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

DEE FARMER,

Plaintiff,

vs.

EDWARD BRENNAN, DENNIS KURZYDLO, LARRY E. DUBOIS and N.W. SMITH,

Defendants.

CIVIL ACTION
NO. 91-C-716-S

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OPPISITION OF DEFENDANTS' MOTION TO DISMISS

Irrespective of the Plaintiffs' First Amended Complaint, the defendants' are not entitled to dismissal in this case for the reasons setforth in their motion or otherwise, as demonstrated below:

I. Factual Background

This is a civil action challenging the defendants' actions of designating the plaintiff, a feminine male-to-female transsexual to the violent environment of a penitentiary, knowing said evironment to be violent and a threat to plaintiffs' saftey. As a result of the defendants' deliberate indifference to plaintiffs saftey by implementing said designation and their misclassification plaintiff was sexually assualted.

The Complaint, as amended seeks injunctive relief and monatory damages.

II. Standard of View

The Supreme Court in Conley v. Gibson, 355 U.S. 41 (1957) setforth the stndard for determining a motion to dismiss pursuant to Rule 12, Federal Rules of Civil Procedure. The standard, a very rigorous one, permitts the Court to dismiss a complaint for failure to state a claim only when there is no set of facts upon which a plaintiff can prevail.

The defendants' claim in the instant case, there are no allegations by plaintiff of actual intent or reckless disregard on the part of any of the defendants'. (Brief at 3)

Though defendants' properly recognize that showing deliberate indifference is not one simply of showing inattention, inadvertance or negligence, but rather plaintiff must show that the defendants' acted with "actual intent or reckless disregard" Wilks v. Young, 897 F.2d 896, 898 (7th Cir. 1990).

Recently, addressing prison officials liability in sexual assualts upon inmates, the Seventh Circuit Court of Appeals in McGill v. Duckworth, 50 CrL 1014 (7th Cir. 1991) stated:

> A prisoner interest in saftey does not lead to absolute liability, however, any more than the state is the insurers medical care for prisoners. Not only Estelle but also more recent cases such as Wilson v. Seiter, 111 S.Ct. 2321, 49 CrL 2264 (US Sup. Ct 1991) and Whitley v. Albers, 475 U.S. 312, 38 CrL 3161 (1986) hold that the Eighth Amendment addresses only punishment. Whether an injury inflicted by fellow prisoners, or the pain of a medical condition, is "punishment" depends on the mental state of those who cause or fail to prevent it. If prison officials put McGill into the IDU so that a bigger inmate would have a better chance to rape him, then it is as if

> the officials inflicted that pain and humiliation themselves. Other mental states, including total indifference to risks, come so close to deliberateness that courts treat them alike. Thus, judges speak of "deliberate indifference" or "recklessness" as the functional equivalent of intent. Although there are shadings of meaning here, <u>total unconcern for the prisoners' welfare - coupled with serious risk - is the functional equivalent of wanting harm to come to the prisoner</u>.

Accepting the facts in the Complaint as true, as the court must in determining if the plaintiff has failed to state a claim upon which relief can be granted, in this instance the Complaint reveals: (1) Defendants' knew that there is a serious risk of harm to transsexual offenders, whom display feminine characteristics, if they are housed in any all male institution; however, the risk of harm increases to substantial proportions as the level of the instutition is higher and the violence within the institution is more frequent; (2) Defendants' knew that plaintiff was a transsexual, who displayed feminine charcteristics, both mental and physically. Further, because of these facts alone she was previously determined to be inappropiate for housing in a penitentiary enviornment where there is a greater risk of sexual assualts and threats to her life; (3) Defendants' knew that the United States Penitentiary in Terre Haute, Indiana has a violent environment with a history of assualts, drugs and rapes; (4) Defendants' also knew that to place the plaintiff in said environment she would be assualted assualted, not to mention the substantial sexual pressure she would be subjected to; (5) Completely aware of the environment at USP-Terre Haute and the substantial risk

to the plaintiffs' saftey if she were placed in said facility they designated her to USP-Terre Haute and after being released in the general population, in less than a week she was sexually assualted. (Complaint Id.)

In other words, the Complaint alleges that the Defendants' knew that if they placed the plaintiff in a penitentiary environment including USP-Terre Haute she would be raped solely because of her transsexuality. Nevertheless, they were totally indifferent to her saftey when they had actual knowledge of a serious risk to plaintiffs' saftey and not only did nothing to prevent the danger, but created the situation themselves. These are the very type of actions the Seventh Circuit Court of Appeals in McGill v. Duckworth, supra recognized as stating a claim against prison officials under the Eighth Amednment.

Further, while the Bureau of Prisons (BOP) has the duty to "provide for protection, intruction and discipline of all persons charged with and convicted of an offense against the United States", 18 U.S.C. 4042, plaintiff bears the burden and has succeeding in meeting her obligation of proving "deliberate indifference" on the part of Bureau of Prisons staff who are charged with the duty to keep inmates free of harm. Johnson v. United States, 285 F.Supp. 372 (E.D.Va. 1966) Though, this duty is not absolute it requires the exercise of ordinary deligence that was totally disregarded when the defendants' placed the plaintiff in the violent environement of a penitentiary. Jones v. United States, 534 F.2d. 53 (5th Cir.) cert. denied, 424 U.S. 978 (1976).

Clearly, placing a transsexual into the general population of a penitentiary "could pose significant threat to internal security in general and to plaintiff in particular." (quoting Farmer v. Carlson, 685 F.Supp 1335, 1342 (M.D. Pa. 1988) citing Lamb v. Maschner, 631 F.Supp 351 (D. Kan 1986) also see Supre v. Ricketts, 792 F.2d 958, 960 (10th Cir. 1986) (transsexual in protective custody because of feminine characteristics)

Accordingly, under the standard of Conley v. Gibson, supra and McGill v. Duckworth, supra the plaintiffs' complaint alleging that the defendants' were deliberate indifferent to her saftey states a claim upon which relief can be granted.

III. SECURITY LEVEL OF THE INSTITUTION DOES NOT EFFECT THIS CAUSE OF ACTION.

Defendants' point-out "inmate Farmer was classified from September 17, 1987 to April 4, 1990, as a security classification level 5 under Bureau of Prisons policy. Both FCI-Oxford and USP-Terre Haute are level four institutions. While USP-Terre Haute still retains the penitentiary title conferred by Congree many years ago, it was in fact a level four institution. (Brief at 3)

Though, the security level of the institution may go to the weight of the evidence as to whether the defendants' were deliberate indifferent to plaintiff, a peroperate transsexual saftey by recommending and ultimately confining her in violent environement of a penitentiary, USP-Terre Haute, the security level of the institution is certainly not decisive of the issue. Noteworthy, is that the defendants' does not state that USP-Terre Haute is not a penitentiary; rather, they state it retains the penitentiary title, but is in fact a level four

institution. Indeed they donot and cannot state that because USP-Terre Haute is a security level four institution it is not a penitentiary.[1] The issue of whether the defendants' exhibited "reckless disregard" to the plaintiffs' saftey can only be concluded by knowing whether the defendants willfully placed the plaintiff in USP-Terre Haute with a knowledge that her saftey would be endangered. Plaintiff alleges in her complaint that the defendants' knew that she would sexually assualted if they placed her at USP-Terre Haute, despite its' assigned security level.

Furthermore, though USP-Terre Haute was desginated as a security level four institution, the court can decipher that the security level of the institution does not necessarily predict the type of inmates confined therein or its' environment. Inasmuch according to the Bureau of Prisons policy FCI-Oxford and USP-Terre Haute are both level four institutions, however defendants transferred plaintiff to USP-Terre Haute because it offerred greater security. In fact, USP-Terre Hauted housed, both maximum security and custody level inmates. Ironically, USP-Terre Haute is now a High Level institution, which under the former Bureau of Prisons policy would have been a security level five or six. Nevertheless, USP-Terre Haute did and continues

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1 For the purposes of this action a penitentiary is one that has a violent environment.

to have a violent environment with a history of assualts, murders, rapes and drugs. Defendants' attempt to claim that to place the plaintiff in this environment would not jeporadize her saftey merely because the institution is assigned as a secuirty level four has absolutely no foundation in fact or law. Accordingly, defendants argument is without any merit.

IV. DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY

Defendants argue somewhat without particularzation that they are entitled to qualified immunity. In Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) the Supreme Court stated:

> "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."

The Supreme Court in Anderson v. Creighton discussed the qualified immunity defense by stating: "this is not to say that an official action is protected by qualified immunity unless the very action in question has been previously held unlawful . . . . but it is to say that in light of pre-existing law the unlawfulness must be apparent." Anderson, 483 U.S. at 640

It cannot exactly be said that the defendants' placement of the plaintiff in USP-Terre Haute which she alleges has a violent environment, including a history of assualts, rapes and drugs does not violate a clearly established right to her guarntee of saftey. In fact, the court in Farmer v. Carlson, supra upheld prison officials contentions that the placement of

the very plaintiff in this case, in a penitentiary would threaten her life solely because of her transsexuality. (see also, cases cited therein) The very type of environment that prison officials contended they could not place the plaintiff in because of her feminine characteristics which would cause danger to her life, is the sametype of institution the plaintiff claims that the defendants' subsequently placed her in, even if it may be on a somewhat lesser scale.

Moreover, in the case of Moysten v. Carlson, CV 82-1108 RAR (S.D. Ca.) a federal preoperative male-to-female transsexual prisoner claimed that the Bureau of Prisons was deliberate indifferent to her saftey by designating her to an all male institution, never a penitentiary as the plaintiff contends, where she was subject to harassment, sexual pressure and assualts by fellow inmates. The federal district court granted a preliminary injunction and later the case was settled which included the placement of the plaintiff/Moysten in a co-correctional facility.

The results on the Moysten case is consistent with Bureau of Prisons, Health Service Manual which provides that transsexual offenders ordinarily will be placed in co-correctional facilities. It would be only reasonable that Bureau officials instituted this policy to ensure the saftey of the transsexual.

Nevertheless, going back to the Supreme Courts' ruling in Anderson, supra pre-existing law establishes beyond any doubt that inmates have a right to saftey and when factors are present that any reasonable person would know to be a danger to an inmate, prison officials must take steps to relieve any risk of harm.

There is a slew of cases on the issue and though very few directly involve transsuals there are others that come so close, such as homosexuals and youthful offenders. See e.g., Blizzard v. Quillen, 579 F.Supp 1446 (D.Del 1984) (failure to protect inmate informant); Matzker v. Herr, 748 F.2d 1142 (7th Cir. 1984) (failure to protect white inmate); Glover v. Alabama Dept. of Corrections, 734 F.2d 691 (11th Cir. 1984) (prison officials created risk for inmate by his statement and then failed to protect him) Quinn v. Manuel, 767 F.2d 174 (5th Cir. 1985) (failure to protect suicide inmate) Thomas v. Booker, 762 F.2d. 654 (8th Cir. 1985)

Relevent to this also is the case of Martin v. White, 742 F.2d 469 (8th Cir. 1984) in which the Court held that history of assualts at institution created a pervasive risk that plaintiff inmates would be sexually assualted. Cf. Porn v. White, 762 F.2d 635 (8th Cir. 1985) (sexually assualted white inmate). also see, Greene v. Meese, 875 F.2d 639, 641 (7th Cir. 1989) (acknowledging that Bureau of Prisons will likely deny requests for relief from disciplinary sanctions allegedly imposed in retailation for defendants' rejection of homosexual overtones); Roland v. Johnson, 856 F.2d 764, 769-70 (6th Cir 1988) (prison officials failed to effectuate policy to prevent sexual assault upon inmate).

Recently, the Secound Circuit Court of Appeals recognized the risk of placing certain inmates in particular prison environments in United States v. Lara, 905 F.2d 599 (2cnd Cir. 1990) the Court held that extreme vunerability of bisexual, not transsexual as the plaintiff, federal inmate who had been sexually assualted

required downward departure in sentencing guidlines. See also, United States v. Gonzales, 50 CrL 1024 (C A 2 1991) a young vunerable federal prisoner would probably be sexually assualted. In these two cases the court was able to recognize a potential threat to certain offenders and certainly prison officials themselves should be able to recognize a threat to particular inmates, especially transsexuals.

These cases are only the skimming of pre-existing law that clearly establishes placing a feminine appearing, preoperative transsexual in a penitentiary that houses violent inmates and has a history of assualts would endanger their life. That, any reasonable person could recognize the pervasive risk of harm. Thus, the defendants' placement of the plaintiff at USP-Terre Haute violated her established right to saftey.

Accordingly, Defendants' argument is without merit, has no basis in fact or law, and is superficial. Thus, they are not entitled to qualified immunity.

V. THE COURT HAS PERSONAL JURISDICTION OVER EACH DEFENDANT

This court in the case of Farmer v. Moritsugu, 742 F.Supp 525 (W.D.Wi 1990) in a similar argument as raised by the defendants here, that the Court lacks personal jurisdiction over them because they were not personally served with a copy of the summons and complaint, ruled that though Moritsugu office was in the District of Columbia the U.S. Marshals' could properly effect service of process by certified mail return reciept requested.

Nonetheless, because plaintiff is a federal prisoner proceeding pro'se if the Court finds that defendants' have not been properly served the U.S. Marshals should be ordered to properly serve the Defendants inasmuch the plaintiff is proceeding pro'se and it would not serve the interest of justice to dismiss this case for ineffective process, especially since the plaintiff was not directly involved in the process nor the determination as to how the defendants' would be served.

As the Defendants' properly recognize this Court may acquire personal jurisdiction over the defendants' whom reside outside the Courts' judicial district through Wisconsin long-arm statute. International Shoe v. Washinton, 326 U.S. 310 (1945). Defendants recognize that the provisions of the long-arm statute are to be liberally construded in favor of exercising in personaum jurisdiction. Bruniswick Corp. v. Susuki Motor Company, Ltd, 573 F.Supp 1412, 1416 (E.D. Wis 1983) However, they attempt to avoid the consequences of this concession by eluding in an unqualified manner that neither Defendant DuBois or Smith have substantial contacts of a continous and systematic nature with FCI-Oxford.

Not surprisingly, because neither DuBois or Smith is currentky an employee at the Bureau of Prisons North Central Region, they would no longer have any contact with the State of Wisconsin. However, during the times of their actions or omissions as described in the Complaint, as amended, both DuBois and Smith had substantial contacts with FCI-Oxford.

As Correctional Services Administrator, Defendant Smith handled transfers from FCI-Oxford on a continous and systematical

basis. Likewise, as Regional Director, Defendant DuBois had substantial contact with FCI-Oxford. He handled all of the administrative appeals from FCI-Oxford, audits, controlled housing placements, etc. . A curtosey review of the Code of Federal Regulations regarding the Bureau of Prisons will establish that the Regional Director has substantial duties with respect to each institution in said region. That, these duties require frequent contact with the institutions, respectively and cannot be delegated. Furthermore, it is somewhat ironic that Defendant DuBois would claim that this Court cannot exercise personal jurisdiction over hin inasmuch the Court previously exercised personal jurisdiction over him in the case of Farmer v. Haas, 927 F.2d 607 (7th Cir. 1991) (Table, text available on WESTLAW)

In conclusion, each of the Defendants' were aware of the plaintiffs' transsexuality, had knowledge of the pervasive risk of harm she would be subjected to in a penitentiary environment and because of their inactions or actions as described in the Complaint, as amended plaintiff was placed in said environment and in less than one week was raped. These facts, establish jurisdiction of the Court of each defendant.

VI. CONCLUSION

For all the foregoing reasons plaintiff as asserted a claim upon which relief can be granted by establishing inter alia that each of the defendants were involved in the alleged "reckless disregard" for her saftey resulting in her being sexually assualted. Thus, the defendants ar not entitled to qualified immunity and

the Court has personal jurisdiction of each defendant.

WHEREFORE Plaintiff prays this Honorable Court to:

(a) Deny the Defendants' Motion to Dismiss, and

(b) Any further and different relief this Court deems appropiate.

Respectfully submitted,

Dee Farmer

Dee Farmer
Register Number 23288-037
United States Medical Center
for Federal Prisoners
Post Office Box 4000
Springfield, Missouri 65808

CERTIFICATE OF SERVICE

The undersign hereby certify that a copy of the foregoing was mailed this 4th day of December, 1991, to:

J.B. Van Hollen, Assistant
United States Attorney
Room 420, U.S. Courthouse
120 North Henry Street
Madison, Wisconsin 53703

mailed on 9th

Dee Farmer