

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

DEE FARMER,

Plaintiff,

v.

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

Defendants.

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NUMBER

U.S. DISTRICT COURT  
WEST. DIST. WISCONSIN

NOV 10 1994

FILED  
JOSEPH W. SKIDMORE, CLERK

CASE  
NUMBER

MEMORANDUM AND ORDER

91-C-716-S

Plaintiff Dee Framer claims that the defendants Edward Brennan, Dennis Kurzydlo, Larry E. DuBois, N.W. Smith, Michael Quinlan and Calvin Edwards violated his Eighth Amendment rights. He alleges that they 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.

On August 22, 1994 defendants moved for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of fact, conclusions of law, affidavits and a brief in support thereof. On September 21, 1994 the Court ordered defendants to provide certain administrative remedy records which were filed and served on October 5, 1994. Plaintiff was to respond to defendants' pending motion for summary judgment not later than November 1, 1994 and has not responded to date.

Copy of this document has been  
provided to: Morano,

Orchard, Reisterer

this 10 day of Nov, 1994.

By L. Jensen

Deputy Clerk



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 pleadings as plaintiff has, 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 Dee Farmer is currently incarcerated at the Federal Correctional Institution, Butner, North Carolina. He was incarcerated at the Federal Correctional Institution, Oxford,



Wisconsin (FCI-Oxford) from June 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 the United States Penitentiary, Terre Haute, Indiana (USP-Terre Haute) from December 1987 until May 1989. 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.

The Federal Bureau of Prisons utilizes the Security Designation and Custody Classification process to classify inmates and institutions. In 1988 and 1989 both FCI-Oxford and USP-Terre Haute were designated as security level "4" institutions. An institution's security level is based on security factors such as gun towers, perimeter barriers, detection devices, internal security, types of housing and staffing patterns.

An inmate's security level is based on the severity of offense behavior, presence/non-presence of detainer, projected length of incarceration, types of prior commitments, history of violence, escapes and institutional adjustment. Between September 17, 1987 to April 4, 1990 plaintiff was classified as a level "5" inmate.

On February 6, 1989 plaintiff's case manager at FCI-Oxford requested a transfer for plaintiff as a result of his failure to obey institution rules. He submitted the request to the Regional Office. Mr. Bell, Assistant Correctional Services Administrator,



North Central Region recommended plaintiff be transferred to USP-Terre Haute. This recommendation was approved by Mr. Sniezek, Correctional Programs Administrator who noted that plaintiff's physical appearance had been surgically altered to make him appear less masculine. Mr. Skaggs, special assistant to the Regional Director, recommended that plaintiff be transferred to USP-Terre Haute because of his feminine characteristics. Acting Regional Director, Mr. Lundoff approved plaintiff's disciplinary transfer to USP-Terre Haute.

Plaintiff could have been transferred consistent with his security level "5" to any security "5" institution. He was transferred to USP-Terre-Haute, a security level "4" institution for the purpose of placing him in a different environment consistent with his individual security needs. Plaintiff was transferred to USP-Terre Haute on March 9, 1989.

Defendants Brennan and Kurzydlo had no reason to believe that plaintiff would be subjected to a substantial risk of harm as a result of his transfer to USP-Terre-Haute. Defendants DuBois, Smith and Quinlan had no personal involvement in the decision to transfer plaintiff.

Defendant Edwards was not involved in the decision to transfer plaintiff to USP-Terre Haute. Defendant Edwards had no reason to believe plaintiff could not function safely in the general population at USP-Terre-Haute.

The administrative remedy information submitted by defendants on October 5, 1994 indicates that in 1988, 387 administrative



remedies were filed at the USP-Terre Haute. 106 of these remedies concerned program assignments, 70 were appeals from disciplinary actions and 41 concerned problems with staff. There were 189 administrative remedies filed at USP-Terre Haute from January 1, 1989 through April 1989. Two of these administrative remedies concerned an inmate's request for protection.

#### MEMORANDUM

Plaintiff claims that the defendants violated his Eighth Amendment rights. Plaintiff may not rest upon the mere allegations of his complaint but must by affidavit or other evidence set forth specific facts showing that there is a genuine issue for trial. Rule 56 (e), Federal Rules of Civil Procedure. Plaintiff has failed to submit any factual opposition to defendants' motion. Accordingly, there is no genuine issue of fact remaining for trial.

Plaintiff and his counsel are fully aware of their responsibility to respond to defendants' motion for summary judgment and have chosen not to. They are more interested in adjournments and delay than a timely and just resolution of the matter.

In Farmer v. Brennan, 114 S.Ct. 1970, 1979, 1982 (1994) the Court stated as follows:

We hold instead that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the 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.

Prison officials charged with deliberate indifference might show, for example, that they did not know of the underlying facts indicating sufficiently substantial danger and that they were therefore unaware of a danger, or that they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent.

The issue before the Court is whether defendants knew of underlying facts from which an inference could be drawn that a substantial risk of serious harm existed for plaintiff at USP-Terre Haute in March 1989. There are no underlying facts which would in any way indicate a substantial risk of danger to plaintiff. USP-Terre Haute is a security "4" institution, the same level as FCI-Oxford. It is not a level "5" security institution as originally alleged. The administrative remedy documents submitted by defendants do not demonstrate as previously contended by plaintiff that USP-Terre Haute was a violent institution where sexual assaults occurred frequently. Defendants were not aware of any potential danger to plaintiff at USP-Terre Haute and they could not have been from the evidence presented.

Defendants did not have knowledge of underlying facts from which they could have drawn the inference that a substantial risk of serious harm existed for plaintiff at USP-Terre Haute in March 1989, nor did those underlying facts even exist. Accordingly, defendants did not violate plaintiff's Eighth Amendment rights by transferring him to USP-Terre Haute, and their motion for summary judgment will be granted.

Farmer v. Brennan, et al., 91-C-716-S

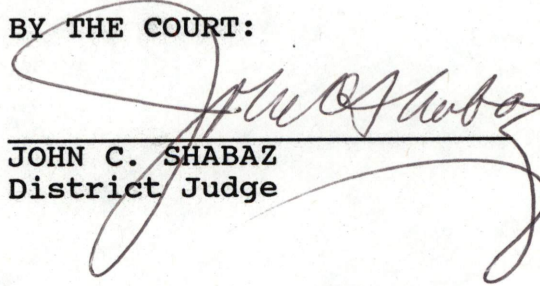
ORDER

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

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

Entered this 8<sup>th</sup> day of November, 1994.

BY THE COURT:

  
JOHN C. SHABAZ  
District Judge