

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

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DOCKET NUMBER
U.S. DISTRICT COURT WEST. DIST. OF WISCONSIN
MAR 23 1992
FILED
JOSEPH W. SKUPNIEWITZ, CLERK
CASE NUMBER

DEE FARMER,

Plaintiff,

v.

ORDER

EDWARD BRENNAN, DENNIS KURZYDLO,
LARRY E. DUBOIS, N. W. SMITH,
MICHAEL QUINLAN and CALVIN EDWARDS,

91-C-716-S

Defendants.

Plaintiff Dee Farmer was allowed to proceed in forma pauperis on his Eighth Amendment claim against defendants Edward Brennan, Dennis Kurzydlo, Larry E. DuBois, N.W. Smith, Michael Quinlan and Calvin Edwards. Plaintiff alleges in his complaint that the defendants were deliberately indifferent to his safety when they transferred him to the United States Penitentiary, Terre Haute, Indiana (USP-Terre Haute) on March 9, 1989.

An amended scheduling order was entered in the above entitled matter on December 20, 1991 requiring dispositive motions to be filed not later than February 15, 1992. Defendants timely moved for summary judgment pursuant to Federal Rules of Civil Procedure, Rule 56, on February 18, 1992 the first work day after February 15, 1992. The defendants submitted proposed findings of fact and conclusions of law, affidavits and a brief in support of the motion.

Copy of this document has been

mailed to the following: _____

Pltf. Farmer & AUSA Van Hollen

this 20 day of March, 19 92

By Ella Slavcheva
Secretary to Judge John C. Shabaz

Plaintiff's response to defendants' motion for summary judgment was to be filed not later than March 9, 1992. On March 9, 1992 defendants received a document entitled, "Rule 56(f) motion in response to defendants' untimely motion for summary judgment". This document which was not received by the Court until March 18, 1992 requests that defendants' motion for summary judgment be denied until plaintiff receives defendant Quinlan's response to his second request for documents which was to be filed not later than March 14, 1992. Since these documents, not shown by plaintiff to be necessary to oppose defendants' motion for summary judgment, were not to be filed until after both plaintiff's dispositive motion and brief in opposition to defendants' motion for summary judgment, plaintiff's Rule 56(f) motion will be denied.

On March 17, 1992 defendants filed a motion for protective order staying discovery until their motion for summary judgment on the issue of qualified immunity has been decided. Defendants' motion for a protective order will be granted.

Plaintiff also filed a brief in opposition to defendants' motion for summary judgment, an affidavit and a cross motion for summary judgment on March 18, 1992. Although plaintiff's brief in opposition to defendants' motion for summary judgment and his cross motion for summary judgment are untimely they will be considered.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if

not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding defendants' motion for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff is an inmate currently confined at the United States Medical Center for Federal Prisoners, Springfield, Missouri (USMCFP). He was confined at the Federal Correctional Institution, Oxford, Wisconsin (FCI-Oxford) from January 27, 1988 until March 9, 1989.

At all times material to this action defendant Edward Brennan was the warden and defendant Dennis Kurzydlo was a unit manager at FCI-Oxford. Defendant Calvin Edwards was the warden at USP-Terre Haute from December 1987 until May 1989.

At all times material to this action defendant Larry E. DuBois was the Regional Director and defendant N.W. Smith was the Correctional Services Administrator of the North Central Region, Federal Bureau of Prisons. Defendant J. Michael Quinlan was the Director of the Federal Bureau of Prisons.

On January 25, 1989 plaintiff was found guilty by a disciplinary hearing officer at FCI-Oxford of Attempting to Give Anything of Value to Another. Disciplinary sanctions included a recommendation for a disciplinary transfer. On January 31, 1989 defendant Kurzydlo prepared plaintiff's progress report and on February 6, 1989 he requested that plaintiff be transferred to USP-Terre Haute. Defendant Kurzydlo believed that USP-Terre Haute was well equipped to handle the problems and needs presented by plaintiff.

At the time of plaintiff's transfer on March 9, 1989 defendant Calvin Edwards was the warden at USP-Terre Haute. Plaintiff never personally or through correspondence advised defendant Edwards that he was concerned for his safety. Defendant Edwards had no reason to believe that plaintiff could not function safely within the population at USP-Terre Haute. None of the defendants had actual knowledge that there was a threat to plaintiff's safety at USP-Terre Haute.

On April 1, 1989 plaintiff alleges that he was sexually assaulted by another inmate. On April 7, 1989 plaintiff was placed in administrative detention pursuant to a directive from the North Central Regional Office pending a hearing concerning his HIV positive status.

CONCLUSIONS OF LAW

Plaintiff claims that his Eighth Amendment rights were violated by the defendants when they transferred him to USP-Terre Haute on March 9, 1989. Since there is no genuine dispute of any material fact this case can be decided as a matter of law. The failure of prison officials to protect an inmate from assault by another inmate may violate an inmate's Eighth Amendment rights if the officials were deliberately indifferent to a strong likelihood of attack. Meriweather v. Faulkner, 821 F. 2d 408, 417 (7th Cir. 1987), cert. denied 108 S.Ct. 311 (1987).

Prison officials are liable under the Eighth Amendment if they had actual knowledge of a threat to an inmate's safety and failed to take action to prevent the danger. McGill v. Duckworth, 944 F. 2d 344, 349 (7th Cir. 1991). A prisoner normally proves actual knowledge of impending harm by showing that he complained to prison officials about a specific threat to his safety. Id. The officials' failure to prevent an attack of an inmate must be deliberate or reckless in a criminal sense. Santiago v. Lane, 894 F. 2d 218, 221 (7th Cir. 1990).

Defendants did not know that plaintiff would be in imminent danger of attack if he were transferred to USP-Terre Haute.

Plaintiff never expressed any concern for his safety to any of the defendants. Since defendants had no knowledge of any potential danger to plaintiff, they were not deliberately indifferent to his safety. Accordingly plaintiff's Eighth Amendment rights were not violated and defendants' motion for summary judgment will be granted. Plaintiff's cross motion for summary judgment will be denied.

Plaintiff has filed motions for telephonic depositions, photographic discovery and to compel discovery. These motions must be denied as moot. Plaintiff's motions for extension of time to name witnesses, file documents and exclude certain evidence are also denied as moot.

ORDER

IT IS ORDERED that defendants' motion for a protective order is GRANTED.

IT IS FURTHER ORDERED that plaintiff's Rule 56(f) motion and cross motion for summary judgment are DENIED.

IT IS FURTHER ORDERED that plaintiff's motion for telephonic depositions, photographic discovery and to compel discovery are DENIED as moot.

IT IS FURTHER ORDERED that plaintiff's motions to name additional witnesses, file documents and exclude certain evidence are DENIED as moot.

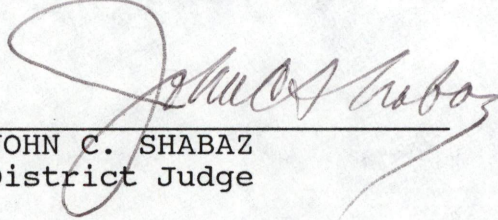
IT IS FURTHER ORDERED that defendants' motion for summary judgment is GRANTED.

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IT IS FURTHER ORDERED that judgment be entered in favor of the defendants and against the plaintiff DISMISSING his complaint and all claims contained therein with prejudice and costs.

Entered this 20th day of March, 1992.

BY THE COURT:



JOHN C. SHABAZ
District Judge