IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIAM S. HARRINGTON,

Plaintiff,

OPINION AND
ORDER
99-C-652-C

v.

TIMOTHY DOUMA, Asst. Warden, Security and
CAPTAIN LINDA J. SCHWANDT,
Administrative Captain,

Defendants.

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This is a civil action for monetary and injunctive relief brought pursuant to 42 U.S.C. § 1983. Pro se plaintiff William S. Harrington is a prisoner at the Columbia Correctional Institution in Portage, Wisconsin. He contends that defendants Timothy Douma and Linda Schwandt failed to protect him from an assault from his cellmate. Jurisdiction is present. See 28 U.S.C. §§ 1331, 1343(a).

Presently before the court are the parties' cross motions for summary judgment. Because I find it is disputed whether defendants knew that there was a substantial likelihood that plaintiff would be assaulted and failed to take reasonable protective measures, I will deny both

sides' motions for summary judgment on plaintiff's Eighth Amendment claim. See Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Because I find that plaintiff has not introduced facts from which a jury could conclude that defendants retaliated against him for the exercise of his constitutional rights, defendants' motion on plaintiff's retaliation claim will be granted and plaintiff's motion will be denied.

As explained in this court's Procedures to be Followed on Motions for Summary Judgment, a copy of which was given to each party with the Preliminary Pretrial Conference Order on January 13, 2000, I will take as undisputed defendants' proposed findings of fact that are supported by evidence in the record because plaintiff has failed to submit any response. See Procedures, II.C.1 ("Unless the nonmovant properly places a factual proposition of the movant into dispute, the court will conclude that there is no genuine issue as to the finding of fact initially proposed by the movant.") In addition to the explanation of summary judgment procedures provided in this court's Procedures, in an order entered on January 26, 2000, I instructed plaintiff that his summary judgment motion did not conform to this court's Procedures and explained how to propose facts properly. Also, in an order entered on May 31, 2000, I warned plaintiff that he could not rely on his own motion for summary judgment as a response to defendants' motion and that defendants' proposed findings would be taken as true if he did not respond. I gave plaintiff additional time in which to submit a response to

defendants' motion, which he failed to do.

In defendants' proposed findings of fact and brief, they cite to an unsigned affidavit of defendant Schwandt that was filed on May 12, 2000. On May 26, 2000, defendants filed a signed and sworn affidavit of defendant Schwandt that they requested replace the earlier, slightly different one. I will not consider factual propositions that rely only on statements in the May 12 affidavit. See Defs.' Proposed Findings of Fact #9, 12, 21, 22 and 23. Defendants' lawyer should not have cited an unsigned affidavit in the brief or proposed findings, especially in light of the fact that the signed affidavit deleted certain paragraphs and edited others.

For purposes of summary judgment, I find the following facts submitted by the parties and from the record to be material and undisputed.

UNDISPUTED FACTS

A. Parties

Plaintiff William S. Harrington was incarcerated at Columbia Correctional Institution in Portage, Wisconsin at all relevant times. Defendant Timothy Douma was the associate warden security director at the institution and defendant Linda Schwandt was the administrative captain.

B. Screening of Calvin Banks

The institution is a maximum security facility. Approximately thirty-five percent of the institution's inmates are double-celled at any given time. When an inmate arrives at the institution, he is screened for double-celling by medical, clinical and security staff. An inmate is allowed to be double-celled unless he has a documented record of predatory behavior, assaults of other inmates or a contagious disease.

Inmate Calvin Banks's record was screened after he arrived at the institution in April 1999. There was some evidence of assaultive behavior in conduct reports in Banks's record. He was charged and disciplined twice for battery of a correctional officer in 1996, once for battery of an inmate in 1996, once for battery of an inmate in 1998 and once for attempted battery of an inmate in May 1999. (It is unclear whether Banks was screened before or after the May 1999 conduct report.) Defendant Schwandt completed the screening and approved Banks for double-celling. Defendant Douma supported defendant Schwandt's decision.

C. Complaints About Cell Assignment and Defendants' Response

On April 20, 1999, plaintiff was transferred to the institution. On May 16, 1999, plaintiff was assigned to disciplinary segregation II unit, cell #44. On June 24, 1999, Calvin Banks was assigned to the same cell. At the time of Banks's placement, defendant Douma had

no information indicating that Banks and plaintiff would not get along.

In a letter dated June 23, 1999, Banks wrote to defendant Schwandt, indicating that he was unhappy about having to sleep on the floor. Plaintiff was sleeping on the one bunk in the cell.

In a letter dated June 24, 1999 to defendant Schwandt, plaintiff wrote:

> Today inmate Calvin Banks-121575 was placed in my cell on the floor while on DSII in segregation status. This inmate has a known assaultive behavior history. Before me is conduct report #752030 in which he was found guilty of 303.12 battery on June 6, 1996. I do not understand why it is that you are putting me at risk with a man who is already known for such. I am not in segregation for any type of violence, I'm in prison for a violent offence. Why am I being subjected to such? I do not feel comfortable with this situation. My seniority provides me with remaining the resident in a bunk, however, it would be appreciated if we could be separated. I bring this issue to surface mainly due the incident which occurred in Youngstown, Ohio, where similar situations were at hand and the inmate who complained of such was dead. . .
>
> I thank you sincerely for your attention in this most urgent matter.

After receiving letters from Banks and plaintiff, defendant Schwandt asked staff on the unit how Banks and plaintiff were getting along. This is a routine initial response because there are many complaints from inmates about being double-celled. Staff members told defendant Schwandt that plaintiff and Banks got along well and spent most of their time on legal work.

After receiving the letters from plaintiff and Banks, defendant Schwandt stopped to talk to plaintiff and Banks in their cell as she was making rounds in the unit. When she stopped,

plaintiff and Banks were discussing legal work. She asked each of them how they were doing; she did not indicate that she had received complaints from both of them. Banks went to the cell door to discuss his concerns about sleeping on a mattress on the floor and being double-celled even though there were open cells. Defendant Schwandt explained that it was standard procedure for segregation units to have open cells in case of a disturbance. Although Banks was not pleased by defendant Schwandt's explanation, he returned to what he had been doing before she stopped by the cell.

In front of Banks, defendant Schwandt asked plaintiff how he was doing. He said something like, "Well, I don't know." Defendant Schwandt asked plaintiff whether he had something he wanted to discuss with her. (It is defendant Schwandt's practice to take inmates out of their cells to discuss their concerns when they ask to do so.) Plaintiff responded, "Not now," and went back to the bunk.

In a letter dated June 25, 1999, plaintiff wrote to defendant Schwandt complaining about how she had confronted him about his complaint about his safety in front of others. On June 27, 1999, plaintiff wrote defendant Schwandt another letter about his concerns for his safety. It is unclear whether defendant Schwandt received either of these letters.

On June 29, 1999, plaintiff wrote defendant Douma a letter about his concerns for his safety as a result of being double-celled with Banks. He wrote:

> [Calvin Banks] has an assultive [sic] history which is no secret to security here. He is in DSII now for a battery attempt. He has had an outside charge putting more time onto his present sentence for battery which occurred at D.C.I. in 1996. Prior to that he had a battery at Waupun C.I. --And now he's in the cell with me for. . . ?
>
> I wrote the Administration Captain, Capt. Schwandt, regarding the concerns for my safety asking her why I was being put at risk of bodily harm. I expressed to her that this inmate who "they" placed onto my single cell floor was constantly complaining about being on the floor while continuously reminding me of his assultive [sic] history and at one point showed me a [conduct report] in which he had battered an inmate at D.C.I. with a lock-and-sock. I explained to her that this inmate displayed hostile behaviors and I feared for my safety in a room locked in 23-24 hours a day as he expressed his anger for being in a cell with me on the floor and strong desires to be removed from this condition.
>
> . . .
>
> I am very concerned about my safty [sic] and therefore I am again attempting to find aid in this situation. . . . If this man touches me as a result of the games you people are playing with him, I swear to god that I will sue you and [defendant Schwandt].

In a memorandum dated July 1, 1999, defendant Douma acknowledged receiving plaintiff's letter and urged him to resolve his differences with Banks. Defendant Douma told plaintiff that double-celling was necessary because of overcrowding and that prison officials did not change cell assignments upon request in the segregation unit.

Defendant Schwandt asked the staff to monitor plaintiff and Banks until they were moved to a different cell. When they were moved to cell #35, Banks took the bunk, leaving

plaintiff with no choice but to sleep on the floor. Defendant Schwandt received no other complaints from plaintiff or Banks.

In early July 1999, plaintiff filed an administrative grievance complaining of his concerns for his safety.

D. Incident on July 31, 1999

On July 31, 1999, plaintiff and Banks had an altercation. Plaintiff accused Banks of attacking and hitting him with a jar of Vaseline inside of a sock, which Banks denied. On or about August 1, 1999, Lieutenant Timothy Higbee interviewed plaintiff about the July 31 incident. On August 1, 1999, nurse Paul Persson assessed plaintiff's medical condition. Plaintiff complained to Persson that he had a headache and drainage in his right eye. After examining plaintiff, Persson prepared a report in which he indicated that plaintiff's eyes were clear with no blinking or tearing and that there was a slight abrasion just below plaintiff's right eye. Plaintiff told Persson that his cellmate had struck him in the head; Persson did not find any bumps or bruises on plaintiff's head. Persson gave plaintiff medication for his headache and encouraged him to follow up with the health service unit as needed.

Defendant Schwandt was designated to investigate the incident. She determined that plaintiff had swelling on the back of his head, a 1/4 inch scratch near his right eye and a three

inch scratch under his left eye. There was blood on plaintiff's blanket in two places, an envelope, a sheet of paper and the cell wall. During a search of the cell, prison officials found an empty Vaseline jar and its plastic cover with a broken edge.

When defendant Schwandt interviewed Banks, he denied having an altercation or argument with plaintiff. There was no evidence of any injury to Banks. On August 9, 1999, defendant Schwandt interviewed plaintiff. Plaintiff told defendant Schwandt that Banks had jumped him from behind as he lay on his mattress on the floor and that plaintiff reached up over his right shoulder to place Banks in a headlock and did not let go until Banks agreed the incident was over. When defendant Schwandt asked plaintiff why he had failed to mention that Banks had hit him with a Vaseline jar inside a sock, plaintiff told her that that had occurred before Banks jumped on him. Plaintiff said that Banks hit him in the head with the jar seven to twelve times.

Defendant Schwandt had three reasons for not believing that Banks attacked plaintiff. First, plaintiff refused to provide a written statement even though defendant Schwandt assured him his statement would be treated as if from a confidential informant. Second, plaintiff refused to press charges after Columbia County authorities were contacted, came to the institution and interviewed plaintiff. Third, defendant Schwandt concluded that plaintiff's explanation was inconsistent with the physical evidence. Specifically, defendant concluded that

it was unlikely that the scratches on plaintiff's face were made by someone in a headlock and that the scratches were too minor to have resulted in blood spots on the cell wall, paper and blanket. Defendant also relied on the fact that the Vaseline jar was intact and the cover was broken only along the edge and that other inmates she interviewed stated they heard no arguments or disruption from the cell of plaintiff and Banks.

On August 11, 1999, plaintiff signed and dated an inmate complaint in which he complained about the way defendants handled his safety concerns. According to the complaint, the department of corrections received plaintiff's complaint on August 16, 1999.

On August 12, 1999, defendant Schwandt issued a conduct report to plaintiff, charging him with lying about the incident and disruptive conduct. At the time defendant Schwandt wrote the conduct report, she was unaware that plaintiff had filed a grievance. In fact, she was unaware that he had filed a grievance until April 26, 2000, when she went to the inmate complaint examiner's office to find out whether and when a grievance had been filed. On August 13, 1999, defendant Schwandt issued a conduct report to Banks, charging him with disruptive conduct.

On August 30, 1999, disciplinary hearings were held for plaintiff and Banks. Plaintiff was found guilty of disruptive conduct and lying and Banks was found guilty of disruptive conduct. They were each given 90 days of program segregation and 15 days' loss of exercise.

OPINION

A. Summary Judgment Standard

To succeed on a motion for summary judgment, the moving party must show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex, 477 U.S. at 324. All evidence and inferences must be viewed in the light most favorable to the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

B. Failure to Protect

The Eighth Amendment, as applied against state officials through the Fourteenth Amendment, gives prisoners a right to remain safe from assaults by other inmates. See Langston v. Peters, 100 F.3d 1235, 1237 (7th Cir. 1996). "'[P]rison officials have a duty. . . to protect prisoners from violence at the hands of other prisoners.'" Farmer v. Brennan, 511 U.S. 825 (1994). "Having incarcerated 'persons [with] demonstrated proclivit[ies] for antisocial criminal, and often violent, conduct,' see Hudson v. Palmer, 468 U.S. 517, 526 (1984), having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course." Farmer, 511 U.S. at 833.

In a failure to protect case, "[t]he inmate must prove a sufficiently serious deprivation, i.e., conditions which objectively 'pos[e] a substantial risk of serious harm.'" Pope v. Shafer, 86 F.3d 90, 92 (7th Cir. 1996). The inmate must also prove that the prison official acted with deliberate indifference to the inmate's safety, "effectively condon[ing] the attack by allowing it to happen." Langston, 100 F.3d at 1237 (quoting Haley v. Gross, 86 F.3d 630, 640 (7th Cir. 1996)). A prison official may be liable for knowing that there was a substantial likelihood that the prisoner would be assaulted and failing to take reasonable protective measures. See Farmer, 511 U.S. at 847. The prison official must be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists and the official must draw that inference. See Pavlick v. Mifflin, 90 F.3d 205, 207-08 (7th Cir. 1996). The prisoner does not have to show that the prison official intended that the prisoner be harmed; it is enough that the official ignored a known risk to the prisoner's safety. See id. at 208. In failure to protect cases, "[a] prisoner normally proves actual knowledge of impending harm by showing that he complained to prison officials about a specific threat to his safety." McGill v. Duckworth, 944 F.3d 344, 349 (7th Cir. 1991).

Defendants contend that plaintiff did not face a substantial risk of serious harm and that even if he did, they did not know about it and that to the extent that they did know about it, they responded appropriately. However, the facts are sufficient to raise a question for the

jury whether plaintiff faced a substantial risk of serious harm as a result of being double-celled with Banks in a cell with only one bed and whether defendants knew that there was a substantial likelihood that plaintiff would be assaulted by Banks and failed to take reasonable protective measures. See Farmer, 511 U.S. at 847. Defendants Schwandt and Douma both participated in screening Banks for double-celling when he arrived at the institution, which entailed determining whether Banks had a documented record of assaultive behavior. At the time of the screening, Banks's disciplinary record showed that he had been disciplined at least twice for battery of another inmate and twice for battery of a correctional officer. Despite these conduct reports in Banks's disciplinary file, defendants approved him for double-celling. In addition, Banks's most recent attempted battery charge stemmed from an incident on May 11, 1999, about a month and a half before Banks and plaintiff were assigned to the same cell. Although it is unclear whether defendant Schwandt was aware of this incident, defendant Douma signed the conduct report.

After Banks was placed in plaintiff's cell, defendant Schwandt received at least one letter from plaintiff before the July 31 altercation. In the June 24 letter, plaintiff stated, "I do not understand why it is that you are putting me at risk with a man who is already known for such [assaultive behavior]." Defendant Schwandt responded to plaintiff's letter by asking staff how plaintiff and Banks were getting along, asking staff to monitor them and asking plaintiff how

he was doing in front of Banks. Similarly, defendant Douma received a letter from plaintiff in which he wrote, "I explained to [defendant Schwandt] that [Banks] displayed hostile behaviors and I feared for my safety in a room locked in 23-24 hours a day as he expressed his anger for being in a cell with me on the floor and strong desires to be removed from this condition." Defendant Douma responded by urging him to resolve his differences with Banks. In his letters to defendants, plaintiff identified his potential assailant as his cellmate Banks, specified that he feared bodily harm because of escalating tension, pointed out Banks's history of violence against other inmates and requested that he or Banks be moved. From these facts, a jury could reasonably conclude that defendants were deliberately indifferent to plaintiff's serious safety needs, in violation of his Eighth Amendment rights. It will be the jury's role to determine whether the response of defendants Schwandt and Douma was enough to fulfill their "duty under the Eighth Amendment [] to ensure 'reasonable safety,' a standard that incorporates due regard for prison officials 'unenviable task of keeping dangerous men in safe custody under humane conditions.'" Id. at 844 (internal citations omitted). Accordingly, the parties' motions for summary judgment on this claim will be denied.

Defendants have indicated that they believe plaintiff lied about the July 31 altercation and that Banks did not attack plaintiff. In order to succeed at trial on his claim that defendants violated his rights under the Eighth Amendment, plaintiff will have to present

evidence that he suffered actual physical injury at the hands of Banks. See Babcock v. White, 102 F.3d 267, 272 (7th Cir. 1996) ("it is the reasonably preventable assault itself, rather than any fear of assault, that gives rise to a compensable claim under the Eighth Amendment").

C. Retaliation

A prison official who takes action against a prisoner to retaliate against the prisoner's exercise of a constitutional right may be liable to the prisoner for damages. See Babcock, 102 F.3d at 274. To state a claim of retaliatory treatment for the exercise of a constitutionally protected right, plaintiff need not present direct evidence in the complaint; however, he must "'allege a chronology of events from which retaliation may be inferred.'" Black v. Lane, 22 F.3d 1395, 1399 (7th Cir. 1994) (quoting Benson v. Cady, 761 F.2d 335, 342 (7th Cir. 1985)). It is insufficient simply to allege the ultimate fact of retaliation. See Benson, 761 F.2d at 342. In addition, the facts alleged must be sufficient to show that absent a retaliatory motive, the prison official would have acted differently. See Babcock, 102 F.3d at 275.

Plaintiff contends that he received a conduct report in retaliation for filing an administrative grievance contending that defendants had failed to take preventive measures when informed of a potential assault by Banks. He signed and dated the administrative grievance on August 11, 1999, but the complaint was not received by the department of

corrections until August 16, 1999. When defendant Schwandt issued plaintiff a conduct report on August 12, 1999, she did not know about plaintiff's grievance. She wrote the conduct report following an investigation of the incident, at which point she concluded that plaintiff was lying about the incident because of his refusal to provide a written statement, his refusal to press charges against Banks and inconsistencies between his story and the physical evidence. Plaintiff has failed to establish that defendant Schwandt issued the conduct report in retaliation for plaintiff's exercise of his constitutional rights rather than in response to her findings following the investigation. Absent evidence that either defendant knew before issuing the conduct report that he had filed a grievance, plaintiff's retaliation claim fails. Defendants' motion for summary judgment on this claim will be granted and plaintiff's motion will be denied.

ORDER

IT IS ORDERED that the motion of defendants Timothy Douma and Linda Schwandt for summary judgment is GRANTED as to plaintiff's retaliation claim and DENIED as to plaintiff's Eighth Amendment claim. FURTHER, IT IS ORDERED that

plaintiff William S. Harrington's motion for summary judgment is DENIED.

Entered this 7th day of August, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge