IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
September 9, 2019
Lyle W. Cayce
Clerk

No. 18-30837

CLARENCE JOSEPH JASON,

Plaintiff–Appellee,

v.

ROBERT TANNER, Warden, Rayburn Correctional Center; SHANE LADNER, Lieutenant; BRADLEY PIERCE, Sergeant,

Defendants–Appellants.

Appeal from the United States District Court
for the Eastern District of Louisiana

Before SMITH, GRAVES, and WILLETT, Circuit Judges.

DON R. WILLETT, Circuit Judge:

Clarence Jason was struck by a fellow inmate on the back of the head with a yard tool that the prison issued to inmates. Jason sued four state officials under § 1983 for violating his Eighth Amendment rights, claiming deliberate indifference and failure to train. The officials asserted qualified immunity, but the district court granted it only to one official. The other three appeal that denial. We REVERSE and grant qualified immunity to all four officials.

I

Clarence Jason was an inmate at a Louisiana prison. The prison has an inmate yard that features a football field, a baseball field, and a basketball court. One day while Jason was on the yard, a fellow inmate struck him on the

Exhibit "A"

back of the head with a sling blade. A sling blade is a manual weed-cutting tool consisting of a long wooden handle with a heavy (often hooked) steel blade at the end. The attacker had a sling blade in the first place because Sergeant Master Bradley Pierce had issued it to a third (and otherwise uninvolved) inmate as part of a program in which inmates tended the yard.

The prison issued a few sling blades each morning. To check out a sling blade, an inmate handed over his ID card. (An inmate relies on his ID for meals, attending educational programs, visitation privileges, and "virtually anything else" that requires leaving his unit. So, apparently, the exchange was a meaningful accounting measure.) Meanwhile, officers supervised the inmates by making periodic rounds in the yard.

Despite this ID-exchange protocol, one inmate with a sling blade abandoned his tool and wandered off. Before the supervising officer noticed, the attacker picked up the discarded blade and cracked Jason's skull from behind. The blow caused Jason "severe head trauma."

Right before this, Jason had gotten into an argument with his attacker. But other than that, Jason alleges no previous disputes with him. The prison discovered the attack when the supervising officer, Lt. Shane Ladner, came across a pool of blood and a broken sling blade while on patrol. At that point, Ladner radioed for help, and the officers nabbed the attacker.

All of this happened despite the prison's Tool Control Policy. The warden, Robert Tanner, testified that he and several other prison officials drafted the Tool Control Policy; that the policy is reviewed annually; and that the American Correctional Association found that the tool policy complied with its standards in every audit since 1993.

The Tool Control Policy instructs the prison on how to inventory and categorize various tools—like "restricted tools" and "compound maintenance tools." Jason seemed to imply in his brief that sling blades were restricted tools.

Exhibit "A"

And the district court too determined that they were restricted tools. But according to the prison officers, "swing blades and other similar yard tools . . . (such as shovels, reel mowers, and hoes)" weren't classified as restricted. Presumably, they may have been classified as "compound maintenance tools."

In any event, under the policy, the prison stores yard tools in a locked storage room while they're not being used. The prison issued yard tools for two to three hours at a time. And the officers testified that, under the policy, they "received regular, ongoing training . . . to ensure the safety and security of the inmates."

As for monitoring the yard, Ladner and Pierce testified that

1. They both make rounds;
2. Two "dorm officers" "observe the yard through the dorm windows during their [dorm] rounds";
3. Several tower cameras at the fence line continually show yard activity;
4. The "Gate" officer has a line of sight "over the front portions of [the yard]"; and
5. So do "officers stationed at the gym, and the laundry, and the vo-tech building" as well as the Gate officer for another, nearby prison unit.

But none of these measures prevented this attack.

Going "at least as far back as 2007," there had been "no prior assaults by inmates with a yard tool at [the prison]." And "during the previous seven-year period, there [had] only been four incidents"—three with a broom and one with a mop.

II

Jason filed a § 1983 suit asserting violations of his Eighth Amendment rights. He sued:

- Shane Ladner, Lieutenant at the prison;
- Bradley Pierce, Sergeant Master at the prison;

Exhibit-"A"

III

"The denial of a motion for summary judgment based on qualified immunity is immediately appealable notwithstanding that such denial was premised upon the existence of 'material issues of fact.'"[1] We have jurisdiction to review only the district court's legal analysis of qualified immunity.[2]

We review the denial of qualified immunity de novo.[3] In doing so, we assess the scope of established rights and the reasonableness of officer conduct.[4] Summary judgment is appropriate only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[5] In reviewing, we consider only "the scope of clearly established law and the objective reasonableness" of the defendant's acts (as determined by the district court).[6] As we've explained, we "can review the *materiality* of any factual disputes, but not their *genuineness*."[7]

Materiality challenges "contend[] that taking all the plaintiff's factual allegations as true no violation of a clearly established right was shown."[8] And we must view the facts in the light most favorable to the plaintiff.[9]

IV

As the Supreme Court explained in *Harlow*, government officials have a right to qualified immunity when carrying out their duties.[10] But that

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[1] *Thompson v. Upshur Cty.*, 245 F.3d 447, 455 (5th Cir. 2001) (alteration omitted) (quoting *Behrens v. Pelletier*, 516 U.S. 299, 3134 (1996)).

[2] *Southard v. Tex. Bd. of Criminal Justice*, 114 F.3d 539, 552 (5th Cir. 1997).

[3] *Thompson*, 245 F.3d at 456.

[4] *Freeman v. Gores*, 483 F.3d 404, 410 (5th Cir. 2007).

[5] FED. R. CIV. P. 56(a).

[6] *Thompson*, 245 F.3d at 456.

[7] *Kinney v. Weaver*, 367 F.3d 337, 346 (5th Cir. 2004) (en banc) (emphasis in original) (quoting *Wagner v. Bay City*, 227 F.3d 316, 320 (5th Cir. 2000)).

[8] *Estate of Davis ex rel. McCully v. City of N. Richland Hills*, 406 F.3d 375, 379 (5th Cir. 2005).

[9] *Southard*, 114 F.3d at 552.

[10] *Harlow v. Fitzgerald*, 457 U.S. 800, 817–18 (1982).

Exhibit "A"

immunity is not absolute. Plaintiffs can go to trial if they show that the official violated their clearly established right.[11] In other words, it's a two-prong test—(1) whether the official violated a right; and (2) whether that right was clearly established.

The constitutional right here is the Eighth Amendment's protection against cruel and unusual punishment. As the Supreme Court explained in *Farmer*[12] and as we reiterated in *Williams*, "prison officials have a duty to protect prisoners from violence at the hands of other prisoners."[13] For claims against officials who failed to adequately protect an inmate and who failed to train, there are different tests. But both largely turn on the existence of "deliberate indifference."

A

The Supreme Court's 1994 *Farmer* decision held that prison officials violate their duty to protect prisoners under the Eighth Amendment "only when two requirements are met."[14] First, as an objective matter, the deprivation or harm must be "sufficiently serious."[15] Second, the official must have been deliberately indifferent.[16]

The Supreme Court defined the first element—sufficient seriousness—as the "denial of the minimal civilized measure of life's necessities."[17] Jason sustained a serious head wound. So his injury meets the first requirement of the *Farmer* standard.

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[11] *Id.*; *see also Hogan v. Cunningham*, 722 F.3d 725, 734 (5th Cir. 2013); *Ontiveros v. City of Rosenberg*, 564 F.3d 379, 382 (5th Cir. 2009).

[12] *Farmer v. Brennan*, 511 U.S. 825, 833 (1994).

[13] *Williams v. Hampton*, 797 F.3d 276, 280 (5th Cir. 2015) (en banc) (quoting *Farmer*, 511 U.S. at 833).

[14] *Farmer*, 511 U.S. at 834.

[15] *Id.* (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)).

[16] *Id.*

[17] *Id.* (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

Exhibit "A"

As for deliberate indifference, the Supreme Court defined it as when the official "knows of and disregards an excessive risk to inmate health or safety."[18] In other words, it's a subjective test. Elaborating, the Supreme Court explained: "[T]he 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. This approach comports best with the text of the Amendment as our cases have interpreted it. The Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments.'"[19]

But the district court seemed to misapply the test. The court determined that Ladner and Pierce knew the risk. But the court failed to identify evidence indicating that they knew of a "substantial risk" that a fellow inmate would attack Jason. Ladner and Pierce acknowledged that there was *a risk* that an inmate could use a sling blade to attack someone. But there were measures in place to prevent that. A substantial risk requires more.

The district court next concluded that Ladner and Pierce disregarded that risk. The court's rationale? Ladner and Pierce couldn't prove that everyone who was supposed to keep watch in fact had a line of sight and actually watched the inmates—at all times. Plus, neither Ladner nor Pierce witnessed the assault. But that doesn't show disregard of a risk.

Ladner and Pierce's jobs were simply to keep track of the blades and to keep an eye on the prisoners while they made their rounds. Jason never alleged, and the district court never asserted, that Ladner and Pierce shirked their duties; that they handed out sling blades and then failed to do their

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[18] *Id.* at 837.
[19] *Id.*

Exhibit "A"

rounds. The sad reality is simply that, in this case, the prison's protocol wasn't enough to keep Jason safe.

Consider our 2015 en banc opinion *Williams*.[20] There, one of the prison guards—Hampton—failed to check that her block gun was loaded. It was supposed to contain a hard, nonlethal rubber slug. But it was empty. And after the relieving officer traded places with Hampton, prisoners escaped from their exercise pens, attacking fellow inmates who later sued.[21]

In its internal investigation, the prison found that Hampton violated her duties, thus threatening the safety of the prisoners and her fellow guards.[22] Even so, we still granted her qualified immunity. There was no evidence that Hampton knew the block gun was unloaded when she handed it to the relieving officer.[23] So she didn't realize there was "an excessive risk to inmate safety or that she disregarded such a risk."[24] And we also emphasized that there was "no evidence that any inmate had escaped from the exercise pens prior to the day of the attacks at issue."[25] In granting qualified immunity, we stressed that deliberate indifference "has its genesis in the cruel and unusual punishments clause of the Eighth Amendment."[26] Yet these "acts or omissions did not amount to punishment."[27]

Here, there was no evidence that Ladner and Pierce shirked their duties. No one alleges that they themselves did anything wrong. And even in *Williams*, when the defendant had made a mistake, that alone still wasn't enough to

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[20] 797 F.3d at 278–80.
[21] *Id.* at 279–80.
[22] *Id.* at 286.
[23] *Id.* at 287.
[24] *Id.* at 288.
[25] *Id.* at 289.
[26] *Id.*
[27] *Id.*

Exhibit - "A"

defeat qualified immunity. What's more, there was no evidence that any inmate had ever before attacked a fellow inmate with a sling blade.

Admittedly, one might have reservations about the sensibility of giving inmates sling blades to begin with. But under our en banc decision in *Williams*, Ladner's and Pierce's alleged individual conduct doesn't rise to deliberate indifference. They should thus be immune from suit.

B

Turning to Tanner: Section 1983 liability for supervisory officials hinges on a three-part test, which we reiterated in our 2001 *Thompson* opinion.[28] First, the supervisor must've failed to train the officers involved. Second, that failure to train must've caused the violation of the plaintiff's rights. Third, the failure to train must've constituted deliberate indifference.[29]

The district court held that Tanner failed to adequately train his officers. The court held so because it found "that in 15 years, Defendant Pierce received only 15 minutes of documented training related to 'tools,' and Defendant Ladner, in 24 years of service, received 5.5 hours of 'tools' training, all prior to 2009." The appellants urge that our 2005 *Roberts* opinion cautioned that adequacy-of-training assessments should consider all training provided rather than be construed too narrowly.[30] We read *Roberts* differently, as focused on the training "in relation to the tasks the particular officers must perform."[31]

Even so, it wasn't the lack of *training* that *caused* the risk to Jason. Rather, it was the sufficiency of the overall protocol—having only two guards making rounds and relying on other guards peering out of windows. But that situation might have been a mere reality of the prison's budget.

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[28] *Thompson*, 245 F.3d at 459.
[29] *Id.*
[30] *Roberts v. City of Shreveport*, 397 F.3d 287, 293–94 (5th Cir. 2005)).
[31] *Id.* (quoting *City of Canton v. Harris*, 489 U.S. 378, 390 (1989)).

Exhibit "A"

Regardless, even if the district court were right about the first two requirements, its deliberate-indifference analysis runs aground. The deliberate-indifference requirement stems from the Supreme Court's ruling in *Monell* some 40 years ago, rejecting pure respondeat superior liability under § 1983.[32] It was only eight years ago that the Supreme Court, in *Connick*, fully elaborated on deliberate indifference. In the Court's words:

> "Deliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Bryan Cty.* [*v. Brown*, 520 U.S. 397, 410 (1997)]. Thus, when city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program.[33]

In *Connick*, the Supreme Court considered "whether a district attorney's office may be held liable under § 1983 for failure to train based on a single *Brady* violation."[34] The case had to do with a supposed armed robbery and murder. Despite convictions for both charges, Thompson (the plaintiff) was innocent. It was only after nearly two decades in prison—one month from execution—that Thompson's investigator discovered exculpatory evidence that the prosecution failed to turn over. The reviewing court vacated both of his convictions. And he sued the district attorney in his official capacity.[35]

The jury "found the district attorney's office liable for failing to train the prosecutors."[36] On appeal, Connick (the DA) insisted that it was wrong to find him "deliberately indifferent to an obvious need for more or different *Brady*

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[32] *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694–95 (1978).
[33] *Connick v. Thompson*, 563 U.S. 51, 61–62 (2011) (alteration omitted).
[34] *Id.* at 54.
[35] *Id.*
[36] *Id.* at 57.

Exhibit "A"

training because there was no evidence that he was aware of a pattern of similar *Brady* violations."[37] But we affirmed. And rehearing the case en banc, we again affirmed—this time with a down-the-middle, even split. The Supreme Court reversed.

The Supreme Court held that to "prove deliberate indifference, Thompson needed to show that Connick was on notice that, absent additional specified training, it was 'highly predictable' that the prosecutors in his office would be confounded by those gray areas and make incorrect *Brady* decisions as a result. In fact, Thompson had to show that it was *so* predictable that failing to train the prosecutors amounted to *conscious disregard* for defendants' *Brady* rights."[38] In other words, there needed to be a pattern of previous violations.[39]

Justice Scalia's concurrence elaborated on deliberate indifference. He explained that a "theory of deliberate indifference" which allowed liability despite "no pattern or practice of prior violations" would effectively "repeal the law of *Monell* in favor of the Law of Large Numbers."[40]

Here, there was no repeated pattern of violations. True, there had been three yard fights with brooms and one with a mop. Now there's been one with a yard tool. But prison fights are lamentably common. And three yard fights with brooms and one with a mop just aren't enough to constitute a pattern.

Besides, the Supreme Court in *Connick* required that only very similar violations could jointly form a pattern.[41] In that case, Thompson underscored that "during the ten years preceding his armed robbery trial, Louisiana courts had overturned four convictions because of *Brady* violations by prosecutors in

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[37] *Id.* at 58.
[38] *Id.* at 71.
[39] *Id.*
[40] *Id.* at 73 (Scalia, J., concurring).
[41] *Connick*, 563 U.S. at 62.

Exhibit "A"

Connick's office."[42] Yet those cases weren't similar enough for the Court. Similarly, four cleaning-tool incidents don't create a pattern of violation that should've put the prison on notice for a sling-blade incident.

That's why in our unreported 2013 *Walker* case, we held that even a repeated pattern of violence isn't by itself enough to prove deliberate indifference.[43] There, the warden put a prisoner in the same cell as a notoriously violent inmate. The violent inmate killed his new cellmate, and the dead cellmate's parents sued the prison for failure to train. Yet we held that the plaintiffs hadn't shown deliberate indifference because they couldn't prove it was the lack of training that caused the violation.[44]

Returning to the cleaning-tool incidents: Even if the district court was right on causation, there was no pattern of violations. When inmate-on-inmate violence is a week-to-week regularity, four broom-or-mop incidents over seven years might not reasonably sound the yard-tool alarm. After all, many prisoners have devised many creative ways to injure someone—shanks,[45] toothbrush shivs,[46] ruler shivs,[47] ladle shivs,[48] tightly-rolled-newspaper spears (successfully used to kill a guard in 1985),[49] or broken black binder clips.[50]

All of this isn't to say that prisons have no duty to ensure safety. Nor is it to say that prisoners don't deserve safety; or that it's impossible to keep them

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[42] *Id.* at 63.

[43] *Walker v. Upshaw*, 515 F. App'x 334, 335 (5th Cir. 2013).

[44] *Id.* at 339–40.

[45] Ed Pilkington, *Seven Inmates Brutally Killed with Knives in South Carolina Prison Unrest*, GUARDIAN (Apr. 16, 2018), https://www.theguardian.com/us-news/2018/apr/16/7-inmates-dead-17-injured-south-carolina-prison-fight.

[46] Brent Rose, *The Many Insane Flavors of Improvised Prison Weapons*, GIZMODO (Oct. 25, 2011), https://gizmodo.com/the-many-insane-flavors-of-improvised-prison-weapons-5853104.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

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safe. No, that is all far from the truth. Rather, these makeshift-weapon examples merely demonstrate how prisons often face novel threats. It may well be impractical to take every single theoretically possible safety precaution.

Besides, there is an exception that will sometimes apply (though not here): single-incident liability as theorized in *City of Canton*.[51] That exception allows liability where a municipality "fail[ed] to train its employees concerning a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face."[52]

One recent Fifth Circuit case used this exception: *Littell*.[53] There, "$50 went missing during a sixth-grade choir class."[54] No one fessed up. So the assistant principal "took all twenty-two girls in the choir class to the female school nurse, who strip searched them, taking them one at a time into a bathroom, where she checked around the waistband of their panties, loosened their bras, and checked under their shirts."[55] The school district allegedly permitted "school officials to conduct invasive searches" of students. But it did so with no training whatsoever.[56]

We found that the facts "mirror[ed] *Canton*'s hypothetical in all material respects."[57] But here, there *was* training. There was also a monitoring system in place. Again, it just failed to prevent the attack. Put differently: square peg, round hole. *Littell* was about a supervisor who didn't train his subordinates; not even at all. Had he adequately trained them, they would've known not to

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[51] 489 U.S. at 396 (O'Connor, J., concurring).
[52] *Id.*
[53] *Littell v. Hous. Indep. Sch. Dist.*, 894 F.3d 616, 625 (5th Cir. 2018).
[54] *Id.* at 619.
[55] *Id.* at 620.
[56] *Id.*
[57] *Id.* at 625.

Exhibit-"A"

strip search young girls. Yet here, it's not so much about insufficient training. Instead, it's about insufficient protocol.

This was the first and only sling-blade attack in a presumably otherwise incident-free program. The prison had instituted safety measures against sling-blade misuse—albeit one that didn't prevent this attack. But the Supreme Court's caselaw and our caselaw emphasize that only inadequate training can establish vicarious liability. Not simply an inadequate protocol.

* * *

In sum, we REVERSE the district court and grant all three appellants qualified immunity.

Exhibit-"A"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CLARENCE JOSEPH JASON,
Plaintiff

VERSUS

JAMES LEBLANC, ET AL.,
Defendants

CIVIL DOCKET

NO. 15-607

SECTION: "E" (5)

ORDER AND REASONS

Plaintiff Clarence Joseph Jason filed suit against Defendants James LeBlanc, Robert Tanner, Shane Ladner, and Bradley Pierce, seeking vindication of his Eighth Amendment rights pursuant to 42 U.S.C. § 1983.[1] Before the Court is Defendants' renewed motion for summary judgment.[2] Defendants seek a judgment that they are entitled to qualified immunity on Plaintiff's claims. Plaintiff opposes the motion.[3] Defendants filed a reply memorandum.[4]

BACKGROUND

This case involves the August 27, 2014 attack on Plaintiff Clarence Jason, an inmate at Rayburn Correctional Center ("RCC").[5] Plaintiff was attacked with a swing blade wielded by another inmate, Victor Cooper, who picked up the tool after finding it abandoned in the prison yard.[6] Plaintiff alleges Defendants Lieutenant Shane Ladner and Sergeant Master Bradley Pierce, in their individual capacities, violated his right to reasonably safe conditions of confinement when the Defendants provided inmates with

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[1] R. Docs. 1, 22.
[2] R. Doc. 92.
[3] R. Doc. 97.
[4] R. Doc. 101.
[5] R. Docs. 1, 22.
[6] For a full discussion of the factual background, see the Court's September 25, 2017 Order and Reasons on Defendants' first motion for summary judgment. *Jason v. LeBlanc*, 2017 WL 4238709 (E.D. La. Sept. 25, 2017).

Exhibit - "B"

unsupervised access to tools that could be used as dangerous weapons.[7] Plaintiff also brings claims against Defendants Robert Tanner, Warden of RCC, and James LeBlanc, Secretary of the Louisiana Department of Public Safety and Corrections, in their individual capacities, for failing to train RCC officers.[8]

On December 27, 2016, Defendants filed a motion for summary judgment, asserting they are entitled to qualified immunity on Plaintiff's claims.[9] The Court was unable to determine the motion for summary judgment on the failure to protect claim because the second prong, deliberate indifference, could not be resolved at that time.[10] As explained by the Court, a prison official demonstrates deliberate indifference when he "knows of and disregards an excessive risk to inmate health or safety."[11] The standard outlined by *Farmer v. Brennan*[12] requires an evaluation of both the subjective knowledge and objective reasonableness of each Defendant and, as a result, the Court was required to consider the individual roles of each defendant in the disputed incidents.[13] Based on the summary judgment record, the Court found it was unable to determine whether Pierce and Ladner were deliberately indifferent. Because the extent of Pierce's and Ladner's training was disputed, the Court also was unable to rule on Plaintiff's failure to train claim against Defendants Tanner and LeBlanc. The Court denied the motion for summary judgment as to all Defendants without prejudice, and allowed discovery limited to the

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[7] R. Docs. 1, 22. Defendants' motion to dismiss claims against them in their official capacities, R. Doc. 23, was granted on August 24, 2015, R. Doc. 26.
[8] In Plaintiff's opposition to the motion for summary judgment, he alludes to a separate claim against Tanner for a failure to supervise. Plaintiff's original complaint does not include a cause of action for failure to train or supervise. R. Doc. 1. Plaintiff's amended complaint adds only a cause of action for failure to train. R. Doc. 22.
[9] R. Doc. 51.
[10] R. Doc. 73 at 13-15.
[11] *Id.* (citing *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)).
[12] 511 U.S. 825 (1994).
[13] *Longoria v. Texas*, 473 F.3d 586, 592-93 (5th Cir. 2006).

relevant issues.[14] The Court allowed Defendants to refile their motion for summary judgment after the completion of the limited discovery.[15]

On March 20, 2018, Defendants filed a renewed motion for summary judgment.[16] Defendants again assert they are entitled to qualified immunity on all of Plaintiff's claims.

LEGAL STANDARD

I. Summary Judgment

Under Federal Rule of Civil Procedure 56, summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[17] "An issue is material if its resolution could affect the outcome of the action."[18] When assessing whether a material factual dispute exists, the Court considers "all of the evidence in the record but refrains from making credibility determinations or weighing the evidence."[19] All reasonable inferences are drawn in favor of the nonmoving party.[20] There is no genuine issue of material fact if, even viewing the evidence in the light most favorable to the nonmoving party, no reasonable trier of fact could find for the nonmoving party, thus entitling the moving party to judgment as a matter of law.[21] "A genuine dispute as to a material fact exists when, after considering the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, a court determines that the evidence is such that a reasonable jury could return a verdict for the party opposing the motion."[22]

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[14] R. Doc. 73 at 15.
[15] *Id.*
[16] R. Doc. 92.
[17] FED. R. CIV. P. 56.
[18] *DIRECTV Inc. v. Robson*, 420 F.3d 532, 536 (5th Cir. 2005).
[19] *Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co.*, 530 F.3d 395, 398 (5th Cir. 2008). *See also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150–51 (2000).
[20] *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).
[21] *Smith v. Amedisys, Inc.*, 298 F.3d 434, 440 (5th Cir. 2002).
[22] *Haverda v. Hays County*, 723 F.3d 586, 591 (5th Cir. 2013).

Exhibit "B"

II. Qualified Immunity

Defendants have moved for summary judgment that they are entitled to qualified immunity from suit.[23] "Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct."[24] "Qualified immunity 'gives government officials breathing room to make reasonable but mistaken judgments,' and 'protects all but the plainly incompetent or those who knowingly violate the law.'"[25] As explained by the Supreme Court, "qualified immunity seeks to ensure that defendants reasonably can anticipate when their conduct may give rise to liability."[26] In essence, qualified immunity "avoid[s] excessive disruption of government" by permitting officials to exercise their vested discretion without fear of civil liability."[27]

Typically, the movant on summary judgment bears the initial burden of demonstrating the absence of a material fact issue.[28] But "[a] good-faith assertion of qualified immunity alters the usual summary judgment burden of proof, shifting it to the plaintiff to show that the defense is not applicable."[29] To defeat an assertion of qualified immunity, a plaintiff must "identify specific evidence in the summary judgment record demonstrating that there is a material fact issue concerning the essential elements of its case for which it will bear the burden of proof at trial."[30] "Conclusory allegations and

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[23] R. Doc. 92.
[24] *Davidson v. City of Stafford, Texas*, 848 F.3d 384, 391 (5th Cir. 2017) (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)).
[25] *Id.* (citing *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012)).
[26] *United States v. Lanier*, 520 U.S. 259, 570 (1997) (internal quotation marks and citations omitted).
[27] *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).
[28] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).
[29] *Cass v. City of Abilene*, 814 F.3d 721, 729 (5th Cir. 2016).
[30] *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir. 1994).

denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation" are all insufficient to overcome immunity.[31]

ANALYSIS

Plaintiff raises claims against Defendants Ladner and Pierce for violating his right to reasonably safe conditions of confinement by distributing dangerous tools to RCC inmates and failing to adequately supervise the inmates' possession and use of those tools. Plaintiff also brings claims against Defendants LeBlanc and Tanner for failing to properly train RCC officials. Defendants assert they are entitled to qualified immunity as to all of Plaintiff's claims. The Court will address each of these claims in turn.

I. Lieutenant Ladner and Sergeant Master Pierce

The Supreme Court held in *Farmer v. Brennan* that the Eighth Amendment imposes a duty upon prison officials to protect prisoners in custody from violence at the hands of other prisoners.[32] The Fifth Circuit, relying on *Farmer*, set forth the analysis to be followed when a prisoner's Eighth Amendment rights allegedly have been violated by a failure to protect resulting in an attack by a fellow inmate:

> It is well established that prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners. It is not, however, every injury suffered by one prisoner at the hands of another that translates into constitutional liability for prison officials responsible for the victim's safety. A prison official violates the Eighth Amendment only when the inmate shows that (1) he was incarcerated under conditions the official knew posed a substantial risk of serious harm and (2) the prison official was deliberately indifferent to such risk.[33]

The Fifth Circuit has provided the standard for determining deliberate indifference in this context:

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[31] *Orr v. Copeland*, 844 F.3d 484 (5th Cir. 2016).
[32] *Farmer*, 511 U.S. at 833.
[33] *Walker v. Upshaw*, 515 Fed. App'x 334, 338 (5th Cir. 2013) (internal citations omitted). *See also Longoria v. Texas*, 473 F.3d 586, 592-93 (5th Cir. 2006).

Exhibit "B"

> A prison official is deliberately indifferent to a risk when he knows of and disregards an excessive risk to inmate health or safety. To know of a risk, an official must be subjectively aware of the risk: that is, 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. This issue is a question of fact. Finally, even if a prison official was subjectively aware of the risk, he may be found free from liability if he "responded reasonably to the risk, even if the harm ultimately was not averted."[34]

The Court already has determined that the Plaintiff in this case was incarcerated under conditions posing a substantial risk of harm:

> In order to show a violation of his Eighth Amendment right, Plaintiff must first demonstrate that he was incarcerated under conditions posing a substantial risk of serious harm.[35] "Whether a risk is substantial and the threatened harm is serious represents an objective test[.]"[36] As explained above, "Several courts . . . have noted that the Eighth Amendment may be violated when prison officials permit inmate access to objects that could be used as weapons, especially when this conduct is accompanied by a lack of adequate supervision over the inmates."[37] In addition, similar to facts in *Goka v. Bobbitt*, "the risk to inmate safety from misuse of maintenance and other tools as weapons is evident on the fact of the tool control policy[.]"[38] Plaintiff attaches a copy of RCC's Tool Control Policy to his opposition to the Defendants' motion for summary judgment.[39] RCC's Tool Control Policy, which has the stated purpose of establishing "procedures that will ensure adequate control of tools," explicitly states that "[o]ffenders may only use certain tools," referred to as "Restricted Tools", "because of their potential security risk, within the fenced compound under *direct* supervision of staff."[40] RCC's Tool Control Policy further defines restricted tools as "implements that can be used to fabricate weapons, or that can be used as weapons; or that can be used to facilitate an escape."[41] Although the Tool Control Policy does not include a sling blade in its non-exhaustive list of examples of restricted tools, the Court finds that it is clear the sling blade used in the assault at issue is a paradigmatic example of a restricted tool pursuant to RCC's own policy.
>
> As the sling blade at issue is clearly a restricted tool, RCC's own policy mandates that inmates only be allowed to use the tool when under direct

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[34] *Anderson v. Wilkinson*, 440 Fed. App'x 379, 381 (5th Cir. 2011) (quoting *Farmer*, 511 U.S. at 844). *See also Adames v. Perez*, 331 F.3d 508, 512 (5th Cir. 2003).
[35] *Anderson*, 440 Fed. App'x at 381 (5th Cir. 2011) (citing *Farmer*, 511 U.S. at 834).
[36] *Hinojosa v. Livingston*, 807 F.3d 657, 665 (5th Cir. 2015) (citations omitted).
[37] *Iwanski v. Oklahoma Dep't of Corrections*, 201 F.3d 448, 1999 WL 1188836 (10th Cir. 1999).
[38] 862 F.2d 646, 652 (7th Cir. 1988).
[39] R. Doc. 59-3.
[40] *Id.* at 1, 3 (emphasis added).
[41] *Id.* at 3.

> supervision. Defendants argue that offenders working on the Wind Yard "are monitored via video monitors by the Unit Key Officer and Lieutenant using the camera outside of the buildings" and "a Lieutenant and Unit Key Officer periodically make rounds on the yard to assess the status of all of the offenders including those working inside the buildings and outside on the yard."[42] The Plaintiff argues it is clear there was no direct supervision in this instance. First, Plaintiff points to the affidavit of Darryl Mizell, the Chief Investigator for RCC, in which Mizell states there is no camera surveillance monitoring of the Wind recreational yard and that the surveillance cameras in place are only intended to prevent any escape and therefore are only directed at the perimeter fence.[43] In addition, Defendants admit that "After Sgt. Pierce issued the swing blade to offender Turner, he had no knowledge that offender Bernard Turner left his assignment or violated the prison disciplinary rules regarding the issued equipment."[44] Defendants also admit it is undisputed that "[w]hile the swing blade was unattended on the yard, another offender picked it up and used it to attack the plaintiff."[45]
>
> Had there been *direct* supervision, as required by RCC's own Tool Control Policy, there would not have been an opportunity for an inmate to leave the swing blade unattended on the yard, leave the yard altogether, or for another inmate to pick up the abandoned tool and attack the Plaintiff. Since it is an undisputed [fact] that this occurred, the Court finds the prison did not follow its own policies with respect to the supervision of restricted tools and, thus, the Plaintiff has satisfied his burden in demonstrating that he was incarcerated under conditions posing a substantial risk of serious harm.[46]

The Court also has determined that swing blades are restricted tools under the Tool Control Policy.[47] The parties agree that the policy defines restricted tools as "implements that can be used to fabricate weapons, or that can be used as weapons; or that can be used to facilitate an escape."[48] It is clear that the list of examples of restricted tools is non-exhaustive.[49] The parties agree that the swing blade is described as flat, sharp metal plate, roughly three inches wide by twelve inches long, attached to a three-foot-long wood

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[42] R. Doc. 51-1 at ¶¶ 8-9.
[43] R. Doc. 59-14 at ¶ 8 (citing R. Doc. 51-4, at ¶¶ 20-21).
[44] R. Doc. 51-1 at ¶ 34.
[45] *Id.* at ¶ 35.
[46] R. Doc. 73 at 11.
[47] *Id.* at 11-12.
[48] R. Doc. 92-8 at 4.
[49] *Id.* ("Some examples of restricted tools are . . . ").

Exhibit "B"

stick.[50] The parties further agree that swing blades can be used as a weapon.[51] The Court therefore reiterates its holding that the swing blade fits the definition of a restricted tool under the Tool Control Policy.[52]

The issue remaining to be addressed as to the claims against Pierce and Ladner is whether these Defendants were deliberately indifferent to this substantial risk of harm.

With respect to this issue, the parties agree there are quite a few undisputed material facts:

- In August of 2014, Plaintiff Clarence Jason was an inmate at Rayburn Correctional Center ("RCC") in Washington Parish, Louisiana.[53]
- Plaintiff was housed in Wind Unit, a section of RCC that includes four inmate dormitories, a breezeway that runs between the dormitories, and a large open-air space referred to as the Wind Yard.[54] The Wind Yard is expansive, and includes a full-size football field, baseball field, basketball court, and other recreational spaces.[55]
- On work days, the Key Officer for Wind Unit chooses several inmates who have the appropriate work duty status, assigns each of these inmates a work area in the yard, and issues each of these inmates a specific yard tool—for example, a shovel, reel mower, or hoe.[56]

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[50] R. Doc. 1 at ¶ 3.
[51] R. Doc. 92-11 at 114 ln. 25 – 115 ln. 6.
[52] Even if the swing blade is not a restricted tool under the Tool Control Policy, the analysis in this case would remain substantially the same. Clearly, a swing blade is a dangerous tool that can be used as a weapon. The Defendants either had subjective knowledge of the substantial risk of harm posed by a swing blade in the hands of an unsupervised inmate, or they should have had such knowledge because the risk was obvious, and yet they disregarded that risk.
[53] R. Doc. 92-1 at ¶ 1; R. Doc. 97-1 at ¶ 1.
[54] R. Doc. 92-1 at ¶ 28; R. Doc. 97-1 at ¶ 28. RCC has five discrete units: Rain Unit, Wind Unit, Snow Unit, Sun Unit, and Sleet Unit. R. Doc. 92-1 at ¶ 11; R. Doc. 97-1 at ¶ 11.
[55] R. Doc. 97-7 at 13 (Deposition of Shane Ladner).
[56] R. Doc. 92-1 at ¶ 19-20; R. Doc. 97-1 at ¶ 19-20.

- After asking for volunteers, the Key Officer selects the inmates who receive yard tools at random from the roughly 300 inmates who are put out into the Wind Yard.[57]
- The issuance of tools is governed by the RCC Tool Control Policy, the stated purpose of which is to "ensure adequate control of tools."[58]
- The policy governs the inventory and identification process for tools, and assigns various responsibilities to RCC officers.[59]
- The RCC Tool Control Policy includes a section on "Restricted Tools."[60]
- According to the RCC Tool Control Policy, restricted tools are "implements that can be used to fabricate weapons, or that can be used as weapons; or can be used to facilitate an escape."[61] Examples include axes, box cutters, files, and hacksaws.[62] Because of the potential security risk of issuing such tools to inmates, the policy mandates that "[o]ffenders may only use [restricted] tools . . . within the fenced compound under *direct supervision of staff*."[63]
- Swing blades are not expressly listed as restricted tools in the RCC Tool Control Policy.[64]
- The inmates who are issued tools keep them for approximately two to three hours at a time.[65]

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[57] R. Doc. 97-1 at ¶ 21. *See* R. Doc. 92-11 at 59 lns. 3-15.
[58] R. Doc. 92-1 at ¶ 14; R. Doc. 97-1 at ¶ 14. *See* R. Doc. 97-4 (RCC Tool Control Policy).
[59] R. Doc. 97-4 at 4.
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.* (emphasis added).
[64] *Id.*
[65] R. Doc. 92-1 at ¶ 24; R. Doc. 97-1 at ¶ 24.

Exhibit "B"

- On any given day, and on the day of the incident, the Wind Unit is assigned one Lieutenant Officer, a Key Officer, two Dorm Officers, and a Gate Officer.[66]
- The Lieutenant Officer is the supervisor over the entire Wind Unit, and makes several "rounds" throughout the unit during the day, but is not restricted to the Wind Unit premises.[67] On the day of the incident, Defendant Ladner was the Lieutenant Officer on duty.[68]
- The Wind Unit's Key Officer makes rounds all day throughout the entire unit, including the Wind Yard.[69] On the day of the incident, Defendant Pierce was the Key Officer on duty.[70]
- The Dorm Officers are assigned to work in the four dormitories, and do not conduct rounds on the Wind Yard.[71] Dorm Officers are able to view parts of the Wind Yard through the dormitory windows.[72]
- The Gate Officer has line of sight over the front portions of the Wind Yard.[73]
- There are cameras installed on several towers that monitor activity at the fence surrounding the Wind Unit.[74]

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[66] R. Doc. 92-1 at ¶ 30; R. Doc. 97-1 at ¶ 29.
[67] R. Doc. 92-1 at ¶ 31; R. Doc. 97-1 at ¶ 30.
[68] R. Doc. 92-1 at ¶ 30; R. Doc. 97-1 at ¶ 29. It is unclear from the record where Defendant Pierce was during the assault on Plaintiff.
[69] R. Doc. 92-1 at ¶ 31; R. Doc. 97-1 at ¶ 30.
[70] R. Doc. 92-1 at ¶ 30; R. Doc. 97-1 at ¶ 29.
[71] R. Doc. 92-1 at ¶ 31; R. Doc. 97-1 at ¶ 30. *See also* R. Doc. 97-6 at 55 ln. 17 (Deposition of Bradley Pierce).
[72] R. Doc. 97-6 at 55 (Deposition of Bradley Pierce).
[73] R. Doc. 92-1 at ¶ 32; R. Doc. 97-1 at ¶ 31.
[74] R. Doc. 92-1 at ¶ 32; R. Doc. 97-1 at ¶ 31.

- No cameras monitor the area of the Wind Yard in which the attack took place.[75]
- On August 27, 2014, Defendant Sergeant Master Bradley Pierce issued a swing blade to inmate Bernard Turner to cut the grass on Wind Yard.[76]
- The swing blade consists of a flat, sharp metal plate, roughly three inches wide by twelve inches long, attached to a three-foot-long wooden stick.[77]
- At some point after Pierce issued the swing blade to Turner, Turner abandoned the tool in the Wind Yard.[78]
- No RCC officer was watching Turner when he abandoned the swing blade.[79]
- After Turner abandoned the swing blade, it was picked up by another inmate, Victor Cooper, who then beat Plaintiff in his head and back with it.[80]
- No RCC officer witnessed the attack.[81]

To establish these two Defendants were deliberately indifferent, Plaintiff must show (1) Pierce and Ladner both had subjective knowledge of the substantial risk of harm, and (2) both disregarded that risk.[82] "Whether a prison official had the requisite

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[75] R. Doc. 97-9 at 3 (Answers to Interrogatories by Robert Tanner) ("There is no camera that videos the west side of Wind Yard where the initial attack happened").
[76] R. Doc. 92-1 at ¶ 6; R. Doc. 97-1 at ¶ 6.
[77] R. Doc. 1 at ¶ 3. The parties do not dispute Plaintiff's characterization of the tool.
[78] R. Doc. 92-1 at ¶ 7; R. Doc. 97-1 at ¶ 7.
[79] R. Doc. 92-1 at ¶ 10; R. Doc. 97-1 at ¶ 10. Pierce testified that, at the time of the incident, he had no knowledge that Turner had abandoned the swing blade. Further, it does not appear from the summary judgment record that any RCC official witnessed the abandonment of the tool or the events that immediately followed. *See* R. Doc. 92-5 (Affidavit of Major Darryl Mizell, RCC Chief Investigator).
[80] R. Doc. 92-1 at ¶ 2-3; R. Doc. 97-1 at ¶ 2-3.
[81] R. Doc. 92-11 at 83 lns. 6-10 ("We don't know what happened. We never did—were able to prove that Victor Cooper struck Clarence Jason with a tool—it's obvious somebody did—and, I mean I can't prove he did. But he did it.").
[82] *See Adames v. Perez*, 331 F.3d 508, 512 (5th Cir. 2003).

Exhibit "B"

knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence[.]"[83]

Plaintiff points to competent summary judgment evidence showing that Pierce and Ladner had subjective knowledge of the substantial risk of harm. Defendant Pierce testified it was "foreseeable" that "the situation like what we're dealing with" could happen.[84] Pierce also testified that he had read the RCC Tool Control Policy, and was aware the Policy provided that "offenders may only use certain tools because of their potential security risk within the fence compound under direct supervision of staff."[85] Defendant Ladner testified that "[i]t's common for [offenders] to use anything they can get their hands on as a weapon, anything."[86] Ladner conceded that tools "could be used for assault," and prison staff "should always keep offender and tools in sight."[87] Indeed, Ladner's testimony emphasizes the fact that prison inmates can turn almost any object into a weapon, and that the vigilance of the correctional officers is essential to maintain inmate safety.[88] Ladner testified that he was familiar with the RCC Tool Control Policy, including its requirements regarding restrictive tools.[89] Based on the evidence before the Court, it appears likely that these Defendants had subjective knowledge of the substantial risk of harm.[90]

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[83] *Id.* (quoting *Farmer*, 511 U.S. at 842).
[84] R. Doc. 97-6 at 15.
[85] *Id.* at 22.
[86] R. Doc. 92-11 at 107 lns. 5-7.
[87] *Id.* at 101.
[88] *Id.* It is not necessary to show that Defendants were aware of any risk specific to the Plaintiff, as the Plaintiff need not show that he was especially likely to be assaulted. *Farmer*, 511 U.S. at 843 ("[I]t does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk."). Rather, Plaintiff need only show that the officials deliberately ignored a substantial risk to the safety of all inmates. *Id.* at 843-44.
[89] R. Doc. 92-11 at 111.
[90] At the very least, there are disputed issues of fact as to whether Ladner and Pierce had knowledge of the substantial risk of harm.

Even if Ladner and Pierce did not have subjective knowledge of the substantial risk of harm, "[a] factfinder may conclude that a prison official knew of substantial risk from the very fact that the risk was obvious."[91] In *Goka v. Bobbitt*, the Seventh Circuit considered a factually similar case.[92] An inmate had been assaulted by another inmate who was wielding a broom handle which he had been allowed to keep in his cell.[93] Under the tool control policy in effect at that prison, all tools were to be controlled by prison staff when not in use. The Seventh Circuit found that "the risk to inmate safety from misuse of maintenance and other tools as weapons is evident on the face of the tool control policy, which states that the primary purpose of the policy is 'to minimize the potential danger to facility security from the misuses of tools.'"[94] The same is true in this case. RCC's Tool Control Policy, which has the stated purpose of establishing "procedures that will ensure adequate control of tools," explicitly states that "[o]ffenders may only use certain tools," referred to as "Restricted Tools," "because of their potential security risk, within the fenced compound under *direct* supervision of staff."[95] The Court finds that, even if Defendant Pierce and Defendant Ladner did not have subjective knowledge of the substantial and obvious risk posed by handing out potentially dangerous tools to inmates without appropriate supervision, the risk was so obvious they should have known.[96]

The final issue to be determined is whether Pierce and Ladner were deliberately indifferent when they disregarded the known risk of harm. The Supreme Court has

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[91] *Iwanski*, 1999 WL 1188836, at *2 (quoting *Farmer*, 511 U.S. at 842).
[92] 862 F.2d 646 (7th Cir. 1988).
[93] *Id.* at 648.
[94] *Id.* at 652.
[95] R. Doc. 92-8 at 1, 3 (emphasis added).
[96] In *Goka* the court denied summary judgment, finding that disputed issues of fact existed as to whether the defendants knew of the risk of harm and took any action to prevent it, and the extent of each defendant's knowledge concerning enforcement of the tool control policy. *Goka*, 862 F.2d at 652. At the very least, disputed issues of fact also preclude summary judgment on this issue in this case.

Exhibit "B"

explained that a prison official disregards a known risk "by failing to take reasonable measures to abate it."[97] Defendants Ladner and Pierce rest their right to qualified immunity on their argument that there is "someone watching the inmates at all times" while the inmates are in Wind Yard and that this defeats a finding that either one of them disregarded the risk of substantial harm.[98] Defendant Tanner, the warden in charge of the facility, testified that the direct supervision required under the Tool Control Policy is "eyes on them,"[99] and that "for a restricted tool they need to be in sight."[100] To show that they were "watching" the inmates and, as a result, did not disregard the risk of substantial harm, Pierce and Ladner must show that an RCC official had a direct line of sight and was actually looking at all inmates while they used restricted tools.

Plaintiff bears the burden of establishing that there are contested issues of material fact with respect to whether Ladner and Pierce were deliberately indifferent. To meet this burden, Plaintiff argues that whether the Defendants met this standard while the inmates with restricted tools were in the Wind Yard is a disputed issue of fact. Plaintiff notes that "Defendants' testimony establishes that at any given moment, Defendant Pierce might be the sole officer indirectly supervising 300 inmates, some armed with tools that can be used [as] dangerous weapons."[101] Defendant Pierce testified that, as the Key Officer, he did not maintain a direct line of sight over all the inmates in the yard while he made rounds throughout the unit. When asked, "[y]ou didn't have a direct line of sight at all times, though?" Defendant Pierce responded, "No."[102] As the officer most directly

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[97] *Farmer*, 511 U.S. at 847.
[98] R. Doc. 92-1 at ¶ 33.
[99] R. Doc. 92-9 at 78 lns. 5-6.
[100] *Id.* at 79 lns. 11-12.
[101] R. Doc. 97-1 at ¶ 30.
[102] R. Doc. 92-10 at 143 lns. 11-13.

responsible for monitoring the inmates in Wind Yard, Defendant Pierce's view of the yard would be critical to satisfying the Policy's mandate of "direct supervision" over inmates using restricted tools.

As noted above, the Wind Yard is quite large, and includes a full-size football field, a full-sized baseball diamond, and other recreational spaces.[103] It would likely be impossible for one officer to actually watch all the inmates with restricted tools while they were in the Wind Yard, and the assistance provided by other officers is far from clear.[104] Defendant Ladner testified that, as the Wind Unit Lieutenant, he is not restricted to the Wind Unit, and he would at times be "off-unit"[105] and, as a result, he could not have been in a position to observe the inmates in the Wind Yard. Defendant Ladner also conceded that "the two dorm officers are confined to the dormitory,"[106] and, as a result, the dorm officers could only see the Wind Yard through various windows. Ladner, in what appears to be self-contradictory testimony, testified "they might not have their eyes on that offender, but there is someone watching them at all times."[107] Ladner, in other deposition testimony, admitted that "there's not necessarily an officer there every minute."[108] The parties do not dispute that the Gate Officer has only line of sight over the front portions

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[103] R. Doc. 92-11 at 51 lns. 8-20.

[104] Defendants' testimony suggests that RCC officers more closely supervised inmates in the recent past. As Plaintiff notes, until roughly four years ago, inmates worked during the day in the fields, and were directly supervised by gun guards. R. Doc. 97-1 at ¶ 84. Defendant Pierce explained that "[t]hey'd go out there to cut grass . . . [and officers would] walk[] around while they're cutting the grass—they're cutting the grass with swing blades—and you [would] have four gun guards that surround them." R. Doc. 92-10 at 13 ln. 21 – 14 ln. 9. Defendant Ladner testified that "[w]e used to have 60-something officers assigned to the field. Now we have three." R. Doc. 92-11 at 85. "In order to properly execute the sentence of hard labor, which is one of the duties of RCC, every offender [must have] a job to the extent possible." R. Doc. 51-3 at ¶ 32 (affidavit of Keith Bickham).

[105] R. Doc. 92-11 at 45 lns. 2-18 ("I might be escorting someone to this unit, or escorting someone to this unit, or coming up here to the control center to pick up something here, so, yes, anywhere on the compound.").

[106] R. Doc. 92-11 at 53 lns. 20-21.

[107] *Id.* at 101 lns. 16-19.

[108] *Id.* at 62 lns. 8-9.

Exhibit "B"

of the Wind Yard.[109] The cited passages of the Defendants' depositions indicate, at best, that various staff members, assigned throughout the Wind Unit, have some line of sight over the inmates in Wind Yard at various times, and that these officers occasionally witness disciplinary infractions by inmates.[110] Ladner testified, pointing to locations on a photograph of Wind Unit, "you have officers stationed here (indicating), that can see all of this. You have officers stationed here that can see all of this. . . you have this camera that is watching all of this, a camera here that's watching all of this . . . ."[111] This testimony does not establish that officers were watching all inmates with restricted tools in the Wind Yard at all times. The Court cannot see to which areas of the Wind Yard Ladner was pointing and the Defendants did not capture the meaning of his testimony by having him mark up an exhibit that was then attached to his deposition.

Defendants did not produce summary judgment evidence to show which portions of the Wind Yard can be seen from the dormitory windows or that the area in which the assault took place could be seen from them. Neither did Ladner or Pierce produce evidence that any of the Dorm Officers saw or could have seen Turner abandon the swing blade in the Wind Yard or the subsequent assault. Further, it is undisputed that cameras only monitor a portion of the Wind Yard, and that no cameras monitor the area in which the attack took place.[112]

Neither Pierce nor Ladner, nor any other officer, saw Turner abandon the tool, and no officer witnessed the attack on the Plaintiff.[113] It appears from the record that the

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[109] R. Doc. 92-1 at ¶ 32; R. Doc. 97-1 at ¶ 31.
[110] R. Doc. 92-10 at 168 lns. 15-25; R. Doc. 92-11 at 104 lns. 8-18.
[111] R. Doc. 92-11 at 101 ln. 24 – 102 ln. 1-8.
[112] R. Doc. 97-9 at 3 (Answers to Interrogatories by Robert Tanner) ("There is no camera that videos the west side of Wind Yard where the initial attack happened").
[113] R. Doc. 92-1 at ¶ 10; R. Doc. 97-1 at ¶ 10.

assault was not discovered until Defendant Ladner discovered "a large amount of blood and a broken swing blade" on the Wind Yard.[114] Had there been "eyes on"[115] supervision of the inmates in the Wind Yard "at all times,"[116] as Defendants claim, a guard would have seen the abandonment of the tool and the assault.

Summary judgment in qualified immunity cases is appropriate only if the plaintiff fails to "identify specific evidence in the summary judgment record demonstrating that there is a material fact issue concerning the essential elements of its case for which it will bear the burden of proof."[117] The Court finds the Plaintiff has established that there are genuine disputes of material fact with respect to whether there were RCC officials actually looking at inmates with restricted tools all times while they were in Wind Yard. Because Ladner and Pierce rest their right to qualified immunity on this assertion, which remains in dispute, the Court is unable to determine whether Ladner and Pierce took, or failed to take, reasonable measures to abate the risk of substantial harm presented by the use of potentially dangerous tools by inmates in the Wind Yard.[118] Accordingly, the Court denies summary judgment on the issue of whether Pierce and Ladner are entitled to qualified immunity.[119]

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[114] R. Doc. 92-1 at ¶11; R. Doc. 97-1 at ¶ 11.
[115] R. Doc. 92-9 at 78 lns. 5-6.
[116] R. Doc. 92-11 at 101 lns. 16-17.
[117] *Orr v. Copeland*, 844 F.3d 484 (5th Cir. 2016).
[118] To be clear, the Court is not making a determination at this stage that the Defendants are not entitled to qualified immunity. The Court's ruling is that genuine issues of material fact preclude the Court from making such a determination.
[119] The Fifth Circuit has jurisdiction to review a district court's denial of summary judgment with respect to qualified immunity "only to the extent that the appeal concerns the purely legal question whether the defendants are entitled to qualified immunity on the facts that the district court found sufficiently supported in the summary judgment record." *Hamilton v. Kindred*, 845 F.3d 659, 661 (5th Cir. 2017) (quoting *Kinney v. Weaver*, 367 F.3d 337, 347 (5th Cir. 2004)). The Fifth Circuit "lack[s] the power to review the district court's decision that a genuine factual dispute exists and instead consider[s] only whether the district court erred in assessing the legal significance of conduct that the district court deemed sufficiently supported." *Id.* (internal quotations omitted).

Exhibit "B"

II. Warden Robert Tanner

Defendants also move for summary judgment that Defendant Tanner is entitled to qualified immunity with respect to Plaintiff's claim that Tanner failed to properly train RCC officials on the use of dangerous tools by inmates. Officials are not subject to liability under 42 U.S.C. § 1983 for acts or omissions of their subordinates on the basis of respondeat superior.[120] However, a supervisory official may be liable for a constitutional violation if (1) the supervisor failed to train the subordinate officer; (2) a causal link exists between the failure to train and the violation of the plaintiff's rights, and (3) the failure to train amounts to deliberate indifference.[121] To defeat qualified immunity, the Plaintiff must show that all three factors have been met or that disputed issues of material fact exist with respect to some or all of the factors.

The undisputed facts relevant to Ladner's right to qualified immunity are:

- Warden Tanner was involved in the drafting and revisions of the RCC Tool Control Policy.[122]
- The issuance of tools is governed by the RCC Tool Control Policy, the stated purpose of which is to "ensure adequate control of tools."[123]
- The policy governs the inventory and identification process for tools, and assigns various responsibilities to RCC officers.[124]
- According to the RCC Tool Control Policy, restricted tools "are implements that can be used to fabricate weapons, or that can be used as weapons; or

[120] *Thompson v. Upshur County*, 245 F.3d 447, 459 (5th Cir. 2001).
[121] *Id.*
[122] R. Doc. 92-1 at ¶ 15; R. Doc. 97-1 at ¶ 15.
[123] R. Doc. 92-1 at ¶ 14; R. Doc. 97-1 at ¶ 14. *See* R. Doc. 97-4 (RCC Tool Control Policy).
[124] R. Doc. 97-4.

can be used to facilitate an escape."[125] Examples include axes, box cutters, files, and hacksaws.[126]

- The Tool Control Policy mandates that "[o]ffenders may only use [restricted] tools . . . within the fenced compound under direct supervision of staff."[127]
- The Defendants produced Unusual Occurrence Reports ("UORs") involving assaults or altercations between inmates from 2007-2009 and 2011-2017 as well as the Disciplinary Reports involving aggravated fighting from 2010.[128]
- During the seven-year period prior to the assault on Plaintiff, there were no incidents involving assaults with yard tools.[129]
- During the seven-year period prior to the assault on Plaintiff, there were only four incidents in which an item issued for inmate work assignments was used in an assault—three incidents involving brooms, and one incident involving a mop.[130]

A. Failure to Adequately Train

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[125] *Id.* at 4.
[126] *Id.*
[127] *Id.*
[128] R. Doc. 92-1 at ¶ 34; R. Doc. 97-1 at ¶ 33. Plaintiff does not contest this statement of fact, but asserts that it is out of context. Plaintiff offers, "Plaintiff cannot confirm or deny whether Defendants in fact produced all of the UORs for the past ten years." R. Doc. 97-1 at ¶ 33. In his deposition, Deputy Warden Keith Bickham conceded that UORs are periodically deleted. *Id.*
[129] R. Doc. 92-1 at ¶ 35; R. Doc. 97-1 at ¶ 34. Plaintiff denies this statement of fact, but provides no evidence to dispute the truth of it. Plaintiff's objection is that, notwithstanding the lack of prior incidents, the risk of harm to inmates in the Wind Yard was "obvious and foreseeable." R. Doc. 97-1 at ¶ 34. This argument, even if accepted as true, does not create a dispute as to whether there were, in fact, prior assaults with a yard tool during the relevant time period.
[130] R. Doc. 92-1 at ¶ 36; R. Doc. 97-1 at ¶ 35. Plaintiff denies this statement of fact, but provides no record citations to summary judgment evidence to show there is a genuine issue of fact.

Exhibit-"B"

The first prong of the analysis asks whether the supervisor failed to adequately train the individual officers under his or her command.[131] "For liability to attach based on an 'inadequate training' claim, a plaintiff must allege with specificity how a particular training program is defective."[132] Further, "the focus must be on the adequacy of the training program in relation to the tasks the particular officers must perform."[133]

On this issue, the Court finds a genuine dispute of material fact exists as to whether Defendants Pierce and Ladner, as well as other RCC officials, were adequately trained on the supervision required when inmates are using dangerous tools in the Wind Yard. Defendants assert "CSM Pierce and Lt. Ladner both testified that they received regular, on-going training as to the RCC Tool Control Policy as well as many other RCC policies to ensure the safety and security of the inmates and the institution itself."[134] Defendant Ladner testified that "we train on tool policy year-round."[135] However, Plaintiff has submitted competent summary judgment evidence calling into question the training the officers received with respect to the supervision of the use of dangerous tools.[136]

Plaintiff relies in part on the training transcripts of Defendants Pierce and Ladner.[137] These transcripts reveal that in 15 years, Defendant Pierce received only 15 minutes of documented training related to "tools," and Defendant Ladner, in 24 years of service, received 5.5 hours of "tools" training, all prior to 2009.[138] Defendant Tanner testified that all training is documented.[139] As a result, if Ladner and Pierce had been

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[131] *Roberts v. City of Shreveport*, 397 F.3d 287, 293 (5th Cir. 2005).
[132] *Id.*
[133] *Id.*
[134] R. Doc. 92-1 at ¶ 25.
[135] R. Doc. 97-7 at 20, lns. 5-6.
[136] R. Doc. 97-1 at ¶ 25.
[137] R. Docs. 97-13, 97-14.
[138] R. Docs. 97-13, 97-14.
[139] R. Doc. 92-9 at 67, lns. 20-25 – 68, ln. 20.

trained on the Tool Policy or the supervision of inmates using dangerous tools generally, it is reasonable to expect that this training would have been documented in their employment records. Little or no training is reflected in the records and, in the event there was some limited training on tools, it is unclear what this training entailed, as Defendants could not produce any training materials, lesson plans, or other records documenting the content of the training sessions.

Plaintiff also asserts that Defendants' own testimony demonstrates that they were inadequately trained. For example, in his response to interrogatories, Defendant Pierce represented that he was "not aware of any training dealing with tools,"[140] and Defendant Ladner represented in his own response to interrogatories that he "can't recall any specific training regarding tools."[141] Further, the Defendants' depositions demonstrate their misunderstanding of the Tool Control Policy, suggesting that whatever training they did receive was inadequate to prepare them to implement the policy. For example, Defendant Tanner, the warden who drafted and adopted the policy, testified that he's "not the guy that decides that [certain tools] are restricted,"[142] and that the determination of which tools are restricted should be guided by "common sense."[143] In contradiction, Defendant Ladner stated that restricted status "is what is decided by the warden as restricted."[144] Moreover, Defendant Pierce's deposition suggests a troubling unfamiliarity with the RCC Tool Control Policy. Pierce is unable to articulate what types of tools would be considered "restrictive," how restrictive tools are identified, or who is responsible for making that

[140] R. Doc. 97-10 at 3.
[141] R. Doc. 97-11 at 4.
[142] R. Doc. 92-9 at 77 lns. 8-9.
[143] *Id.* at 77 lns. 5-12.
[144] R. Doc. 92-11 at 113 lns. 10-11.

Exhibit "B"

determination.[145] Defendants also maintain different definitions of what constitutes "direct supervision." Defendant Tanner, who approved the policy, testified that "direct supervision" means "eyes on them."[146] Defendant Pierce, however, when asked whether his rounds in the Wind Yard qualified as "direct supervision, explained, "Well, direct supervision—I'm there. So, as long as I'm still moving, making the rounds, that's direct supervision, in my eyes."[147] Defendant Ladner testified that "as long as an officer can see [the inmates], that's supervision."[148] Ladner also testified there's "probably not" a distinction between direct and indirect supervision.[149]

In sum, the Court finds that the Plaintiff has established genuine disputes of material fact with regard to whether Defendants Ladner and Pierce were adequately trained on the supervision required over use of dangerous tools by inmates.

B. Causal Connection

The second prong of the failure-to-train inquiry asks whether "a causal connection existed between the failure to supervise or train and the violation of the plaintiff's rights."[150] The Fifth Circuit requires the "failure to train be the 'moving force' that caused the specific constitutional violation."[151] The causal connection "must be more than a mere 'but for' coupling between cause and effect. The deficiency in training must be the actual cause of the constitutional violation."[152] Although "[t]he requirements of proof of inadequacy of training and causation are, in many respects, intertwined," a plaintiff must

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[145] R. Doc. 92-10 at 137-147.
[146] R. Doc. 92-9 at 78 lns. 5-6.
[147] R. Doc. 92-10 at 143 lns. 7-10.
[148] R. Doc. 92-11 at 116 lns. 3-4.
[149] *Id.* at 116 lns. 18-20.
[150] *Hobart v. Estrada*, 582 Fed. App'x 348, 356 (5th Cir. 2014).
[151] *Valle v. City of Houston*, 613 F.3d 536, 546 (5th Cir. 2010) (quoting *Brown v. Bryan Cty.*, 219 F.3d 450, 461 (5th Cir. 2000)).
[152] *Id.* (quoting *Thomas v. Connick*, 578 F.3d 293, 300 (5th Cir. 2009).

submit "competent summary judgment evidence of [the] causal relationship between any shortcoming of the officers' training . . . and the injury complained of."[153] The summary judgment record must "put at issue whether additional training would have avoided the accident."[154]

As explained above, disputed issues of fact prevent the Court from determining whether a failure to train is established. Assuming the failure to train is established, however, Plaintiff has put forward sufficient evidence for a reasonable jury to find that the failure to train is causally connected to the violation of Plaintiff's right. According to their deposition testimony, Defendants Ladner and Pierce lacked basic knowledge about the RCC Tool Control Policy; the officers failed to articulate the policy's standards for supervision over the use of tools, and misunderstood what tools qualified as "restricted tools."[155] Based on the summary judgment record, a jury could reasonably infer that additional training on the RCC Tool Control Policy would have caused Ladner and Pierce to comply with the Tool Control Policy by providing direct supervision over the use of the tools in the Wind Yard, thereby averting the assault.[156] Accordingly, a reasonable jury could conclude that the lack of training constituted the moving force of Plaintiff's injury.[157]

C. Deliberate Indifference

The third prong of the failure to train inquiry is whether the failure to train amounts to deliberate indifference. There are two ways to show deliberate indifference in

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[153] *Pineda v. City of Houston*, 291 F.3d 325, 334 (5th Cir. 2002).
[154] *Id.*
[155] *See, e.g.*, R. Doc. 92-10 at 137-147; R. Doc. 92-11 at 116 lns. 3-20.
[156] Even if a swing blade is not a restricted tool under the Tool Control Policy, it still clearly can be used as a dangerous weapon, and training on the supervision needed for inmates using a swing blade likely would have averted the assault.
[157] *See Bryan County*, 219 F.3d at 465.

Exhibit "B"

a failure to train claim. Usually, a plaintiff presents evidence of a pattern of similar violations resulting from the deficient training policy.[158] In the alternative, a plaintiff may establish deliberate indifference under the "single incident exception."[159] "This exception is narrow and requires proof that the highly predictable consequence of a failure to train would result in the specific injury suffered, and that the failure to train represented the moving force behind the constitutional violation.

Plaintiff has not presented any evidence showing a pattern of similar violations at RCC. Plaintiff did not allege such a pattern in his complaint, and, despite Defendant's production of nearly a thousand pages of RCC incident reports, is not able to demonstrate a pattern based on the summary judgment record. Defendants submitted as undisputed facts that: (1) from at least as far back as 2007 until August 27, 2014, there were no prior assaults by inmates with a yard tool at RCC;[160] and (2) during the seven-year period prior to the assault on Plaintiff, there were only four incidents in which an item issued for inmate work assignments was used in an assault.[161] Although Plaintiff asserts that these facts are immaterial or lacking context,[162] Plaintiff nevertheless fails to submit any summary judgment evidence to dispute their truth. As a result, there is no evidence in the summary judgment record suggesting any pattern of yard-tool-related assaults as a result of the alleged training deficiency.[163]

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[158] *Valle*, 613 F.3d at 547.
[159] *Goodman*, 571 F.3d at 395 (citing *Brown*, 219 F.3d at 457).
[160] R. Doc. 92-1 at ¶ 35; R. Doc. 97-1 at ¶ 34.
[161] R. Doc. 92-1 at ¶ 36; R. Doc. 97-1 at ¶ 35. Of these four incidents, three involved brooms and one involved a mop.
[162] R. Doc. 97-1 at ¶¶ 34-36.
[163] Plaintiff has complained about the Defendants' document production, and suggests that documentation may exist that would establish prior incidents of tool-related assaults. For example, Plaintiff points out that the Defendants previously provided Plaintiff with a "certification" signed by Deputy Warden Keith that RCC had no Unusual Occurrence Reports ("UORs") for inmate assaults involving weapons for the past ten years. Plaintiff subsequently filed a motion to compel, and Bickham admitted in his deposition that the certification was false because he had not actually looked for UORs for the past ten years. Defendants then

As Plaintiff has not introduced evidence of similar incidents, he must establish deliberate indifference under the single incident exception. As the Fifth Circuit has explained in the context of Fourth Amendment claims, "typically, application of the single incident exception requires evidence of the proclivities of the particular officer involved" in the specific incident or other evidence demonstrating that the constitutional violations would have appeared to the supervisor as a "highly predictable consequence" of the training deficiencies.[164]

The Fifth Circuit cases examining the single incident exception—ordinarily addressing Fourth Amendment claims involving the use of excessive force by an untrained officer—give little guidance with respect to the issues presented in this matter. For example, in *Brown v. Bryan County* the Fifth Circuit considered a claim that a sheriff had failed to train an inexperienced deputy, leading to the use of excessive force by the deputy against the plaintiff in violation of the Fourth Amendment.[165] In that case, the court found the jury could have reasonably concluded that it was obvious to the sheriff that his decision not to train the deputy would result in a constitutional deprivation, even though the plaintiff had not demonstrated a history of similar violations.[166] As later decisions have emphasized, the *Brown* court based its decision in part on the fact that the particular deputy involved demonstrated a proclivity for excessive force that put the

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produced thousands of pages of UORs. Plaintiff maintains that the UORs produced by the Defendants may be incomplete, as "Bickham testified that UORs are periodically deleted and he 'just doesn't know how often.'" R. Doc. 97 at 15. Plaintiff states he "cannot rule out the possibility that UORs documenting prior incidents are missing." *Id.* The Court acknowledges that Defendants' failure to produce comprehensive records is troubling. Nevertheless, it is well-established that the burden of proof in a motion for summary judgment based on qualified immunity rests on the Plaintiff. *See, e.g., Kovacic v. Villarreal*, 628 F.3d 209, 211-12 (5th Cir. 2010) ("We do not require that an official demonstrate that he did not violate clearly established federal rights; our precedent places that burden upon plaintiffs.")(quoting *Thompson v. Upshur County*, 245 F.3d 447, 456 (5th Cir. 2001).

[164] *Hobart*, 582 Fed. App'x at 358 (quoting *Valle*, 613 F.3d at 549).

[165] 219 F.3d 450, 463 (5th Cir. 2000).

[166] *Id.*

Exhibit "B"

sheriff on notice that training was necessary.[167] Such evidence of an officer's proclivity for use of excessive force has no relevance in the Eighth Amendment context when the plaintiff suffers violence at the hands of his fellow inmate, rather than by an untrained officer.[168]

The parties have not directed this Court to, and neither has the Court's own research identified, any cases in which the Fifth Circuit has examined the evidentiary requirements for the single incident exception in Eighth Amendment failure to train cases in which the failure to train results in an inmate-on-inmate assault. Cases from other circuits are somewhat helpful. In *Thomas v. Cumberland County*, for example, the Third Circuit reversed the district court's grant of qualified immunity on the plaintiff's § 1983 failure to train claim, finding that a triable issue remained as to whether the county exhibited deliberate indifference to the need for training of officers in conflict de-escalation.[169] The plaintiff in *Thomas* was an inmate who had been assaulted by another inmate.[170] The plaintiff had not put forward evidence of a pattern of similar constitutional violations, but the court found the "volatile nature" of the prison would make it more predictable that the need for such training would be apparent.[171] Because the circumstances that made an inmate-on-inmate assault likely were present, "the lack of training here is akin to a failure to equip law enforcement officers with specific tools to

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[167] *See, e.g., Hobart*, 582 Fed. App'x at 358 (*Brown* involved "evidence of the proclivities of the particular officer involved in the excessive use of force"); *Valle*, 613 F.3d at 549 ("in the one case in which we found a single incident sufficient to support municipal liability, there was an abundance of evidence about the proclivities of the particular officer involved in the use of excessive force").

[168] Even in the Fourth Amendment context, the Fifth Circuit has left open the possibility that evidence unrelated to the proclivities of the officer involved may be sufficient to support a claim under the single incident exception. *See Hobart*, 582 Fed. App'x at 358. ("[O]ur case law does not absolutely require evidence of character traits or proclivities of the officer responsible for the single constitutional violation. . .").

[169] 749 F.3d 217 (3d Cir. 2014).

[170] *Id.* at 219.

[171] *Id.* at 225.

handle recurring situations."[172] The court applied the single incident exception because, as the Supreme Court noted in *City of Canton v. Harris*, "the need for training can be said to be so obvious, that failure to do so could properly be characterized as deliberate indifference to constitutional rights even without a pattern of constitutional violations."[173] As a result, the court in *Thomas* denied summary judgment on qualified immunity.

In the Eighth Amendment context, the single incident exception requires proof that Defendant Tanner "had sufficient notice" that the failure to train was "obviously likely" to lead to the violation of Plaintiff's rights."[174] This evidence must show the "training deficiencies must have been so obvious that the [constitutional violation] would have appeared to the [supervisor] a highly predictable consequence."[175] In this case, the Court finds a genuine dispute of fact exists with regard to whether the need for training is so obvious that the failure to train constitutes deliberate indifference. Defendants contend there is no evidence of subjective awareness of a risk of tool-related assault, arguing, "Warden Tanner testified that he was not aware of any issues with the policies and procedures as to the issuance, supervision, and control of yard tools at RCC."[176] Defendants misunderstand the analysis, however. In determining whether a risk was so obvious as to amount to deliberate indifference, the Fifth Circuit conducts an objective inquiry, asking whether "it *should* have been obvious [to the supervisor] that the highly predictable consequence of not training" his employees would be to cause Plaintiff's

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[172] *Id.*
[173] *Id.* at 223 (discussing *City of Canton v. Harris*, 489 U.S. 378, 390 n.10 (1989)).
[174] *Hobart*, 582 Fed. App'x at 357 (quoting *Brown*, 219 F.3d at 460).
[175] *Id.* (citations omitted).
[176] R. Doc. 92 at 7.

Exhibit-"B"

injury.[177] Based on the summary judgment record, the Court finds a reasonable jury could conclude the risk should have been obvious to Defendant Tanner.

The summary judgment evidence calls into question whether the RCC officers were adequately trained regarding the supervision over inmates using dangerous tools. As Plaintiff convincingly argues, "Defendants' testimony establishes that at any given moment, Defendant Pierce might be the sole officer indirectly supervising 300 inmates, some armed with tools that can be used as dangerous weapons, on a yard so big it includes a full-size football field, baseball field, basketball court, and other recreational spaces."[178] In a space this large, the lack of comprehensive "eyes on" or monitored camera surveillance appears to have left areas of the Wind Yard shielded entirely from RCC surveillance, at least at times.[179] Given these logistical difficulties, it would be essential for RCC officers to be trained on what "direct supervision" is required. At this point, the training Tanner required and provided on this topic for the officers under his command is in dispute.

Furthermore, as in *Johnson*, Defendant Tanner acknowledges the potential for violence among inmates in the Wind Yard is high.[180] It is undisputed that Defendant Tanner testified that the RCC Tool Control Policy was drafted to address the "obvious" risk that the inmates might use a yard tool as a dangerous weapon.[181] It also is undisputed that the tool policy itself recognizes that the use of dangerous tools by inmates poses a security risk because the policy requires "direct supervision" over those tools.[182]

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[177] *Brown*, 219 F.3d at 461 (emphasis added).
[178] R. Doc. 97-1 at ¶ 31.
[179] R. Doc. 97-9 at 3 (Answers to Interrogatories by Robert Tanner) ("There is no camera that videos the west side of Wind Yard where the initial attack happened").
[180] R. Doc. 92-9 at 30 lns. 11-16.
[181] *Id.*
[182] R. Doc. 92-8 at 4.

Defendant Ladner testified that "it's common for [the inmates] to use anything they can get their hands on as a weapon, anything."[183] As a result, assuming all disputed facts in favor of the Plaintiff, a reasonable jury could find that the failure to train RCC officials on the RCC Tool Control Policy, or otherwise train them with respect to the supervision needed over inmates using dangerous tools, was "obviously likely" to lead to an assault. Accordingly, the Court cannot conclude that Defendant Tanner was not deliberately indifferent as a matter of law. This Court finds that a triable issue of fact exists in this case as to whether the risk of a tool-related attack created by the failure to train was so obvious as to constitute deliberate indifference. Accordingly, Defendants' motion is denied as to Plaintiff's failure-to-train claim against Defendant Tanner.

III. Secretary James LeBlanc

Once a Defendant properly invokes qualified immunity, "the plaintiff has the burden to negate the defense once properly raised."[184] In Plaintiff's opposition to Defendant's motion for summary judgment, Plaintiff fails to present any evidence whatsoever in support of its claims against Defendant LeBlanc. According, the Court finds Defendant LeBlanc is entitled to qualified immunity on Plaintiff's claims.

[183] R. Doc. 92-11 at 107 lns. 5-7.
[184] *Brumfield v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008). *See also Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 194 (5th Cir. 2009) (citing *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)).

Exhibit "B"

CONCLUSION

For the foregoing reasons;

IT IS ORDERED that Defendants' motion for summary judgment with respect to Defendants Pierce, Ladner, and Tanner is hereby **DENIED**.

IT IS FURTHER ORDERED that Defendants' motion for summary judgment with respect to Defendant LeBlanc is hereby **GRANTED**.

New Orleans, Louisiana, this 13th day of June, 2018.

Susie Morgan

SUSIE MORGAN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CLARENCE JOSEPH JASON, **Plaintiff**	**CIVIL DOCKET**
VERSUS	**NO. 15-607**
JAMES LEBLANC, ET AL., **Defendants**	**SECTION: "E" (5)**

ORDER AND REASONS

Before the Court is a motion for summary judgment based on qualified immunity filed by Defendants James LeBlanc, Secretary of the Louisiana Department of Public Safety and Corrections (DPSC), Robert Tanner, current Warden of the Rayburn Correctional Center (RCC), Lt. Shane Ladner, and Sgt. Master Bradley Pierce.[1] Plaintiff, Clarence Joseph Jason opposes this motion.[2]

FACTUAL AND PROCEDURAL BACKGROUND

On February 18, 2015, Plaintiff filed his initial complaint regarding an incident that occurred at the Rayburn Correctional Center ("RCC") on August 27, 2014.[3] Plaintiff filed an amended complaint on July 6, 2015,[4] and a Schulter Reply Brief on September 8, 2015.[5] It is uncontested that Plaintiff suffered injuries when he was hit from behind with a swing blade originally issued by Defendant Pierce to Bernard Turner, another inmate at RCC.[6] At some point after the swing blade was issued to Turner, Turner abandoned the tool on the prison yard and went inside the prison to watch TV.[7] At this point, another

[1] R. Doc. 51.
[2] R. Doc. 59.
[3] R. Doc. 1.
[4] R. Doc. 22.
[5] R. Doc. 27.
[6] R. Doc. 51-1 at ¶¶ 30, 36; R. Doc. 59-14 at ¶¶ 30, 36.
[7] R. Doc. 51-1 at ¶ 33; R. Doc. 59-14 at ¶ 33.

Exhibit - "C"

inmate, Victor Cooper, picked up the swing blade and used it to attack the Plaintiff.[8] Plaintiff alleges claims pursuant to Title 42, United States Code, Section 1983 against each of the Defendants in their individual capacities for violations of his Eighth Amendment rights and against Defendants LeBlanc and Tanner for their failure train and supervise.[9]

On December 27, 2016, Defendants filed their motion for summary judgment based on qualified immunity.[10] On January 3, 2017, the Court granted Plaintiff's motion for an extension of time to file a response to the Defendants' motion for summary judgment.[11] On January 24, 2017, Plaintiff filed his response in opposition to the Defendants' motion.[12] In his opposition, Plaintiff requests that the Court either deny the Defendants' motion or defer ruling until discovery has occurred.[13]

LEGAL STANDARD

I. Summary Judgment

Summary judgment is appropriate only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[14] "An issue is material if its resolution could affect the outcome of the action."[15] When assessing whether a material factual dispute exists, the Court considers "all of the evidence in the record but refrains from making credibility determinations or weighing

[8] R. Doc. 51-1 at ¶¶ 35, 37; R. Doc. 59-15 at ¶¶ 35, 37.
[9] R. Docs. 1, 22. Defendants' motion to dismiss claims against them in their official capacities, R. Doc. 23, was granted on August 24, 2015. R. Doc. 26.
[10] R. Doc. 51.
[11] R. Doc. 57.
[12] R. Doc. 59.
[13] R. Doc. 59, at 26. The Plaintiff previously filed a motion to compel discovery pursuant to Rule 37(a)(3)(B) of the Federal Rules of Civil Procedure. R. Doc. 48. After oral argument on the motion to compel before Magistrate Judge North, the parties agreed that a stay of discovery is appropriate until Defendants' pending motion for summary judgment on the issue of qualified immunity is resolved. R. Doc. 58.
[14] FED. R. CIV. P. 56; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).
[15] *DIRECTV Inc. v. Robson*, 420 F.3d 532, 536 (5th Cir. 2005).

the evidence."[16] All reasonable inferences are drawn in favor of the nonmoving party.[17] There is no genuine issue of material fact if, even viewing the evidence in the light most favorable to the nonmoving party, no reasonable trier of fact could find for the nonmoving party, thus entitling the moving party to judgment as a matter of law.[18]

If the dispositive issue is one on which the moving party will bear the burden of persuasion at trial, the moving party "must come forward with evidence which would 'entitle it to a directed verdict if the evidence went uncontroverted at trial.'"[19] If the moving party fails to carry this burden, the motion must be denied. If the moving party successfully carries this burden, the burden of production then shifts to the nonmoving party to direct the Court's attention to something in the pleadings or other evidence in the record setting forth specific facts sufficient to establish that a genuine issue of material fact does indeed exist.[20]

If the dispositive issue is one on which the nonmoving party will bear the burden of persuasion at trial, the moving party may satisfy its burden of production by either (1) submitting affirmative evidence that negates an essential element of the nonmovant's claim, or (2) demonstrating there is no evidence in the record to establish an essential element of the nonmovant's claim.[21] When proceeding under the first option, if the

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[16] *Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co.*, 530 F.3d 395, 398 (5th Cir. 2008); *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150–51 (2000).
[17] *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).
[18] *Smith v. Amedisys, Inc.*, 298 F.3d 434, 440 (5th Cir. 2002).
[19] *Int'l Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1263–64 (5th Cir. 1991) (quoting *Golden Rule Ins. Co. v. Lease*, 755 F. Supp. 948, 951 (D. Colo. 1991)).
[20] *Celotex*, 477 U.S. at 322–24.
[21] *Id.* at 331–32 (Brennan, J., dissenting); *see also St. Amant v. Benoit*, 806 F.2d 1294, 1297 (5th Cir. 1987) (citing Justice Brennan's statement of the summary judgment standard in *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–24 (1986), and requiring the movants to submit affirmative evidence to negate an essential element of the nonmovant's claim or, alternatively, demonstrate the nonmovant's evidence is insufficient to establish an essential element); *Fano v. O'Neill*, 806 F.2d 1262, 1266 (citing Justice Brennan's dissent in *Celotex*, and requiring the movant to make an affirmative presentation to negate the nonmovant's claims on summary judgment); 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE §2727.1 (2016) ("Although the Court issued a five-to-four decision, the majority

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nonmoving party cannot muster sufficient evidence to dispute the movant's contention that there are no disputed facts, a trial would be useless, and the moving party is entitled to summary judgment as a matter of law.[22] When, however, the movant is proceeding under the second option and is seeking summary judgment on the ground that the nonmovant has no evidence to establish an essential element of the claim, the nonmoving party may defeat a motion for summary judgment by "calling the Court's attention to supporting evidence already in the record that was overlooked or ignored by the moving party."[23] Under either scenario, the burden then shifts back to the movant to demonstrate the inadequacy of the evidence relied upon by the nonmovant.[24] If the movant meets this burden, "the burden of production shifts [back again] to the nonmoving party, who must either (1) rehabilitate the evidence attacked in the moving party's papers, (2) produce additional evidence showing the existence of a genuine issue for trial as provided in Rule 56(e), or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f)."[25] "Summary judgment should be granted if the nonmoving party fails to respond in one or more of these ways, or if, after the nonmoving party responds, the court determines that the moving party has met its ultimate burden of persuading the court that there is no genuine issue of material fact for trial."[26]

"[U]nsubstantiated assertions are not competent summary judgment evidence. The party opposing summary judgment is required to identify specific evidence in the

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and dissent both agreed as to how the summary-judgment burden of proof operates; they disagreed as to how the standard was applied to the facts of the case." (internal citations omitted)).

[22] *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288–89 (1980); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50 (1986).

[23] *Celotex*, 477 U.S. at 332–33.

[24] *Id.*

[25] *Celotex*, 477 U.S. at 332–33, 333 n.3.

[26] *Id.*; *see also First National Bank of Arizona*, 391 U.S at 289.

record and to articulate the precise manner in which that evidence supports the claim. 'Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment.'"[27]

II. Qualified Immunity

"The doctrine of qualified immunity shields 'government officials performing discretionary functions ... from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[28]

Although qualified immunity is nominally an affirmative defense, "the plaintiff has the burden to negate the defense once properly raised."[29]

> The defendant official must initially plead his good faith and establish that he was acting within the scope of his discretionary authority. Once the defendant has done so, the burden shifts to the plaintiff to rebut this defense by establishing that the official's allegedly wrongful conduct violated clearly established law.[30]

In resolving questions of qualified immunity at the summary judgment stage, courts engage in a two-pronged inquiry.[31] "The court must decide whether the plaintiff has alleged a violation of a constitutional right and whether that right was 'clearly established' at the time of the incident."[32]

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[27] *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998) (citing *Celotex*, 477 U.S. at 324; *Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir. 1994) and quoting *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915–16 & n.7 (5th Cir. 1992)).

[28] *Luna v. Mullenix*, 773 F.3d 712, 718 (5th Cir. 2014) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

[29] *Brumfield*, 551 F.3d at 326. *See also Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 194 (5th Cir. 2009) (citing *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)).

[30] *Id.* (quoting *Bazan ex rel. Bazan v. Hidalgo Cnty.*, 246 F.3d 866, 872 (5th Cir. 1997) ("We do not require that an official demonstrate that he did not violate clearly established federal rights; our precedent places that burden upon plaintiffs.")).

[31] *See Tolan v. Cotton*, 134 S. Ct. 1861, 1865 (2014).

[32] *Orr v. Copeland*, 844 F.3d 484, 492 (5th Cir. 2016).

Exhibit "C"

"[A] plaintiff seeking to overcome qualified immunity must plead specific facts that both allow the court to draw the reasonable inference that the defendant is liable for the harm [the plaintiff] has alleged and that defeat a qualified immunity with equal specificity."[33] "Therefore, even where the qualified immunity defense is raised by motion for summary judgment, the Court 'must first determine whether the allegations in [the] complaint are sufficient to negate [the] assertions of qualified immunity.'"[34] This "demands more than bald allegations and conclusory statements."[35] A plaintiff "must allege facts specifically focusing on the conduct of [the defendant] which caused his injury."[36]

"The qualified immunity defense is appropriately resolved at the summary judgment stage when (1) a plaintiff has established that the defendant has engaged in the complained-of conduct or (2) the court 'skip[s], for the moment, over ... still-contested matters to consider an issue that would moot their effect if proved.'"[37] "If resolution of [qualified immunity] in the summary judgment proceeding turns on what the defendant actually did, rather than on whether the defendant is immunized from liability ..., and if there are conflicting versions of his conduct, one of which would establish and the other defeat liability," then summary judgment is not appropriate.[38] Although summary judgment ultimately may be appropriate based on a plaintiff's inability to prove the facts essential to recovery, this "has nothing to do with the qualified immunity defense."[39]

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[33] *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012).
[34] *Hatcher v. Bement*, 2015 WL 1511106, at *7 (N.D. Tex. Apr. 3, 2015) (quoting *Fleming v. Tunica*, 497 F. App'x 381, 388 (5th Cir. 2012) (alterations in original).
[35] *Id.* (quoting *Wicks v. Miss. State Employment Servs.*, 41 F.3d 991, 995 (5th Cir. 1995)).
[36] *Wicks*, 41 F.3d at 995.
[37] *Hatcher*, 2015 WL 1511106, at *7 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) and citing *Haverda v. Hays County*, 723 F.3d 586, 599 (5th Cir. 2013)) (alterations in original).
[38] *Haverda*, 723 F.3d at 599 (quoting *Barker v. Norman*, 651 F.2d 1107, 1123-24 (5th Cir. 1981)).
[39] *Id.*

"One of the most salient benefits of qualified immunity is protection from pretrial discovery, which is costly, time-consuming, and intrusive."[40] Consequently, the Fifth Circuit "has established a careful procedure under which a district court may defer its qualified immunity ruling if further factual development is necessary to ascertain the availability of that defense."[41] The Fifth Circuit has explained that "a district court must first find 'that the plaintiff's pleadings assert facts which, if true, would overcome the defense of qualified immunity."[42] "Thus, a plaintiff seeking to overcome qualified immunity must plead specific facts that both allow the court to draw the reasonable inference that the defendant is liable for the harm he has alleged and that defeat a qualified immunity defense with equal specificity."[43] "*After* the district court finds the plaintiff has so pled, if the court remains 'unable to rule on the immunity defense without further clarification of the facts,' it may issue a discovery order 'narrowly tailored to uncover only those facts needed to rule on the immunity claim.'"[44] The Fifth Circuit has further explained that "[a]n order that simultaneously withholds ruling on a qualified immunity defense while failing to constrain discovery to develop claimed immunity is by definition not narrowly tailored."[45]

LAW AND ANALYSIS

Plaintiff filed the instant suit *in forma pauperis* seeking relief from the Defendants under 42 U.S.C. § 1983 for violations of the Eighth Amendment's prohibition of cruel and unusual punishments. Plaintiff sued Defendants Secretary James LeBlanc, Warden

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[40] *Backe*, 691 F.3d at 648 (citing *Helton v. Clements*, 787 F.2d 1016, 1017 (5th Cir. 1986).
[41] *Id.*
[42] *Id.* (citations omitted).
[43] *Id.*
[44] *Id.* (quoting *Lion Boulos v. Wilson*, 834 F.2d 504, 507-08 (5th Cir. 1987).
[45] *Id.* at 649.

Exhibit-"C"

Robert Tanner, Lt. Shane Ladner, and Corrections Sergeant Master Bradley Pierce, in their individual capacities pursuant to 42 U.S.C. § 1983 for violations of his Eighth Amendment rights. Plaintiff alleges the Defendants violated his right to reasonably safe conditions of confinement when the Defendants provided other inmates with unsupervised access to tools which could be used as dangerous weapons.

In resolving questions of qualified immunity at the summary judgment stage, courts engage in a two-pronged inquiry.[46] "The court must decide whether the plaintiff has alleged a violation of a constitutional right and whether that right was 'clearly established' at the time of the incident."[47] The court may address the questions in either order.[48]

The Court will first address the second prong: whether the right that was allegedly violated was clearly established at the time of the incident. The Supreme Court has "'repeatedly told courts . . . not to define clearly established law at a high level of generality.'"[49] At the same time, "this does not mean that 'a case directly on point' is required."[50] Rather, "clearly established" means that the "contours of the right must be sufficiently clear that a reasonable officer would understand that what he was doing violates that right."[51] In *Farmer*, the Supreme Court explained that the Eighth Amendment "imposes duties on [prison] officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing,

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[46] *See Tolan v. Cotton*, 134 S. Ct. 1861, 1865 (2014).
[47] *Orr v. Copeland*, 844 F.3d 484, 492 (5th Cir. 2016).
[48] *Pearson*, 555 U.S. at 227.
[49] *Morgan v. Swanson*, 659 F.3d 359, 372 (quoting *Ashcroft v. al-Kidd*, --- U.S. ----, 131 S.Ct. 2074, 2084 (2011)).
[50] *Id.* (quoting *al-Kidd*, 131 S.Ct. at 2083).
[51] *Thompson v. Upshur Cnty., Texas*, 245 F.3d 447, 457 (5th Cir. 2001) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

shelter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.'"[52] Further, "Several courts . . . have noted that the Eighth Amendment may be violated when prison officials permit inmate access to objects that could be used as weapons, especially when this conduct is accompanied by a lack of adequate supervision over the inmates."[53] The Court finds that the Plaintiff's Eighth Amendment right allegedly violated by the Defendants was clearly established at the time of the incident.

With respect to the first prong of the qualified immunity standard – *i.e.* whether the Defendants violated Plaintiff's constitutional rights – the Supreme Court has explained, "The Constitution 'does not mandate comfortable prisons,' but neither does it permit inhumane ones, and it is now settled that 'the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.'"[54] "In its prohibition of 'cruel and unusual punishments,' the Eighth Amendment places restraints on prison officials, who may not, for example, use excessive physical force against prisoners."[55] As explained above, the Eighth Amendment also imposes a duty on prison officials to "take reasonable measures to guarantee the safety of the inmates."[56] To succeed on a claim for a failure to protect, an inmate must show that (1) he was incarcerated under conditions posing a substantial risk of harm; and (2) a prison official was deliberately indifferent to this risk.[57] "A prison official violates the Eighth Amendment's prohibition against cruel and unusual punishment when his

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[52] *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984)).
[53] *Iwanski v. Oklahmoa Dept. of Corrections*, 1999 WL 1188836, at *4 (10th Cir. Dec. 14, 1999) (collecting cases).
[54] *Farmer*, 511 U.S. at 832 (citations omitted).
[55] *Id.* (citations omitted).
[56] *Id.* (citations omitted).
[57] *Anderson v. Wilkinson*, 440 F. App'x 379, 381 (5th Cir. 2011) (citing *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)).

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conduct demonstrates deliberate indifference when he "knows of and disregards an excessive risk to inmate health or safety."[58] "To know of' a risk, an official must be subjectively aware of the risk: that is, 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."[59] "This issue is a question of fact."[60] "Finally, even if a prison official was subjectively aware of the risk, he may be found free from liability if he 'responded reasonably to the risk, even if the harm ultimately was not averted."[61]

"The deliberate indifference standard is 'an extremely high standard to meet.'"[62] The Fifth Circuit has "declined to find deliberate indifference where an official '*should have*' inferred a risk posed to an inmate, requiring proof that the official, '*did* draw such an inference."[63] "Nevertheless, an inmate does not have to produce direct evidence of an official's knowledge about the risk; he may rely on circumstantial evidence to demonstrate such knowledge."[64]

Defendants argue the Plaintiff has not alleged a violation of a constitutional right because, as interpreted by the Defendants, "the plaintiff is alleging that giving tools to inmates that could be used as weapons was a practice that created a dangerous condition."[65] In addition, according to Defendants, the incident at issue was an unpreventable, isolated incident and therefore, Plaintiff's Eighth Amendment right to protection from inmate-on-inmate attacks was not violated.[66] In response, Plaintiff states

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[58] *Id.* (citing *Farmer*, 511 U.S. at 837).
[59] *Id.* (internal citations and quotations omitted).
[60] *Id.* (quoting *Farmer*, 511 U.S. at 837).
[61] *Id.* (quoting *Farmer*, 511 U.S. at 844).
[62] *Id.* (quoting *Domino v. Tex. Dep't of Criminal Justice*, 239 F.3d 752, 756 (5th Cir. 2001)).
[63] *Id.* (emphasis in original) (citations omitted).
[64] *Id.* (citations omitted).
[65] R. Doc. 51-2 at 10.
[66] *Id.*

that he is not claiming that issuing tools to inmates for work is unconstitutional.[67] Instead, Plaintiff argues that issuing tools that can be used as weapons to inmates without direct supervision is dangerous.[68]

In order to show a violation of his Eighth Amendment right, Plaintiff must first demonstrate that he was incarcerated under conditions posing a substantial risk of serious harm.[69] "Whether a risk is substantial and the threatened harm is serious represents an objective test[.]"[70] As explained above, "Several courts . . . have noted that the Eighth Amendment may be violated when prison officials permit inmate access to objects that could be used as weapons, especially when this conduct is accompanied by a lack of adequate supervision over the inmates."[71] In addition, similar to facts in *Goka v. Bobbitt*, "the risk to inmate safety from misuse of maintenance and other tools as weapons is evident on the fact of the tool control policy[.]"[72] Plaintiff attaches a copy of RCC's Tool Control Policy to his opposition to the Defendants' motion for summary judgment.[73] RCC's Tool Control Policy, which has the stated purpose of establishing "procedures that will ensure adequate control of tools," explicitly states that "[o]ffenders may only use certain tools," referred to as "Restricted Tools", "because of their potential security risk, within the fenced compound under *direct* supervision of staff."[74] RCC's Tool Control Policy further defines restricted tools as "implements that can be used to fabricate weapons, or that can be used as weapons; or that can be used to facilitate an escape."[75]

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[67] R. Doc. 59 at 14.
[68] *Id.*
[69] *Anderson*, 440 F. App'x at 381 (5th Cir. 2011) (citing *Farmer*, 511 U.S. at 834).
[70] *Hinojosa v. Livingston*, 807 F.3d 657, 665 (5th Cir. 2015) (citations omitted).
[71] *Iwanski*, 1999 WL 1188836, at *4 (collecting cases).
[72] 862. F.2d 646, 652 (7th Cir. 1988).
[73] R. Doc. 59-3.
[74] *Id.* at 1, 3 (emphasis added)
[75] *Id.* at 3.

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Although the Tool Control Policy does not include a sling blade in its non-exhaustive list of examples of restricted tools, the Court finds that it is clear the sling blade used in the assault at issue is a paradigmatic example of a restricted tool pursuant to RCC's own policy.

As the sling blade at issue is clearly a restricted tool, RCC's own policy mandates that inmates only be allowed to use the tool when under direct supervision. Defendants argue that offenders working on the Wind Yard "are monitored via video monitors by the Unit Key Officer and Lieutenant using the camera outside of the buildings" and "a Lieutenant and Unit Key Officer periodically make rounds on the yard to assess the status of all of the offenders including those working inside the buildings and outside on the yard."[76] The Plaintiff argues it is clear there was no direct supervision in this instance. First, Plaintiff points to the affidavit of Darryl Mizell, the Chief Investigator for RCC,in which Mizell states there is no camera surveillance monitoring of the Wind recreational yard and that the surveillance cameras in place are only intended to prevent any escape and therefore are only directed at the perimeter fence.[77] In addition, Defendants admit that "After Sgt. Pierce issued the swing blade to offender Turner, he had no knowledge that offender Bernard Turner left his assignment or violated the prison disciplinary rules regarding the issued equipment."[78] Defendants also admit it is undisputed that "[w]hile the swing blade was unattended on the yard, another offender picked it up and used it to attack the plaintiff."[79]

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[76] R. Doc. 51-1 at ¶¶ 8-9.
[77] R. Doc. 59-14 at ¶ 8 (citing R. Doc. 51-4, at ¶¶ 20-21).
[78] R. Doc. 51-1 at ¶ 34.
[79] *Id.* at ¶ 35.

Had there been *direct* supervision, as required by RCC's own Tool Control Policy, there would not have been an opportunity for an inmate to leave the swing blade unattended on the yard, leave the yard altogether, or for another inmate to pick up the abandoned tool and attack the Plaintiff. Since it is an undisputed that this occurred, the Court finds the prison did not follow its own policies with respect to the supervision of restricted tools and, thus, the Plaintiff has satisfied his burden in demonstrating that he was incarcerated under conditions posing a substantial risk of serious harm.

Second, in order to defeat Defendants' motion for summary judgment on the basis of qualified immunity, Plaintiff must demonstrate that a genuine issue of material fact exists as to the second element of the failure to protect analysis – i.e. that the defendant prison officials were deliberately indifferent to his need for protection.[80] As explained above, a prison official is "deliberately indifferent" to a risk when he "knows of and disregards an excessive risk to inmate health or safety."[81] An officer's awareness of the risk is evaluated subjectively.[82] The Court must address this issue at it pertains to each individual defendant. Without allowing the Plaintiff to conduct discovery on this issue, the Court finds that it is unable to rule on whether each individual Defendant is entitled to immunity.[83] Greater detail explaining how inmates were ultimately left unsupervised while in possession of restricted tools is needed for the Court to determine which, if any, Defendants, are entitled to qualified immunity. To further elaborate on this point, it is apparent to the Court that there are at least three possible, and mutually-exclusive, explanations as to how and why this potential violation of the Plaintiff's Eighth

[80] *Neals v. Norwood*, 59 F.3d 530, 533 (5th Cir. 1995) (citations and internal quotation marks omitted).
[81] *Anderson*, 440 F. App'x at 381.
[82] *Longoria*, 473 F.3d at 592-93.
[83] *See, e.g. Lion Boulos*, 834 F.2d at 508.

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Amendment rights occurred: (1) the RCC Tool Control Policy drafted by Warden Tanner which requires direct supervision when inmates are issued restricted tools was never actually implemented; (2) the RCC Tool Control Policy was implemented but the prison officials responsible for actually effectuating the policy were never properly trained on how to comply with the direct supervision requirements of the policy; and (3) the RCC Tool Control Policy was implemented and, although the prison officials responsible were properly trained on how to effectuate the policy, they failed to do so. Determining which scenario led to the incident at issue in Plaintiff's complaint is a question of fact that can be resolved only with additional information gained through discovery.[84] The Court finds this information is essential to its determination of whether any of the Defendants is entitled to qualified immunity.[85] It is uncontested that on August 27, 2014, Defendant Pierce issued a swing blade to another inmate, Bernard Turner, to cut grass in the Wind Yard.[86] It is also uncontested that the Plaintiff was hit from behind with the sling blade causing severe lacerations.[87] While these facts are not in dispute, due to the lack of relevant information, information that only the Defendants have access to, the Court is unable to identify which individuals engaged in the specific conduct leading to the lack of direct supervision of inmates with access to restricted tools.[88] The Court is not able to ascertain whether, for example, Defendant Pierce neglected to follow proper procedure or whether another guard, who was assigned to the Wind Yard providing the necessary direct supervision, was not in his or her assigned location. Accordingly, the Court finds limited discovery regarding the roles of each of the Defendants, the policies actually in

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[84] *See Dyer v. City of Mesquite, Texas*, 2017 WL 118811, at *10 (N.D. Tex. Jan. 12, 2017).
[85] *Id.*
[86] R. Doc. 51-1 at ¶ 30; R. Doc. 59-14 at ¶ 30.
[87] R. Doc. 51-1 at ¶ 36; R. Doc. 59-14 at ¶ 36.
[88] *See, e.g., Dyer*, 2017 WL 118811, at *10.

place at the time of the incident regarding the issuance of restricted tools, the training provided, and other relevant information related to the Defendants' subjective knowledge of the risk is necessary to rule on the Defendants' invocations of qualified immunity.

CONCLUSION

For the foregoing reasons;

IT IS ORDERED that the parties shall meet or confer before **Monday, October 9, 2017** to discuss the scope, method, and timing of the limited discovery necessary to address the Defendants' invocation of qualified immunity. If the parties reach agreement, they shall file a joint motion with a proposed order on or before **Tuesday, October 10, 2017**. If the parties do not timely file a joint motion with an agreed upon proposed order, the Court shall hold a status conference on **Friday, October 13, 2017** at **3:00 p.m** at which time the Court will determine the scope, method, and timing of the limited discovery.

IT IS FURTHER ORDERED that the Defendants' Motion for Summary Judgment on the Basis on Qualified Immunity [89] is **DENIED WITHOUT PREJUDICE,** and may be refiled after the completion of the limited discovery ordered above.

New Orleans, Louisiana, this 25th day of September, 2017.

Susie Morgan

SUSIE MORGAN
UNITED STATES DISTRICT JUDGE

[89] R. Doc. 51.

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Additional material from this filing is available in the Clerk's Office.