IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SCOTT JOSEPH BLOM,

Plaintiff,

v.

SALLY DELLEMANN,

Defendant.

OPINION AND ORDER

03-C-0386-C

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This is a civil action for monetary relief brought under 42 U.S.C. § 1983. Plaintiff Scott Blom claims that he was subjected to cruel and unusual punishment by defendant Sally Dellemann, a deputy at the jail where he was incarcerated. Plaintiff alleges that defendant failed to prevent a fellow inmate from attacking him. Now before the court is defendant's motion for summary judgment, in which she argues that: (1) plaintiff cannot prove that defendant acted with deliberate indifference to a serious threat to plaintiff's safety; (2) plaintiff failed to exhaust administrative remedies; and (3) defendant is entitled to protection under the doctrine of qualified immunity. Jurisdiction is present 28 U.S.C. 1331.

Defendant's motion will be granted. However, plaintiff's claim does not fail for lack of exhaustion. Although inmates must avail themselves of administrative remedies before

seeking relief in court, this requirement extends only to those remedies that are actually available. Appellate remedies are not "available" when an inmate has not received a response to his grievance from which to appeal. Because defendant has not shown that plaintiff ever received an appealable response, the fact that he did not file an appeal is of no consequence. However, plaintiff's claim fails on the merits. There is no evidence showing that defendant's conduct rises above the level of ordinary negligence. In order to succeed on a failure to protect claim, an inmate must show that a prison official effectively permitted the attack by a fellow inmate. Because negligence does not meet this standard, plaintiff's claim must fail.

From the parties' proposed findings of fact and the record, I find the following to be material and undisputed.

UNDISPUTED FACTS

A. Failure to Protect

Plaintiff Scott Blom is an inmate who was incarcerated at the St. Croix County jail in St. Croix, Wisconsin, between May 3, 2003 and May 23, 2003. Defendant Sally Dellemann was a deputy sheriff at the St. Croix facility at all relevant times.

Plaintiff was detained at the St. Croix facility after being charged with certain felonies. James Kuralle had been charged for his involvement with these crimes and was being detained at the St. Croix facility also. The jail maintains a "white board," which

includes a list of inmates who should not be in contact with each other. Plaintiff and Kuralle were placed on the "no contact" list when they entered the facility because the charges against them were related.

Inmates interested in participating in daily activities at the jail are required to sign up each morning. On May 16, 2003, plaintiff signed up to attend church services. At the time, plaintiff was being held in a maximum security block. Defendant read off the names of the inmates on the maximum security block attending the church services that day to the staff at the central controls. The maximum security group was approved and released to the classroom where the church service was to be held. Defendant then proceeded to a minimum to medium security block where Kuralle was being held. A number of the inmates on that block who had signed up to go to the church service in the morning decided not to attend, leaving vacancies. The jail's policy permitted inmates who had not signed up in the morning to fill vacancies when they arose and where resources permitted. Pursuant to this policy, defendant allowed Kuralle to fill in one of the vacancies. At the time, she did not remember having seen either plaintiff or Kuralle's name on the no-contact list, but she also did not check the list before allowing him to proceed to the classroom where the service was being held.

Approximately sixty seconds after defendant released Kuralle to attend the church service, one of the jail deputies radioed other security staff, alerting them that a fight was in

progress in the classroom and that he needed assistance breaking it up. Defendant and two other deputies responded immediately and found plaintiff and Kuralle swinging at each other in a corner of the classroom. Defendant ordered both inmates to stop. When they continued fighting, she grabbed plaintiff's arm, ordered him to put his hands behind his back and escorted him to a receiving room. Two of the other deputies handcuffed Kuralle and escorted him to an attorney visiting room. After the incident, defendant checked the no-contact list on the white board and noticed that plaintiff and Kuralle were on the list. Previously, neither plaintiff nor Kuralle had had any altercations either with each other or with other inmates while they were incarcerated at the St. Croix County jail.

Health care staff examined plaintiff and found that he had incurred multiple scrapes and bruises on his upper body, back, neck, face and hands, including a laceration approximately one-quarter inch long beneath his right eye. His nose bled for approximately two minutes and he was given ice and ibuprofen. Most of the bruising healed within three days, according to the jail's health care staff who examined plaintiff.

B. Exhaustion of Administrative Remedies

Shortly after this incident, defendant met with plaintiff to go over the jail's policies and procedures regarding inmate complaints. According to these policies, which are printed in the inmate handbook that each inmate receives at booking, an inmate should attempt to

resolve his dispute with an officer informally before filing a formal complaint. Plaintiff informed defendant that he wished to file a formal complaint and she made sure that he had the appropriate forms for doing so. Plaintiff received these forms on May 21, 2003, and filed his grievance the same day. According to the jail's policies, the jail sergeant reviewing the complaint has seven days to conduct an investigation and respond to the inmate with a decision.

On May 23, 2003, plaintiff was transferred to the Dunn County jail in Dunn County Wisconsin. Because of this transfer, Sergeant Kristen Anderson determined that no response to plaintiff's complaint was necessary. The bottom portion of plaintiff's complaint reads as follows:

> **********
> To be completed by jail administration Grievance # *03-08*
> Date and time form received: *5-21-03*
> Received by: *Kristen Anderson*
> Emergency: _____ Non-Emergency _____ Rejected _____
> Reason for determination: *Transferred to Dunn Co. on 5-23-03*
> Referred to: _____
> **********

On June 8, 2003, after returning to the St. Croix County jail, plaintiff wrote to defendant, asking about the status of his inmate complaint and indicating that he had yet to receive a response. In her response, defendant indicated that Sergeant Anderson had not responded to his grievance because of the transfer. She noted that by the time plaintiff returned, the

complaint had been lost.

The jail's policies provide that if an inmate is "not satisfied with the findings and actions of the Jail Sergeant, [the inmate] may make a written appeal to the Jail Captain or designee within fifteen days of being informed of the Jail Sergeant's decision." If the inmate is not satisfied with the decision of the captain, the inmate may file an appeal with the county sheriff within fifteen days after having received the captain's decision. Plaintiff never pursued an administrative appeal to either the jail captain or the county sheriff.

OPINION

A. Exhaustion of Available Administrative Remedies

The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), prohibits the bringing of any action "with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." Section 1997(a)'s exhaustion requirement is mandatory and applies to all prisoners seeking redress for wrongs occurring in prison. Porter v. Nussle, 534 U.S. 516 (2002). Because a district court lacks discretion to resolve a claim on the merits unless a prisoner has exhausted all administrative remedies available to him, Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999); see also Massey v. Helman, 196 F.3d 727 (7th Cir. 1999), I must address defendant's

failure to exhaust argument first.

Defendant argues that because plaintiff did not avail himself of his right to appeal to the jail captain and the county sheriff, he has failed to meet the Prison Litigation Reform Act's exhaustion requirement. However, the exhaustion requirement extends "only [to] those administrative remedies that are available." Lewis v. Washington, 300 F.3d 829, 833 (7th Cir. 2002). The Court of Appeals for the Seventh Circuit has held that when a prison officials fails to respond to a grievance, appellate remedies are deemed unavailable. Id. The court has "refuse[d] to interpret the PLRA so narrowly as to permit prison officials to exploit the exhaustion requirement through indefinite delay in responding to grievances." Id. (internal quotation marks omitted).

Although defendant faults plaintiff for failing to avail himself of the appellate processes available through the jail's grievance procedure, she glosses over the issue whether anyone ever actually provided plaintiff with a response from which he could have appealed. More to the point, defendant failed to produce any evidence showing that plaintiff received an appealable response. The relevant evidence defendant has submitted includes a copy of plaintiff's grievance form, which indicates that Sergeant Anderson made no substantive decision with respect to the merits of plaintiff's complaint because of his transfer, a letter in which defendant explains to plaintiff why the jail had failed to respond to his complaint and a page of the jail's inmate handbook, indicating that inmate grievances should be answered

by the jail sergeant within seven days. Rather than showing that plaintiff received an answer to his grievance, this evidence tends to confirm that no response was ever made. To the extent that the letter could be considered a response to plaintiff's grievance, it would not be appealable under the jail's procedures. The procedures provide a means of appealing the decision or actions of the jail's sergeant; defendant was a deputy with no apparent authority to answer inmate complaints.

Failure to exhaust is an affirmative defense under Fed. R. Civ. P. 8(c) for which defendant bears the burden of proof. Massey, 196 F.3d at 735. Defendant has not shown that plaintiff ever received a response to his grievance from which he could appeal and thus, has not established that appellate procedures were "available" to him. Lewis, 300 F.3d at 833. Because defendant has not shown that plaintiff failed to exhaust administrative remedies, I turn to the substance of plaintiff's claim.

B. Failure to Protect

1. Applicable standard

In his complaint, plaintiff did not indicate that at the time of the incident giving rise to this action, he was being held as a pretrial detainee. Accordingly, in screening his complaint, I allowed plaintiff's claim to proceed under the Eighth Amendment. However, it is now apparent that plaintiff was a pretrial detainee at all relevant times. "The Eighth

Amendment right to be free from cruel and unusual punishment is applicable only to those criminals who are serving a sentence." Anderson v. Gutschenritter, 836 F.2d 346, 348 (7th Cir. 1988). "[T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law. Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the due process clause of the Fourteenth Amendment." Ingraham v. Wright, 430 U.S. 651, 671-72 n.40 (1977). Because plaintiff's guilt had not been formally adjudicated at the time of the incident giving rise to this suit, his claim arises under the due process clause rather than the Eighth Amendment. "The due process rights of a pretrial detainee are at least as great as the Eighth Amendment protection available to a convicted prisoner." Estate of Cole by Pardue v. Fromm, 94 F.3d 254, 259 (7th Cir. 1996).

As a practical matter, the Court of Appeals for the Seventh Circuit has held that there is little difference between the standards governing failure to protect claims arising under the Eighth Amendment claims and the due process clause. Weiss v. Cooley, 230 F.3d 1027 (7th Cir. 2000). Compare Anderson, 836 F.2d at 349 (to prevail on due process claim, plaintiff must prove callous or deliberate indifference), with Langston v. Peters, 100 F. 3d 1235, 1237 (7th Cir. 1996) (to prove Eighth Amendment violation, inmate must show deliberate indifference). Because the standards are so analogous, the court has found it appropriate to

analyze a due process claim under Eighth Amendment precedent where the parties have done so. Washington v. LaPorte County Sheriff's Dept., 306 F.3d 515, 517 (7th Cir. 2002) ("Since the parties base their arguments on Eighth Amendment precedent, we examine them under that standard.").

In this case, both parties have relied on the Eighth Amendment in analyzing plaintiff's claim, although defendant did note the technical application of the due process clause. Thus, I will adhere generally to Eighth Amendment precedent in evaluating the merits of plaintiff's claim. In any event, the distinction between the standards would not be outcome determinative in this case. Plaintiff has not adduced evidence showing anything more than ordinary negligence. It is well established that under either standard, negligence is not enough. Mayoral v. Sheahan, 245 F.3d 934, 938 (7th Cir. 2001).

2. Merits

"[P]rison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners." Farmer v. Brennan, 511 U.S. 825, 833 (1994) (citation omitted). "Having incarcerated 'persons with demonstrated proclivities for antisocial criminal, and often violent, conduct,' 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." Id. (quoting Hudson v. Palmer, 468 U.S. 517, 526 (1984))

(internal punctuation omitted).

However, not every attack perpetrated by one inmate against another is a constitutional violation. Luttrell v. Nickel, 129 F.3d 933, 935 (7th Cir. 1997); Langston, 100 F. 3d at 1237. A prison official violates the Eighth Amendment only if she acts with deliberate indifference, "'effectively condon[ing] the attack by allowing it to happen.'" Id. (quoting Haley v. Gross, 86 F. 3d 630, 640 (7th Cir. 1996)). Thus, plaintiff must show that defendant had "'actual knowledge of an impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from [her] failure to prevent it.'" Lewis v. Richards, 107 F.3d 549 (7th Cir. 1997) (quoting McGill v. Duckworth, 944 F.2d 344, 348 (7th Cir. 1991)). See also Pavlick v. Mifflin, 90 F.3d 205, 207-08 (7th Cir. 1996) ("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") (quoting Farmer, 511 U.S. at 837). As noted above, inadvertent error, negligence or even gross negligence are insufficient. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996); Snipes, 95 F.3d at 590-91.

In this case, there is no evidence showing that defendant had actual knowledge that allowing plaintiff and Kuralle in the same room would create a substantial risk of serious harm. Although both of their names were on a list posted in a control center, there is no basis for assuming that defendant read it or that she remembered their names at the time she

allowed Kuralle to fill the vacancy. Normally, a prisoner proves actual knowledge "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). Here, plaintiff never complained to defendant that placing him in a room with Kuralle could be dangerous. Similarly, there is no evidence of any previous violence between plaintiff and Kuralle during the time that they were incarcerated at the jail. Without such evidentiary support, plaintiff's bald assertion that "the staff all knew of this no-contact" does not help him.

Plaintiff has submitted a report about an incident in which Kuralle yelled, "I'm gonna bash his face in every chance I see him" in reference to plaintiff. Plaintiff believes that this report supports his claim that the "jail" knew of the danger of placing him and Kuralle together. It does not. First, this report is dated October 27, 2003, approximately five months after the relevant incident. Even if the incident had taken place earlier, the report does not show that defendant was present at the time or that she ever learned of it.

The Court of Appeals for the Seventh Circuit has found an officer's reaction to a fight once it has broken out to be highly probative in the deliberate indifference inquiry. Lytle v. Gebhart, 14 Fed. Appx. 675, 679 (7th Cir. 2001). See also Schubert v. Page, 15 Fed. Appx. 342, 345 (7th Cir. 2001) (failure to intervene in known fight may be evidence of deliberate indifference). Here, as in Lytle, defendant acted immediately to help take control of the fight and stop it. She ordered both Kuralle and plaintiff to stop and grabbed

plaintiff's arm while another responding officer restrained Kuralle.

From the record evidence, a finder of fact could not infer reasonably that defendant acted with deliberate indifference. Plaintiff's submissions support this conclusion. In his response to defendant's proposed findings of fact, plaintiff did not deny that defendant did not allow him to be in the same room with Kuralle knowing or intending that an altercation would arise between them. Dft. PFOF ¶ 15, dkt. #11, at 4; Plt.'s Resp. PFOF, dkt. #17, at 1; Dellemann Aff., dkt. #12, at ¶12. Moreover, in his brief opposing defendant's motion, plaintiff argues that defendant acted negligently in failing to check the no-contact list before allowing Kuralle to enter the classroom, Plt.'s Cpt., dkt. #16, at 6 ("She [defendant] was negligent in not checking the no-contacts"), but he does not charge her with deliberately condoning the attack. Because negligence is not enough in a failure to protect case, plaintiff's own legal arguments do not support his conclusion that his Eighth Amendment rights have been violated.

Although defendant's failure to check the no contact list when approving inmates to fill in program vacancies might constitute a lapse in sound judgment, plaintiff does not have a constitutional right to be free from negligent errors on the part of his handlers. Mayoral, 245 F.3d 938. I need not determine whether defendant is entitled to protection under the doctrine of qualified immunity; plaintiff's claim fails on the merits.

ORDER

IT IS ORDERED that defendant Sally Dellemann's motion for summary judgment on plaintiff Scott Joseph Blom's claim that she violated his constitutional rights by failing to protect him against an attack by a fellow inmate is GRANTED. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 1st day of June, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge