

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ALMONDO BAKER,

Plaintiff,

OPINION AND ORDER

v.

12-cv-125-wmc

LT. FALTYNSKI and
SGT. SCHMIDT,

Defendants.

Plaintiff Almondo Baker is a prisoner at the Oakhill Correctional Institution in Oregon, Wisconsin. He seeks leave to proceed *in forma pauperis* on a proposed complaint brought pursuant to 42 U.S.C. § 1983. Having paid his initial partial filing fee, the next step is determining whether Baker's proposed action is (1) frivolous or malicious; (2) fails to state a claim on which relief may be granted; or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2).

In his complaint, Baker alleges that prison staff at Kettle Moraine Correctional Institution, his previous institution, violated his rights to be free from cruel and unusual punishment under the Eighth Amendment by failing to protect him from assault and battery by his cellmate. After reviewing his complaint, the court determines that plaintiff may proceed on his failure to protect claim.

ALLEGATIONS OF FACT

In addressing any pro se litigant's complaint, the court assumes all of the allegations in the complaint are true and reads those allegations generously. *Haines v.*

Kerner, 404 U.S. 519, 521 (1972). In his complaint, Baker alleges the following facts.

At all times relevant to the complaint, Baker was a prisoner at Kettle Moraine Correctional Institution, in Plymouth, Wisconsin. Defendants Lt. Faltynski and Sgt. Schmidt are employees of the Wisconsin Department of Corrections employed at the Kettle Moraine Correctional Institution.

Around August 2, 2011, Baker was placed on unit 3 in a cell with prisoner Talib Akbar. Immediately before Baker was placed in the cell, Akbar's previous roommate was removed because of threats by Akbar. Akbar was given a "red tag," which is a security classification denoted by a red round sticker on the face on the inmate's security card. An inmate receives a red tag when the Wisconsin Department of Corrections determines that he is dangerous or has a history of violence or threats of violence against other inmates. A red tag requires the inmate to be housed in a cell without a roommate.

Almost immediately, after Baker became Akbar's new cellmate, Akbar began threatening him with physical harm, apparently because Baker would not comply with Akbar's demand to remain silent in the cell. Baker was frightened and feared for his life. He notified defendant Schmidt about Akbar's threats and asked Schmidt to place him in another room before something happened to him. As the sergeant for unit 3, Schmidt had authority to move Baker but Schmidt refused to do so.

Around August 5, 2011, Baker sent defendant Faltynski a Department of Corrections written request form, telling her that he was afraid of Akbar and asking to be removed. Lieutenant Faltynski also had the authority to move Baker. Baker wrote, in part, "Since I was moved I've been having problems with [Akbar]. I feel I'm in a unsafe

environment and I FEAR FOR MY LIFE. Could you please get me out of this cell before someone gets hurt.”

In a written response dated August 7, 2011, Faltynski denied plaintiff’s request. She said, “Not getting along with your roommate is grounds for a major conduct report, not a room change. Medium security prison life depend on inmates getting along with each other in difficult[] situations.”

Around August 13, 2011, Akbar physically attacked Baker in their cell. Baker defended himself. Both Akbar and Baker received conduct reports and segregation. Because of Akbar’s attack, plaintiff experienced “substantial pain, suffering, injury, and extreme and disabling emotional distress, trauma and mental anguish.”

OPINION

Baker alleges that defendants Schmidt and Faltynski violated his Eighth Amendment rights by failing to protect him from Akbar after being alerted of Akbar’s threats. The Eighth Amendment’s prohibition against cruel and unusual punishment means that prison officials “must provide humane conditions of confinement . . . [and] take reasonable measures to guarantee the safety of the inmates.” *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (internal quotations omitted). A prison official violates the Eighth Amendment if he acts with “deliberate indifference” to a “substantial risk of serious harm,” *id.* at 834, which means that: (1) the inmate faces an objectively intolerable risk of serious injury; and (2) the official knows of the substantial risk of harm to the inmate and intentionally fails to take reasonable steps to remedy it. *Id.* at 847; *Brown v. Budz*,

398 F.3d 904, 909 (7th Cir. 2005).

Baker alleges that defendants refused to move him to a different cell even though both of them knew that (1) Akbar was threatening him; (2) Baker feared for his life; and (3) Akbar had a “red tag” classification. At this early stage, these allegations are sufficient to state a claim for failure to protect.

Baker should be aware that at summary judgment or trial he will have to show specific evidence that defendants were aware Akbar posed a serious risk of harm to Baker and acted with deliberate indifference to that known risk. Deliberate indifference “implies at a minimum actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant’s failure to prevent it.” *Dixon v. Godinez*, 114 F.3d 640, 645 (7th Cir. 1997) (quotation omitted). To meet this component, “it is not enough for the inmate to show that the official acted negligently or that he or she should have known about the risk.” *Townsend v. Fuchs*, 522 F.3d 765, 773 (7th Cir. 2008). Rather, “the inmate must show that the official received information from which the inference could be drawn that a substantial risk existed, and that the official actually drew the inference.” *Id.*

ORDER

IT IS ORDERED that:

1. Plaintiff Almondo Baker’s request to proceed on his claim that defendants Sgt. Schmidt and Sgt. Mackey violated his rights under the Eighth Amendment by failing to protect him from assault by Tabil Akbar is GRANTED.
2. For the time being, plaintiff must send defendants a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will

be representing a defendant, he should serve the lawyer directly rather than that defendant. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to that defendant or to the defendant's attorney.

3. Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.
4. Plaintiff is obligated to pay the unpaid balance of his filing fee in monthly payments as described in 28 U.S.C. § 1915(b)(2). This court will notify the warden at his institution of that institution's obligation to deduct payments until the filing fee has been paid in full.
5. Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendants.

Entered this 14th day of May, 2013.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge