IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DEE FARMER, Plaintiff, v. EDWARD BRENNAN, ET AL., Defendants.	Case No. 91-C-716-S

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Defendants, by their attorneys, Kevin C. Potter, United States Attorney for the Western District of Wisconsin, by J.B. Van Hollen, Assistant United States Attorney for that District, hereby submit this memorandum in support of their motion to dismiss plaintiff's complaint. Plaintiff's complaint should be dismissed for several reasons. First, defendants are entitled to qualified immunity on plaintiffs allegations. Second, plaintiff has failed to state a claim upon which relief can be granted. Finally, defendants L.E. DuBois and N.W. Smith should be dismissed as defendants in this action as this court does not have jurisdiction over the persons of L.E. DuBois or N.W. Smith nor were L.E. DuBois or N.W. Smith afforded proper personal service.

Plaintiff alleges a violation of his Eighth Amendment rights against cruel and unusual punishment but has failed to state a claim upon which relief could be granted. These

allegations are defective in that they are vague and conclusory. "Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss." Ivey v. Board of Regents of the University of Alaska, 673 F.2d 266, 268 (9th Cir. 1982), citing, Johnson v. Wells, 566 F.2d 1016 (5th Cir. 1978); Kennedy v. H & M Landing, Inc., 529 F.2d 987 (9th Cir. 1976). Plaintiff fails to allege that any of the defendants participated in acts suggesting deliberate and unconscionable conduct. Prison officials are not liable under the Eighth Amendment unless they know that an inmate is in imminent danger of attack and decide to do nothing. Campbell v. Greer, 831 F.2d 700 (7th Cir. 1987). Prison officials' negligent failure to protect inmates from harm inflicted by other inmates is not an Eighth Amendment violation. Davidson v. Cannon, 474 U.S. 327 (1986). The burden upon plaintiff in showing "deliberate indifference" is not simply one of showing inattention or inadvertence, but rather plaintiff must show that a prison official acted with "actual intent or reckless disregard". Wilks v. Young, 897 F.2d 896, 898 (7th Cir. 1990). The Seventh Circuit Court of Appeals has accordingly adopted the criminal recklessness standard in evaluating a defendants conduct under an Eighth Amendment cause of action. Santiago v. Lane, 894 F.2d 218, 121 No. 7 (7th Cir. 1990). Objective knowledge of a risk of harm by itself is not enough to impose liability under the Eighth Amendment; rather, as an additional requirement, the

risk must be substantial. Wilks, 897 F.2d at 898 No. 3, citing, Benson v. Cady, 761 F.2d 335, 339-340 (7th Cir. 1985). In the instant case, there are no allegations by plaintiff of actual intent or reckless disregard on the part of any of the defendants.

Furthermore, the declaration of N.W. Smith confirms that there was no indifference to plaintiff's security consideration. Inmate Farmer was classified from September 17, 1987, to April 4 1990, as a security classification level 5 inmate under Bureau of Prison's Policy. Both FCI-Oxford and U.S.P. - Terra Haute are level 4 institutions. While U.S.P. - Terra Haute still retains the "penitentiary" title conferred by Congress many years ago, it was in fact a security level 4 institution by policy at the time of this transfer. (Smith Declaration at Par. 4.)

In addition to plaintiff's failure to state a claim defendants are entitled to qualified immunity. In Harlow v. Fitzgerald, the United States Supreme Court held,

> "that government officials performing discretionary functions, generally are shielded from liability for civil damages in so far as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. [citation omitted]"

Harlow, 457 U.S. 800, 818 (1982).

In Anderson v. Creighton, 483 U.S. 635 (1987), the Court outlined the specificity required by the "established constitutional right" in the immunity context.

> "It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been `clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the right. This is not to say that an official action is protected by qualified immunity unless the very action in question has been previously unlawful, [citation omitted] but it is to say that in light of pre-existing law the unlawfulness must be apparent. [citation omitted]"

Anderson, 483 U.S. at 640.

The plaintiff bears the burden of establishing the existence of the allegedly "clearly established" constitutional rights. Abel v. Miller, 824 F.2d 1522, 1534 (7th Cir. 1987), citing, Davis v. Scherer, 468 U.S. 183, 197 (1984). Qualified immunity is intended to protect, "all but the plainly incompetent or those who knowingly violate the law." Anderson, 483 U.S. at 638 quoting, Malley v. Briggs, 475 U.S. 335, 341 (1986).

> "The defendants are immune if, on an objective basis, it is obvious that a reasonably competent prison official could have concluded that...(their conduct)...did not violate the plaintiff's clearly established constitutional rights."

Abel, 824 F.2d at 1522.

In the instant case, the declarations of the defendants show that their conduct meets and surpasses, this objective standard of reasonableness and accordingly they should be entitled to qualified immunity.

Defendants L.E. DuBois and N.W. Smith should also be dismissed as defendants in this action because neither party was

personally served as is required under Rule 4(d)(1) and this court therefore lacks jurisdiction over them.

When a suit is brought against a federal official in his individual capacity, Rule 4(d)(5) does not govern the method of service, but rather service should be made under Rule 4(d)(1). Parsons v. Aguirre, 123 F.R.D. 293, 295 (N.D. Ill. 1988),

> A wealth of case law lends support to this position. For example in Micklus v. Carlson, 623 F.2d 227 (3d Cir. 1980), the court stated that,
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> > [t]he applicable method of service under Rule 4(d) depends upon the theory under which a party proceeds. Where money damages are sought from a public official in his individual capacity, service by certified mail under Rule 4(d)(5) is insufficient ... Instead, the plaintiff must proceed under the terms of Rule 4(d)(1) and effect personal service.
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> 632 F.2d at 240. (footnotes and citations omitted); see id. at 240-241; see also Griffith v. nixon, 518 F.2d 1195, 1196 (2d Cir.) (to extent damages sought against federal officer personally, Rule 4(d)(5) not applicable), cert denied 423 U.S. 995, 96 S.Ct. 422, 46 L.Ed.2d 369 (1975);. . . McCartney v. Hoover, 151 F.2d 694 (7th Cir. 1945); Waller v. Butkovich, 584 F.Supp. 909, 925-926 (M.D. N.C. 1984) (Federal officers sued in individual capacities not personally served under Rule 4(d)(1), though United States was served under Rules 4(d)(4) and 4(d)(5); dismissal therefore was warranted) ... Green v. Laird, 357 F.Supp. 227, 229 (N. D. Ill. 1973) ("[T]he proper manner of serving process on government officials under Rule 4(d) depends on whether the suit contemplates individual liability [Rule 4(d)(1)] or is limited to relief that would affect the defendants only in their official capacities [Rule 4(d)(5)] . . . ").

Parsons, 123 F.R.D. at 295-296.

L.E. DuBois and N.W. Smith state that they did not receive summonses and complaints in this case. They were informed the summonses and complaints were received by the Staff at the North

Central regional office by way of U.S. mail, certified, return receipt requested, however, they did not acknowledge receipt of the complaints or summonses. (DuBois and Smith Declarations at Par. 2). Clearly, this procedure did not comply with the requirements of Rule 4, Federal Rules of Civil Procedure.

> "Unless a defendant voluntarily makes an appearance or waives defective service, a Federal Court is without jurisdiction to render personal judgment against the defendant if service of process is not made in accordance with applicable federal or state statutory requirements. [citations omitted] This principal remains true despite any actual notice the defendant may have of the lawsuit. [citations omitted]"

Sieg v. Karnes, 693 F.2d 803, 807 (8th Cir. 1982). There is no valid service of process, despite the defendants' knowledge of the suit, if the rules governing service of process are not followed because the rules serve a dual purpose of giving the court jurisdiction over the person of the defendant as well as notifying him of the lawsuit. Bennett v. Circus U.S.A., 108 F.R.D. 142, 148 (N.D. Ind. 1985). Actual notice alone is insufficient to give the court the jurisdiction necessary to allow it to enter a judgment against the defendant. Bennett, 108 F.R.D. at 148.

In addition to improper service, this court lacks personal jurisdiction over defendants L.E. DuBois and N.W. Smith because they do not have sufficient contacts with the forum state as is required in International Shoe. International Shoe v. Washington, 326 U.S. 310 (1945). Defendants, in the instant

case, must have sufficient minimum contacts with the State of Wisconsin in order for the court to exercise jurisdiction over them. Textor v. Board of Regents of Northern Illinois University, 711 F.2d 1387, 1392 (7th Cir. 1983). In Wisconsin, the plaintiff clearly bears the burden of showing that defendants had requisite contact with the state (District) to justify the exercise of the court's long arm jurisdiction. Intern Placement and Recruiting v. Reagan Equipment, 592 F.Supp 1252, 1255 (E.D. Wis. 1984), citing Schmitz v. Hunter Machinery Company, 89 Wis.2d 388, 396 (1979); Afram v. Balfour Maclaine Inc., 63 Wis.2d 702, 707 (1974). Defendants realize that the provisions of the long arm statute are to be liberally construed in favor of exercising in personam jurisdiction. Brunswick Corp. v. Suzuki Motor Company Ltd., 575 F.Supp 1412, 1416 (E.D. Wis. 1983). However, the act requires "substantial" activities which are "continuous and systematic". Brunswick, 575 F.Supp at 1417. The Wisconsin Supreme Court has identified five factors influencing whether contacts of the forum and state are substantial and not isolated:

(1) The quantity of the contacts;

(2) the nature and quality of the contacts;

(3) the source of the contacts and there connection with the cause of action;

(4) the interest of the State of Wisconsin; and

(5) the convenience of the parties.

Brunswick, 575 F.Supp at 1417, citing, Nagel v. Crain Cutter

Company, 50 Wis.2d 638, 648 (1970). "These factors are to be balanced by the court with an eye towards determining reasonableness of subjecting the non resident defendant to suit in Wisconsin." Brunswick, Supra.

Plaintiffs cannot demonstrate to this court that defendants L.E. DuBois and N.W. Smith have these sufficient contacts. Neither L.E. DuBois nor N.W. Smith is a resident of Wisconsin nor do they own property in Wisconsin, operate a business in Wisconsin, or have any other connection with or within the State of Wisconsin. (DuBois Declaration at Par. 4 and Smith Declaration at Par. 5) Defendants DuBois and Smith have only the most general involvement with FCI-Oxford by exercising supervisory responsibilities of subordinate staff to conduct investigations and process transfers for inmates. (DuBois and Smith Declarations at Par. 1)

In conclusion, plaintiffs have failed to personally serve or establish the Court's personal jurisdiction on defendants L.E. DuBois and N.W. Smith. In addition, they have failed to state a claim upon which relief could be granted on the Eighth Amendment claim. Furthermore, plaintiff did not establish that his constitutional rights were violated and that defendants knew that what they were doing violated that right. Accordingly,

defendants respectfully request that the Court dismiss the action.

Dated this 28th day of October, 1991.

Respectfully submitted,

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By:

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