

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

JOHN GROSS,

Plaintiff,

OPINION & ORDER

v.

14-cv-782-wmc

WARDEN BOUGHTON *et al.*,

Defendants.

John Gross, an inmate at the Wisconsin Secure Program Facility (“WSPF”), seeks a transfer to a different facility based on defendants’ alleged deliberate indifference to substantial threats to his safety. Specifically, Gross alleges that two inmates, Derek Kramer and Paul Hendler, have engaged in concerted efforts to persuade other inmates to attack him and that WSPF staff have failed to take adequate steps to ensure his safety. The court held an evidentiary hearing on Gross’s motion for immediate relief from imminent danger (dkt. #3) on January 28, 2015. Ultimately, the court concluded that there was insufficient evidence to justify preliminary relief, either as to substantial risk of serious harm or defendants’ deliberate indifference. (Dkt. #39.) This opinion briefly discusses the court’s factual findings and reasoning in denying Gross’s request for an injunction, as well as defendants’ motion to dismiss this case (dkt. #40), which the court will also deny for reasons explained briefly below.

FINDINGS OF FACT

I. Policies at WSPF

A. Special Placement Needs (SPNs) Transfers

Defendant Jerome A. Sweeney is the Security Director at WSPF. At the January 28th hearing, he testified regarding WSPF's general security procedures and policies surrounding SPNs, which provide for physical separation between certain inmates.¹ Defendants' Hearing Exhibit 120 is a copy of the SPN policy and procedures used by the Division of Adult Institutions; it mandates that at least one of several listed criteria be met for an SPN transfer to be considered for approval. (*See* Defs.' Ex. 120.) Sweeney testified generally that threats to injure others do not warrant SPNs, unless there is some history of assault or, alternatively, clear and convincing evidence to believe that the threat will be carried out. Otherwise inmates may fabricate threats to facilitate a move between institutions.

While SPNs require that certain individuals be separated from one another, Sweeney testified that there is also a "blanket exception" to observing SPNs at WSPF, so long as the inmate in question is coming into segregation. Sweeney further testified that although there are "always" concerns regarding SPNs, WSPF staff will carefully assess the SPN in question to ensure inmate safety, considering factors like the initial concern, the time elapsed, the

¹ An SPN is a procedure used by the Department of Corrections that physically separates inmates that may have issues with staff, other inmates or particular facilities. (Defs.' PFOF (dkt. #29) ¶ 19.) One type of SPN requires separation between inmates by facility, but according to Security Director Sweeney, such SPNs are frequently overridden for the purpose of sending inmates to WSPF to serve segregation time. (*Id.* at ¶ 22.) According to Sweeney, SPNs are intended to maintain physical separation between inmates; because inmates in segregated status do not have physical contact with other inmates, SPNs can be safely overridden in such circumstances. (*Id.* at ¶ 23.)

length of time the inmate will be in segregation and the timeframe in which the inmate will transition into General Population.

B. High Risk Offender Program (HROP)

Central to Gross's claims are allegations that his placement in the High Risk Offender Program, or "HROP," puts him at greater risk of assault. HROP is a program offered to inmates who have exhibited good behavior and complied more readily with staff. It is designed to facilitate the reintegration of inmates on administrative confinement status back to general population ("GP"). In service of that goal, WSPF provides inmates with serious or chronic behavioral issues the chance to acquire the skills they need to reintegrate into GP successfully. (Defs.' PFOF (Dkt. #29) ¶ 54.) After a spot in HROP is offered to them, inmates can decide whether they would like to participate. All inmates participating in HROP are housed on the same unit so that the trained HROP team (which includes the Program Captain, Social Worker, Unit Sergeant and Officers, and members of Psychological Services) can administer their programming needs and monitor their progress. (*Id.* at ¶ 55.)

HROP consists of three phases – red, yellow and green. At the hearing, Sweeney testified that red and yellow phases generally last about four months each, although minor infractions can delay an inmate's progress through those phases. (*See Id.* at ¶ 62 ("Movement within the program is performance based[.]").) Infrequently, according to Sweeney, an inmate will spend fewer than four months in red or yellow phase – for example, if he is close to his release date, he may move between phases more quickly to avoid a scenario in which an inmate is released from prison directly from administrative confinement.

The green phase typically lasts about eight months and requires the inmate to have engaged in at least eight months of positive behavior. According to Sweeney, green phase is a key tool in HROP, because it allows for an “assessment process.” During this time, prison staff look for demonstrations of impulse control and awareness of consequences. Green phase offers inmates more freedoms than the preceding phases: for instance, they may be escorted without restraints and can participate in congregate activities, including small jobs and recreation in small numbers. Even in green phase, however, inmates cannot freely leave their cells; they must be escorted by staff members during movement.

Inmates can refuse to participate in recreation, but they must participate in other congregate activities. Because SPNs cannot be in congregate activities together, the general practice at WSPF is to stagger inmates to ensure that SPNs do not go through green phase at the same time. Inmates participating in jobs typically do so in groups of four, though up to six inmates may be present; those participating in recreation are placed in one of two fenced “modules,” each of which contains a total of two inmates. All these congregate areas are monitored by camera, by a sergeant on the unit and by the control center. Additionally, staff members frequently remain in the room to monitor the activities. During programs, a facilitator is present as well. The facilitators are generally equipped with “screamers,” or body alarms; some carry radios; and some activity rooms have panic buttons. During recreation, officers are *not* present at all times, although Sweeney testified that they make frequent rounds.

Sweeney has been the Security Director since September 11, 2011. At the hearing, Sweeney testified that he could recall only two fights occurring between green phase inmates during his tenure. According to Sweeney, staff responded immediately to those

incidents and there were no serious injuries. The inmates who participated in the altercations were removed from HROP, received a conduct report and were placed back into Administrative Confinement.

II. Gross's Incarceration at WSPF

On November 11, 2011, after he committed battery on a staff member, Gross was transferred to WSPF and housed in Alpha Unit. Around December 1, Gross wrote to the warden stating that he had learned two known "special placement needs" inmates, or SPNs, were also housed at WSPF: Paul Hendler and Derek Kramer. The SPNs were entered following two incidents at Green Bay Correctional Institute ("GBCI") in 2008. Specifically, Gross claims that he (1) refused to join Hendler and Kramer's gang, and (2) provided information against several inmates, including Hendler and Kramer. While at GBCI, Gross was assaulted twice. According to Gross, the assaults resulted from his confidential informant status and/or his opposition to gang recruitment. (Defs.' PFOF (dkt. #29) ¶¶ 26-27.)

In December of 2012, Gross was placed on Administrative Confinement, an indefinite and non-punitive status. (Defs.' Resp. PFOF (dkt. #28) ¶ 12.) Around the same time, he was moved to WSPF's Echo Unit on the 400 range. (*Id.* at ¶ 13.) On December 18, Gross noticed that Hendler was moved four cells down from Gross. (*Id.* at ¶ 14.) Gross informed his escorting officer, McDaniel, that there was an SPN in place between himself and Hendler. (*Id.* at ¶ 15.) After two days, Hendler was moved to a different range, but Gross averred that Hendler taunted and verbally attacked him throughout those two days. (*See id.* at ¶ 17.) Gross also averred that other inmates took up

the taunting and threatening even after Hendler was moved; eventually, Gross complained to the Unit Sergeant and was moved to the 300 wing of Echo Unit on June 26, 2013. (*See id.* at ¶ 21.) Gross learned later that Kramer, too, was housed in Echo Unit, participating in HROP. Eventually, Hendler was also moved to Echo Unit to begin HROP.

Gross has never been physically attacked since arriving at WSPF.

III. Gross's Participation in HROP

On May 5, 2014, Gross learned that he had been placed in HROP. As of the injunctive hearing, Gross was in yellow phase of HROP. He testified that he had been granted green phase, pending resolution of this matter. (Hr'g Tr. (dkt. #41) 8:3-5.)

However, although green phase will require Gross to participate in congregate activities, there is no longer a possibility that he will encounter any of the inmates who pose a *concrete* threat to him -- Kramer and Hendler having both graduated from HROP and been transferred out of WSPF. Likewise, Baker -- the only other inmate considered to pose a *possible* threat to Gross, at least by Captain Hooper² -- has also graduated from HROP and been transferred. According to Sweeney, those inmates would not have graduated from HROP had they still been actively involved in gang leadership. In any event, none of the three is still at WSPF, which undermines much of Gross's claim of substantial and imminent danger.

Gross also unsuccessfully requested SPNs against various other inmates. Sweeney testified that there was a chance that Gross's participation in green phase would overlap

² Gross requested an SPN against Baker, and Captain Hooper recommended approval of the SPN on the basis that Gross did serve as a confidential informant and Baker's past behavior showed him to be a "calculating violent offender." (Defs.' PFOF (dkt. #29) ¶ 89.) Ultimately, however, Sweeney did not approve the SPN due to a lack of reliable proof that Baker was threatening Gross.

with the participation of some of these other inmates, including Hernandez and Ramos. Ultimately, Gross was unable to produce evidence that those inmates posed a tangible threat to him, which lessens the impact of the possible overlap.

IV. Evidence of Threats

A key question at the hearing was whether Gross could offer any evidence to corroborate his claim that he has been threatened and harassed at the behest of Hendler and Kramer. Gross testified that correctional officers were present “a couple times” to overhear the threats, but he could not remember the officers’ names, nor could he remember a specific instance in which he was threatened while officers were present. (Hr’g Tr. (dkt. #41) 5:25-6:7.) Ultimately, Gross presented no evidence of threats, other than his own testimony, and conceded that he has no independent evidence corroborating his version of events. (*Id.* at 5:6-13.)

Defendants, for their part, indicate that they monitored Hendler and Kramer’s mail closely for much of the time they were at WSPF but unearthed no threats to Gross. Nor did WSPF records contain any reference to Hendler and Kramer threatening or harassing Gross. Finally, according to Sweeney, WSPF staff members have received no reports from inmate informants that either Kramer or Hendler was threatening Gross or attempting to recruit others to harm him.

Even so, Gross *did* offer his own testimony as to a few, specific instances during which he felt threatened. For example, Gross testified that early in his time at WSPF, he passed Hendler in the hallway. Correctional Officer Roach was present.³ According to Gross, as they passed one another, Hendler said, “I see you finally got what you deserved”

³ Roach did not testify or offer evidence at the hearing.

and “You can’t snitch your way out of this. You can believe that we’re keeping an eye on you and we’ll see you.” (*Id.* at 28:24-29:2.) Gross testified that he wrote to security to complain about these threats, but on conceded cross-examination that his letter did not explicitly complain about Hendler threatening him in front of staff members. (*Id.* at 38:23-39:5.)⁴

Gross also testified that he returned from a hospital visit on approximately September 1 and was locked into his cell.⁵ Soon afterward, he heard several inmates, including Perry Johnson, Wortham and Baker, discussing him as though he had returned from a meeting with Security. For example, Gross claims that Perry Johnson and Wortham commented that “Security must have got what they wanted,” to which Baker responded, “Hendler was right: you got to watch out for this guy.” According to Gross, he then tried to convince them he was not a snitch. Gross further testified that the parties to this conversation were yelling back and forth between their cells. Nevertheless, he believes no correctional officer would have overheard the conversation, and he acknowledged never notifying WSPF staff of this conversation, because he wanted to avoid making himself a bigger target. (Hr’g Tr. (dkt. #41) 25:14-26:17.)

V. Escorts on January 3 and 4, 2015

During a telephonic status conference before the injunctive motion hearing, Gross also represented that in early January, Hendler was escorted past Gross’s cell “with a group

⁴ In fairness, the complaint *does* allege that Hendler “threatened me as we passed.” (Defs.’ Ex. 110, page 0009.)

⁵ Gross’s original complaint suggested this hospital visit occurred in May of 2014, but the evidence in the record, including Gross’s own testimony and an offender complaint he filed on September 2, 2014, indicates that it actually occurred in late August or early September of 2014. (*See* Defs.’ Ex. 115.)

of his sympathizers,” which “started a whole new list of threats, insults and excitement.” (Tr. (dkt. #18) 10:25-11:10.) At the injunctive hearing, defendants responded to those new allegations by providing video evidence of the escorts in question, as well as testimony from the escorting officers. (*See* Defs.’ Ex. 138.) Specifically, Officer Runice testified at the hearing that he escorted Hendler to recreation past Gross’s cell on January 3 and again on January 4. He testified that Hendler never said anything to Gross or anyone else during either of those escorts. The video, entered into evidence as Defendants’ Exhibit 138, appears to confirm that Hendler was escorted alone and that he did not stop or say anything to Gross or any other inmate.

Similarly, Officer Brown-Lucas escorted Hendler back from recreation past Gross’s cell on January 3 and Officer Fields escorted Hendler back from recreation past Gross’s cell on January 4. Both officers testified that Hendler was escorted alone and that Hendler did not say anything to anyone during transit. Exhibit 138 supports these officers’ testimony as well.

All three officers testified that they have never experienced or overheard any inmate threaten or harass Gross.

OPINION

I. Preliminary Injunction

Gross moved for “immediate relief from imminent harm,” which the court construes as a motion for preliminary injunction. “To obtain a preliminary injunction, the moving party must show that its case has ‘some likelihood of success on the merits’ and that it has ‘no adequate remedy at law and will suffer irreparable harm if a preliminary injunction is

denied.” *Stuller, Inc. v. Steak N Shake Enters., Inc.*, 695 F.3d 676, 678 (7th Cir. 2012) (quoting *Ezell v. City of Chi.*, 651 F.3d 684, 694 (7th Cir. 2011)). If the moving party satisfies these threshold requirements, the court then must balance the irreparable harm the moving party will suffer if relief is denied against the harm the non-moving party would suffer if preliminary relief is granted. *Id.* The court also must consider the “public interest in granting or denying an injunction.” *Id.* This “sliding scale” approach “is not mathematical in nature, rather ‘it is more properly characterized as subjective and intuitive, one which permits district courts to weigh the competing considerations and mold appropriate relief.’” *Ty, Inc. v. Jones Grp., Inc.*, 237 F.3d 891, 895-96 (7th Cir. 2001) (quoting *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992)).

As the court explained at the hearing, the main problem with Gross’s request for preliminary relief is that he was unable to show any likelihood of his succeeding on the merits of the Eighth Amendment failure to protect claims. Certainly, the Eighth Amendment requires that “those charged with the high responsibility of running prisons . . . ‘protect prisoners from violence at the hands of other prisoners.’” *Santiago v. Walls*, 599 F.3d 749, 758 (7th Cir. 2010) (quoting *Farmer v. Brennan*, 511 U.S. 825, 833 (1994)). But to prevail on a claim for failure to protect, Gross must demonstrate that: “(1) ‘he is incarcerated under conditions posing a substantial risk of serious harm,’ and (2) defendant-officials acted with ‘deliberate indifference’ to that risk.” *Brown v. Budz*, 398 F.3d 904, 909 (7th Cir. 2005) (quoting *Farmer*, 511 U.S. at 834)).

Unfortunately for Gross, his proof was insufficient with respect to both elements of his claims. With respect to the first prong, demonstrating a “risk of serious harm” requires a “*tangible* threat to [the inmate’s] safety or well-being,” not just a generalized risk of violence.

Wilson v. Ryker, 451 F. App'x 588, 589 (7th Cir. 2011) (emphasis added). Furthermore, for a threat of future harm to be “substantial,” it must be so great “that it is ‘almost certain to materialize if nothing is done.’” *Id.* (quoting *Brown*, 398 F.3d at 911). If Hendler, Kramer or Baker were still housed at WSPF, perhaps Gross could meet this burden: “the existence of a threat or history of violence” can be enough to show a substantial risk of serious harm. *Id.* (citing *Santiago*, 599 F.3d at 758; *Brown*, 398 F.3d at 913). However, all three inmates have been transferred to different institutions now, and Gross could point to no concrete evidence at the hearing that any of the inmates who remain at WSPF pose a tangible, substantial risk of serious harm to him.

Gross did testify that he overheard other inmates calling him a “snitch” and threatening to harm him, which the court considered for purposes other than the truth of the matter asserted over defendants’ hearsay objection. Said another way, Gross’s testimony comes in to show that statements were *made*. See *Tompkins v. Cyr*, 202 F.3d 770, 779 n.3 (5th Cir. 2000) (Threats “were not, and were not alleged to be, factual statements, the truth of which was in question. Rather, the threats were verbal acts.”); *United States v. Thomas*, 86 F.3d 647, 653 n.12 (7th Cir. 1996) (Evidence of threats “was offered as the fact of an assertion and not as [an] assertion of a fact and was therefore not hearsay.”) (quoting *United States v. Garza*, 754 F.2d 1202, 1206 (5th Cir. 1985)) (alteration in original). It does *not* come in to prove the truth of the threats themselves, however, meaning that Gross cannot offer his hearsay testimony to prove that the speakers actually planned to harm him or that such harm was imminent.

For this reason, the court explained at the hearing it needed “something more” than Gross’s own testimony to find imminent danger. (Hr’g Tr. (dkt. #41) 7:18-19.) Because Gross could offer nothing more, he failed to meet his burden on this prong.

Likewise, Gross was unable to point to evidence of deliberate indifference, which requires both that defendants actually knew of the substantial risk of harm to him *and* disregarded it. *Brown*, 398 F.3d at 913. Rather, all the testimony that was offered suggested that defendants (1) followed standard steps to protect Gross, consistent with the institution’s SPN protocols; and (2) did *not* believe additional measures were required to protect him from imminent danger. As to the latter point, Sweeney testified that WSPF had received *no* reports from confidential informants regarding threats made against Gross and had no evidence that other inmates posed a threat to Gross beyond his say-so. Officers Runice, Brown-Lucas and Fields likewise testified that they never heard any inmates threaten or harass Gross.

As to the former point (following SPN protocols), Gross has failed to offer proof that defendants acted unreasonably, much less with deliberate indifference, to the *known* risks Gross faced. As an initial matter, Sweeney testified that HROP is managed and run in such a way that minimizes risks of violence. Inmates are not permitted into green phase, the least restrictive phase, until they have demonstrated several months of positive behavior. Even with the relative freedoms in the green phase, inmates are still not permitted to leave their cells at will and are escorted to and from activities. Moreover, during those activities, correctional officers continuously monitor inmates, either while present in the room or via security cameras. Additionally, Gross was not moved into green phase until Hendler,

Kramer and Baker had all left WSPF, and there is no evidence suggesting that he will be at any greater risk in green phase than any other inmate at WSPF.

This is not to discredit the dangers Gross faces at WSPF. As stated at the hearing, the court does not doubt that Gross's circumstances pose risks to his safety. The granting of a preliminary injunction, however, "is an exercise of a very far-reaching power," which should not be exercised "except in a case clearly demanding it." *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 389 (7th Cir. 1984) (quoting *Warner Bros. Pictures, Inc. v. Gittone*, 110 F.2d 292, 293 (3d Cir. 1940)(per curiam)). Here, there is insufficient evidence to demonstrate either that Gross is currently at substantial risk of serious harm, or that WSPF officials have been deliberately indifferent to that risk. As a result, Gross has yet to demonstrate a likelihood of success on the merits of his claims. The failure to establish one of the prerequisites for preliminary injunctive relief is alone sufficient grounds to deny Gross's motion. *See Cox v. City of Chi.*, 868 F.2d 217, 223 (7th Cir. 1989).

II. Motion to Dismiss

At the close of the hearing, defendants moved to dismiss this action entirely and asked the court to enter judgment in their favor. The sole basis for the motion is defendants' position that Gross has no relief available to him because: (1) the court has denied him injunctive relief; and (2) under Seventh Circuit case law and the PLRA, 42 U.S.C. § 1997e(e), compensatory and nominal damages are unavailable in failure to protect cases where the plaintiff has suffered no physical harm.⁶

⁶ Section 1997e(e) provides: "No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of title 18)." Although the language sweeps broadly, the Seventh Circuit has held that under

With respect to their first argument, defendants appear to assume that because the court denied the request for a preliminary injunction, it has foreclosed the possibility of injunctive relief entirely. That is incorrect. At the hearing, the court held only that Gross had not demonstrated a likelihood of success on the merits of his Eighth Amendment claims on the current record. It did not categorically preclude the possibility of Gross *ever* demonstrating entitlement to injunctive relief. Through deliberate discovery, Gross may be able to offer admissible evidence demonstrating that defendants are behaving with deliberate indifference to substantial threats to his safety posed by other inmates who remain at WSPF and justify injunctive relief. That Gross failed to meet this burden at the preliminary injunction hearing does not justify holding he cannot do so as a matter of law.⁷

As for defendants' second argument, it appears only partially correct. In the Seventh Circuit, prisoners cannot recover money damages to compensate them for the fear of an assault that never occurs. *Babcock v. White*, 102 F.3d 267, 272 (7th Cir. 1996). As defendants note, the *Babcock* court also suggested that nominal damages are inappropriate in the Eighth Amendment context. *Id.* at 271. But several years later, in *Calhoun v. DeTella*,

§ 1997e(e), physical injury is “merely a predicate for an award of damages for mental or emotional injury, not a filing prerequisite for the federal civil action itself.” *Calhoun v. DeTella*, 319 F.3d 936, 940 (7th Cir. 2003).

⁷ Gross recently filed a “supplement” to his brief in opposition to defendants’ motion to dismiss, which provides additional information he contends further supports a denial of the motion, including: (1) an allegation that an associate of Hendler and Kramer stabbed another inmate during an HROP activity; and (2) an allegation that rather than being placed in “green phase” after the hearing, he was instead moved directly into the general population and placed across from an inmate against whom he had previously requested an SPN. (Dkt. #46.) Since the court has already concluded that dismissal of his suit is not warranted, this new information has no impact on the court’s decision, at least at present. On the contrary, if plaintiff was suddenly moved to general population without any green phase, despite multiple witnesses testifying for the state as to its necessity and the continued monitoring of plaintiff’s safety during that phase, the court cannot help but be concerned as to the possible retaliatory nature and indifference that action might reflect. Accordingly, the court will direct that defendants provide a written response to plaintiff’s new assertions within seven days.

319 F.3d 936 (7th Cir. 2003), in dismissing the *Babcock* court's treatment of nominal damages as *dicta*, the Seventh Circuit held that "[j]ust as a 'deprivation of First Amendment rights standing alone is a cognizable injury,' so too is the violation of a person's right to be free from cruel and unusual punishment." *Id.* at 941 (internal citations omitted). The court also noted that the Seventh Circuit, like other circuits, had previously "approved the award of nominal damages for Eighth Amendment violations when prisoners could not establish actual compensable harm." *Calhoun*, 319 F.3d at 942. Finally, the court held that the bar of § 1997e(e) "is inapplicable to awards of nominal or punitive damages for the Eighth Amendment violation itself." *Id.* at 941. Thus, Gross may still be eligible for nominal or punitive damages, despite a lack of physical injury. *Cf. Turner v. Pollard*, 564 F. App'x 234, 239 (7th Cir. 2014) (reversing summary judgment in Eighth Amendment case where inmate presented evidence that a prison official "intentionally and significantly heightened the risk that another inmate would attack him"; "Although compensatory damages are unavailable, summary judgment was also inappropriate because, given the substantial danger to which Swiekatowski allegedly exposed Turner, Turner may be eligible for nominal or punitive damages."). Because the court concludes that Gross may, at minimum, still be able to prove his entitlement to injunctive relief and nominal damages, defendants' motion to dismiss will also be denied.

ORDER

IT IS ORDERED that:

1. Plaintiff John Gross's motion for immediate relief from imminent danger (dkt. #3) is DENIED.

2. Defendants' motion to dismiss (dkt. #40) is DENIED.
3. Defendants shall file a written response to plaintiff's "supplemental information" addressing whether plaintiff is now housed in the general population and, if so, why he was moved and what steps are being taken to ensure his safety.

Entered this 19th day of March, 2015.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge