendants' description of his behavior in general and of the August 26, 2010 altercation in particular. Plaintiff states that he "[does] not threaten prisoners with unprovoked violence or HIV infection or instigate fights with prisoners." Plt.'s Aff., dkt. #66, at 4. Regarding the August 26, 2010 altercation, he states that he "defended himself from threats of violence and death from the white racist inmates whom attacked [plaintiff]." Plt.'s Resp. to Dfts.' PFOF, dkt. #67, at 2. Because it is disputed whether plaintiff was the aggressor in the August 26, 2011 altercation, defendants cannot rely on the idea that an inmate who initiates a fight cannot later assert a failure to protect claim. The question whether plaintiff was actually the aggressor in this incident is one for trial. Payne v. Pauley, 337 F.3d 767, 770 (7th Cir. 2003) ("On summary judgment a court may not make credibility determinations, weigh the evidence, or decide which inferences to draw from the facts; these are jobs for a factfinder.").

Finally, defendants argue that their motion for summary judgment should be granted because plaintiff did not dispute their proposed finding of fact #132, which states "All of defendants' actions were done in accordance to DOC policy and procedure and Wisconsin Administrative Code in order to ensure the safety and well being of [plaintiff]." Plaintiff's failure to dispute this conclusory statement is irrelevant. If one believes plaintiff's version of the facts as discussed above, a jury could reasonably infer that defendants Ericksen and

Pollard ignored plaintiff's complaints of threats and failed to take reasonable measures to prevent harm when they transferred him into general population with white supremacist inmates. Accordingly, I will deny defendants' motion for summary judgment as it pertains to this claim against Ericksen and Pollard.

C. Injunctive Relief

Also, defendants seek summary judgment with respect to plaintiff's request for injunctive relief. The alleged violations took place at the Green Bay Correctional Institution but plaintiff has been moved to the Wisconsin Secure Program Facility. Generally, "[w]hen a prisoner who seeks injunctive relief for a condition specific to a particular prison is transferred out of that prison, the need for relief, and hence the prisoner's claim, become moot." Lehn v. Holmes, 364 F.3d 862, 871 (7th Cir. 2004). Accordingly, I will grant this part of defendants' motion. If plaintiff is transferred back to the Green Bay prison during the pendency of this case, he is free to file a motion to vacate this part of the order.

D. Motion for Sanctions

On February 23, 2011, plaintiff filed a motion for sanctions against defendants' attorneys and the warden and accountant at the Wisconsin Secure Program Facility for

obstructing his prosecution of this case. However, he has since filed a motion to withdraw the motion for sanctions. Therefore, I will consider the motion for sanctions withdrawn.

ORDER

IT IS ORDERED that

1. The motion for summary judgment, dkt. #49, filed by defendants Peter Ericksen, David Longsine, Steven Schmidt, Jane Lagore, Sarah Cooper, Michael Schultz, William Pollard and Cynthia Thorpe is GRANTED with respect to the following claims brought by plaintiff Willie Simpson:

a. defendants Ericksen, Schmidt, Lagore and Thorpe failed to protect plaintiff from his cellmates;

b. defendants Schultz, Cooper and Longsine failed to protect plaintiff from white supremacist inmates by placing him in general population; and

c. plaintiff's request for injunctive relief.

2. Defendants' motion for summary judgment, dkt. #49, is DENIED with respect to plaintiff's claims that defendants Ericksen and Pollard failed to protect him from white supremacist inmates by placing him in general population.

3. Plaintiff's motion to withdraw his motion for sanctions, dkt. #64, is GRANTED;

plaintiff's motion for sanctions, dkt. #46, is considered WITHDRAWN.

Entered this 28th day of April, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge