NO._____

In The United States Supreme Court

Reginald Dunahue – Petitioner

vs.

Wendy Kelley, Marshall Reed, Jeremy Andrews, James Dycus, David Knott, Stephen Lane, Jamin Crawford, and Kathy Baxter.

Respondents

Reginald Dunahue's APPENDIX

Table Of Contents,,

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

VOICE (314) 244-2400
FAX (314) 244-2780
www.ca8.uscourts.gov

January 27, 2020

Mr. Reginald L. Dunahue
ARKANSAS DEPARTMENT OF CORRECTIONS
106911
Cummins Unit
P.O. Box 500
Grady, AR 71644-0500

RE: 19-1691 Reginald Dunahue v. Wendy Kelley, et al

Dear Mr. Dunahue:

The court has issued an opinion in this case. Judgment has been entered in accordance with the opinion. The opinion will be released to the public at 10:00 a.m. today. Please hold the opinion in confidence until that time.

Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing and petitions for rehearing en banc must be received in the clerk's office within 14 days of the date of the entry of judgment. Counsel-filed petitions must be filed electronically in CM/ECF. Paper copies are not required. No grace period for mailing is allowed, and the date of the postmark is irrelevant for pro-se-filed petitions. Any petition for rehearing or petition for rehearing en banc which is not received within the 14 day period for filing permitted by FRAP 40 may be denied as untimely.

Michael E. Gans
Clerk of Court

AMT

Enclosure(s)

cc: Mr. Jim McCormack
Ms. Kesia Morrison

District Court/Agency Case Number(s): 2:18-cv-00021-JM

United States Court of Appeals
For the Eighth Circuit

No. 19-1691

Reginald L. Dunahue

Plaintiff - Appellant

v.

Wendy Kelley, Director, Arkansas Department of Correction; Marshall D. Reed, Chief Deputy Director, Arkansas Department of Correction; Jeremy C. Andrews, Warden, EARU, ADC; David Knott, III, Chief of Security, EARU, ADC; Jamin M. Crawford, Shift Supervisor, EARU, ADC; S. Lane, Captain; James Dycus, Deputy Warden; Kathy Baxter, Sergeant, EARU, ADC

Defendants - Appellees

Appeal from United States District Court
for the Eastern District of Arkansas - Helena

Submitted: December 27, 2019
Filed: January 27, 2020
[Unpublished]

Before LOKEN, SHEPHERD, and ERICKSON, Circuit Judges.

PER CURIAM.

In this 42 U.S.C. § 1983 action, Reginald Dunahue, an inmate at the East Arkansas Regional Unit (EARU) of the Arkansas Department of Corrections (ADC),

(APPENDIX "A")

appeals the district court's[1] denial of his request for appointed counsel, preservice dismissal of some of his claims, and adverse grant of summary judgment as to his remaining claims. For the reasons stated below, we affirm.

In verified complaints, Dunahue named in their individual and official capacities, ADC Director Kelley, ADC Deputy Director Reed, EARU Warden Andrews, EARU Chief of Security Knott, EARU Shift Supervisor Crawford, EARU Captain Lane, EARU Deputy Warden Dycus, and EARU Sergeant Baxter. He claimed defendants failed to protect him from being stabbed by inmate Antonio Smith, who had escaped a damaged "cage" in the recreation yard. Dunahue also moved for appointment of counsel. The district court dismissed Dunahue's claims against Kelley, Reed, and Andrews under 28 U.S.C. § 1915A; denied Dunahue's motions for appointment of counsel; and later granted summary judgment in favor of the remaining defendants, concluding that they were entitled to qualified immunity because it was undisputed the attack on Dunahue was a "surprise."

#1 We first conclude that the district court did not abuse its discretion in denying Dunahue's motion for appointment of counsel. See Patterson v. Kelley, 902 F.3d 845, 849-50 (8th Cir. 2018) (denial of motion for appointment of counsel is reviewed for abuse of discretion; pro se litigants have no right to appointed counsel).

We further conclude that the district court properly dismissed defendants Kelley, Reed, and Andrews because Dunahue failed to allege facts indicating how they were personally involved in any misconduct. See Cooper v. Schriro, 189 F.3d 781, 783 (8th Cir. 1999) (per curiam) (dismissal under § 1915A is reviewed de novo);

[1] The Honorable James M. Moody, Jr., United States District Judge for the Eastern District of Arkansas, adopting the report and recommendations of the Honorable Jerome T. Kearney, United States Magistrate Judge for the Eastern District of Arkansas.

see also Beaulieu v. Ludeman, 690 F.3d 1017, 1030-31 (8th Cir. 2012) (supervisors cannot be held vicariously liable under § 1983 for actions of subordinate; to state claim, plaintiff must allege supervising official violated Constitution through their individual actions). We also conclude that Dunahue's failure-to-protect claims against defendants Knott, Crawford, Lane, Dycus, and Baxter in their official capacities were barred by the Eleventh Amendment. See Glasgow v. Neb. Dep't of Corr., 819 F.3d 436, 441 n. 5 (8th Cir. 2016) (Eleventh Amendment prohibits suits for damages against state officials in their official capacities).

Finally, we uphold the district court's grant of summary judgment as to Dunahue's individual-capacity failure-to-protect claims against the remaining defendants based on qualified immunity. See Moyle v. Anderson, 571 F.3d 814, 817 (8th Cir. 2009) (grant of summary judgment is reviewed de novo; summary judgment is appropriate when evidence viewed in light most favorable to non-movant presents no genuine issue of material fact and movant is entitled to judgment as matter of law). "We have held in a number of cases that prison officials are entitled to qualified immunity from § 1983 damage actions premised on an Eighth Amendment failure-to-protect theory when an inmate was injured in a surprise attack by another inmate." Curry v. Crist, 226 F.3d 974, 978-79 (8th Cir. 2000) (citing cases). Because there is nothing in the record to indicate that Dunahue was exposed to a substantial risk of serious harm, or that the defendants acted with deliberate indifference, we find that summary judgment was proper. See Farmer v. Brennan, 511 U.S. 825, 833-38 (1994) (prison officials have duty to protect prisoners from violence by other inmates; prison official violates Eighth Amendment only when (1) condition poses objective and substantial risk of serious harm, and (2) official knows of, and disregards risk).

Accordingly, we affirm all aspects of the judgment, and we deny Dunahue's motion for appointment of counsel.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

REGINALD DUNAHUE,
ADC #106911 PLAINTIFF

v. 2:18CV00021-JM-JTK

WENDY KELLY, et al. DEFENDANTS

JUDGMENT

Pursuant to the Order entered in this matter on this date, it is Considered, Ordered, and Adjudged that this case is DISMISSED with prejudice. The relief sought is denied.

IT IS SO ADJUDGED this 18th day of March, 2019.

JAMES M. MOODY, JR.
UNITED STATES DISTRICT JUDGE

(APPENDIX "B")

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

REGINALD DUNAHUE, PLAINTIFF
ADC #106911

v. 2:18CV00021-JM-JTK

WENDY KELLY, et al. DEFENDANTS

PROPOSED FINDINGS AND RECOMMENDATIONS

INSTRUCTIONS

The following recommended disposition has been sent to United States District Judge James M. Moody, Jr. Any party may serve and file written objections to this recommendation. Objections should be specific and should include the factual or legal basis for the objection. If the objection is to a factual finding, specifically identify that finding and the evidence that supports your objection. An original and one copy of your objections must be received in the office of the United States District Court Clerk no later than fourteen (14) days from the date of the findings and recommendations. The copy will be furnished to the opposing party. Failure to file timely objections may result in waiver of the right to appeal questions of fact.

If you are objecting to the recommendation and also desire to submit new, different, or additional evidence, and to have a hearing for this purpose before the District Judge, you must, at the same time that you file your written objections, include the following:

1. Why the record made before the Magistrate Judge is inadequate.

(APPENDIX "C")

2. Why the evidence proffered at the hearing before the District Judge (if such a hearing is granted) was not offered at the hearing before the Magistrate Judge.

3. The detail of any testimony desired to be introduced at the hearing before the District Judge in the form of an offer of proof, and a copy, or the original, of any documentary or other non-testimonial evidence desired to be introduced at the hearing before the District Judge.

From this submission, the District Judge will determine the necessity for an additional evidentiary hearing, either before the Magistrate Judge or before the District Judge.

Mail your objections and "Statement of Necessity" to:

Clerk, United States District Court
Eastern District of Arkansas
600 West Capitol Avenue, Suite A149
Little Rock, AR 72201-3325

I. Introduction

Plaintiff Reginald Dunahue is a state inmate incarcerated at the East Arkansas Regional Unit (EARU) of the Arkansas Department of Correction (ADC). He filed this pro se action pursuant to 42 U.S.C. § 1983, seeking damages from Defendants for allegedly failing to protect him from an attack by another inmate (Doc. No. 2). Defendants Kelly, Reed, and Andrews were dismissed on March 1, 2018 (Doc. No. 10).

This matter is before the Court on the Motion for Summary Judgment, Brief in Support, and Statement of Facts filed by remaining Defendants Baxter, Crawford, Dycus,

Knott, and Lane (Doc. Nos. 116-118). Plaintiff filed a Response (Doc. No. 119), Defendants filed a Reply (Doc. No. 122), and Plaintiff filed a Supplemental Response (Doc. No. 125).

II. Amended Complaints

On September 19, 2017, Plaintiff was stabbed by another inmate, Antonio Smith, while being led from the recreation yard back to his cell. (Doc. No. 93, p. 1) In an Amendment adding Defendant Baxter, Plaintiff claimed she violated her duty to protect him from the inmate assault when she did not adequately search Smith prior to placing him in a cut-open cage in the recreation yard. (Id., pp. 2-3) In his first Amended Complaint, he stated Defendant Crawford also failed to protect him when he placed Smith into the cage with a hole in it. (Doc. No. 18, p. 11) Defendant Knott knew or should have known that Smith had access to a knife, based on Plaintiff's prior complaints about inmates with weapons and contraband. (Id.) Defendant Lane also failed to adequately search Smith prior to placing him in the recreation cell and failed to prevent Smith's foreseeable escape and stabbing of the Plaintiff. (Id., p. 25) Dycus knew of the holes in the recreation yard cages and failed to adequately remedy those issues and the problems with inmates in possession of weapons. (Id.)

III. Summary Judgment

Pursuant to FED.R.CIV.P. 56(a), summary judgment is appropriate if the record shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Dulany v. Carnahan, 132 F.3d 1234, 1237 (8th Cir. 1997).

"The moving party bears the initial burden of identifying 'those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.'" Webb v. Lawrence County, 144 F.3d 1131, 1134 (8th Cir. 1998) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (other citations omitted)). "Once the moving party has met this burden, the non-moving party cannot simply rest on mere denials or allegations in the pleadings; rather, the non-movant 'must set forth specific facts showing that there is a genuine issue for trial.'" Id. at 1135. Although the facts are viewed in a light most favorable to the non-moving party, "in order to defeat a motion for summary judgment, the non-movant cannot simply create a factual dispute; rather, there must be a genuine dispute over those facts that could actually affect the outcome of the lawsuit." Id.

A. Official Capacity Liability

The Court initially agrees with Defendants that Plaintiff's monetary claims against them in their official capacities should be dismissed, pursuant to sovereign immunity. See Will v. Michigan Dep't of State Police, 491 U.S. 58, 64 (1989).

B. Individual Capacity Liability

Defendants also ask the Court to dismiss the individual capacity claims against them pursuant to qualified immunity, which protects officials who act in an objectively reasonable manner. It may shield a government official from liability when his or her conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

Qualified immunity is a question of law, not a question of fact. McClendon v. Story County Sheriff's Office, 403 F.3d 510, 515 (8th Cir. 2005). Thus, issues concerning qualified immunity are appropriately resolved on summary judgment. See Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (the privilege is "an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.").

To determine whether defendants are entitled to qualified immunity, the courts generally consider two questions: (1) whether the facts alleged or shown, construed in the light most favorable to the plaintiff, establish a violation of a constitutional or statutory right; and (2) whether that right was so clearly established that a reasonable official would have known that his or her actions were unlawful. Pearson v. Callahan, 555 U.S. 223, 232 (2009).[1] Defendants are entitled to qualified immunity only if no reasonable fact finder could answer both questions in the affirmative. Nelson v. Correctional Medical Services, 583 F.3d 522, 528 (8th Cir. 2009).

According to Defendant Crawford's Declaration, he was called to the recreation yard on September 19, 2017 because inmate António Smith refused to leave the yard. (Doc. No. 116-1, p. 1) When he arrived, he noticed a piece of metal fencing was missing from Smith's cell and instructed Smith to back away from the opening. (Id., p. 2) Smith refused

[1]Courts are "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." Nelson, 583 F.3d at 528 (quoting Pearson v. Callahan, 555 U.S. at 236).

the order, pulled out a homemade shank, stuck his arm through the opening in the fence, and stabbed Plaintiff, who was passing by the cell on the way back to his own cell. (Id.) Crawford and the officers who were in charge of Plaintiff attempted to move Plaintiff out of the way, but Smith escaped through the hole in the cell and continued to attack Plaintiff. (Id.) Crawford and another officer then subdued Smith by spraying him with chemical agents. (Id.) The incident occurred in less than a minute and a half, and Plaintiff was taken to the infirmary and then to a local hospital for medical treatment. (Id., pp. 2-3) Crawford stated he had no reason to believe Smith was a threat to the Plaintiff, and that Defendants Lane, Knott, Dycus, and Baxter were not present on the yard during the incident. (Id., p. 3)

Baxter stated that on the date of the attack, she and a male officer (non-party) went to Inmate Smith's cell to search him prior to escorting him to the recreation yard. (Doc. No. 116-3, p. 1) Because she is female, she is not permitted to strip search a male inmate if a male guard is available to do so. (Id.) Therefore, she stood outside Smith's cell while the other officer searched him, and then both escorted Smith to the yard. (Id.) Baxter did not place Smith in the damaged cell, was not present in the yard when the attack occurred and had no reason to believe that Smith was a danger to Plaintiff. (Id., pp. 1-2)

Defendant Dycus is Deputy Warden over Security at EARU and was not present on the yard when the attack occurred. (Doc. No. 116-4) He reviewed a report prepared after the incident and concluded there was no evidence that staff had reason to believe that Smith was a danger to Plaintiff. (Id.) ADC policy provides that inmate strip searches be conducted by a guard of the same gender as the inmate, if possible, and no record existed to show that

Smith was on a "high security alert" prior to the incident. (Id., pp. 1-2) Neither Defendants Lane nor Knott, staff supervisors, were present on the yard when the attack occurred and neither found any indication that staff had reason to believe that Smith was a danger to Plaintiff. (Doc. Nos. 116-5, 116-6)

Plaintiff stated in his deposition that he did not have any problems with Smith prior to the day of the incident and did not tell anyone he was worried about Smith. (Doc. No. 116-2, p. 5) Smith was not on Plaintiff's enemy alert list and Plaintiff never filed a grievance complaining about him. (Id., p. 6) Plaintiff claimed that an officer warned him that if he did not stop writing grievances about Officer Palmer (a non-party), something would happen to him. (Id.) He also stated he filed grievances prior to the incident about officers who allowed inmates to exit their cells armed with weapons and carry those weapons to the recreational yard, and that Dycus failed to take corrective measures to repair the cages or to prevent inmates from carrying weapons. (Id., p. 7) Although neither Lane nor Dycus were present on the yard at the time of the incident, Plaintiff sued them because they failed to diligently supervise their officers and ensure Plaintiff's safety. (Id., pp. 2-3) Plaintiff stated that Knott was working the day of the incident, but Plaintiff was not sure if he was on the yard at the time Plaintiff was attacked. (Id., p. 4) Baxter was in charge of searching inmates prior to placing them in the recreational area and took Plaintiff and Smith to the yard on that day (Id.)

Based on these declarations and testimonies, Defendants state that Plaintiff cannot show that they knew of a substantial risk of serious harm to him, and were deliberately

indifferent to any risk, citing Farmer v. Brennan, 511 U.S. 825, 834 (1994). Plaintiff admitted he never had interactions with Smith prior to the date of the incident and had no conversations with ADC officials about Smith posing a danger to him prior to the attack. In addition, Defendants state Plaintiff presented no facts to show that they were aware of a danger to him, especially since Defendants Dycus, Knott, Lane, and Baxter were not present during the incident. Defendants also state that Plaintiff's claims that they violated ADC policies do not state a constitutional claim for relief, and that qualified immunity applies to protect them from liability in surprise attack situations. See Tucker v. Evans, 276 F.3d 999 (8th Cir. 2002).

In his Responses, Plaintiff states that prior to the attack, Defendants knew or had reason to know of a substantial risk of harm to inmates on the recreation yard. He states Baxter admitted that she let Smith out of the cell with a knife and admitted that she failed to properly search Smith. She also should have known that an inmate would escape from a cell with holes in it and stab other inmates. Defendant Dycus tolerated officers' lapses in maintaining secure and safe living environments for inmates on the recreation yard and all Defendants were on alert that the recreation cells were cut open and inmates were escaping from them and stabbing other inmates.

In their Reply, Defendants state that Plaintiff's statements are not supported by any facts, and that he made conclusory and inflammatory claims which are misrepresentations of fact and law. In addition, Plaintiff does not present any evidence to support his claim that the attack was set up by a non-party officer in retaliation for grievances he filed.

To support a claim of failure to protect, Plaintiff must allege and prove that Defendants were deliberately indifferent to the need to protect him from a substantial risk of serious harm. Newman v. Holmes, 122 F.3d 650, 652 (8th Cir. 1997). This claim has two components, an objective one asking whether there was a substantial risk of harm to the inmate, and a subjective one asking whether the prison official was deliberately indifferent to that risk. Jackson v. Everett, 140 F.3d 1149, 1151 (8th Cir. 1998). See also Curry v. Crist, 226 F.3d 974, 977 (8th Cir. 2000). In addition, prison officials are entitled to qualified immunity when a failure-to-protect claim arises from injuries resulting from a surprise attack by another inmate. Tucker v. Evans, 276 F.3d at 1001.

In this particular case, there is no dispute that the attack on Plaintiff was a surprise, as he admitted that he had no conversations with Smith and no indication that Smith posed a danger to him. In addition, although he claims Baxter admitted that she allowed Smith on the yard with a knife, this claim is based on Baxter's statement that she did not strip search Smith because she is female, and a male officer was with her to take that responsibility. Plaintiff's conclusion, based on that statement, is completely unfounded and inflammatory, especially because he presents no evidence to show that any of the Defendants had prior knowledge of a risk of harm to him. Although he claims Defendants knew of prior attacks on the yard, he provides no evidence to show those attacks actually occurred or that any of the Defendants had knowledge and/or involvement with them. As noted above, Plaintiff cannot not rest on mere allegations, but "must set forth specific facts showing that there is a genuine issue for trial." Webb, 144 F.3d at 1135. Plaintiff

provides no evidence that he was confined under conditions posing a substantial risk of harm, especially since he himself was unaware that inmate Smith posed a threat of harm, and the evidence shows Crawford quickly responded to the incident as soon as Smith began his attack. Finally, any allegations that Defendants violated ADC policy fail to support a constitutional claim for relief. "[T]he mere violation of a state law or rule does not constitute a federal due process violation." Williams v. Nix, 1 F.3d 712, 717 (8th Cir. 1992).

The Court also finds that Plaintiff's allegations against Defendants Dycus, Knott, and Lane are based on their supervisory positions as Deputy Warden and security officers. Absent a showing that they were personally involved in or aware of a risk of harm, or tacitly authorized improper actions by Defendants Crawford and Baxter, they cannot be held liable. "In a § 1983 case, an official 'is only liable for his ... own misconduct' and is not 'accountable for the misdeed of [his] agents' under a theory such as respondeat superior or supervisor liability." Whitson v. Stone County Jail, 602 F.3d 920, 923 (8th Cir. 2010) (quoting Ashcroft v. Iqbal, 556 U.S. 662 (2009)).

Therefore, absent additional facts or evidence from Plaintiff to show otherwise, the Court finds that Defendants acted reasonably under the circumstances, and that no reasonable fact finder could find that the facts alleged or shown, construed in the light most favorable to Plaintiff, established a violation of a constitutional or statutory right.

IV. Conclusion

IT IS, THEREFORE, RECOMMENDED that Defendants' Motion for Summary

Judgment (Doc. No. 116) be GRANTED, and Plaintiff's Complaint be DISMISSED with prejudice.

IT IS SO RECOMMENDED this 21st day of February, 2019.

JEROME T. KEARNEY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-1691

Reginald L. Dunahue

Appellant

v.

Wendy Kelley, Director, Arkansas Department of Correction, et al.

Appellees

Appeal from U.S. District Court for the Eastern District of Arkansas - Helena
(2:18-cv-00021-JM)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

March 13, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

(APPENDIX "D")

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

REGINALD L. DUNAHUE, PLAINTIFF
ADC #106911

v. 2:18CV00021-JM-JTK

WENDY KELLY, et al. DEFENDANTS

ORDER

The Court has received proposed findings and recommendations from United States Magistrate Judge Jerome T. Kearney. After a review of those proposed findings and recommendations, and the timely objections received thereto, as well as a de novo review of the record, the Court adopts them in their entirety. Accordingly,

IT IS, THEREFORE, ORDERED that:

1. Defendants Kelly, Reed, and Andrews are DISMISSED from this action, without prejudice.

2. All claims other than the failure to protect claims against Defendants Knott and Crawford are DISMISSED without prejudice.

IT IS SO ORDERED this 1st day of March, 2018.

JAMES M. MOODY, JR.
UNITED STATES DISTRICT JUDGE

(APPENDIX "E")

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
EASTERN DIVISION

REGINALD L. DUNAHUE, PLAINTIFF
ADC #106911

v. 2:18CV00021-JM-JTK

WENDY KELLY, et al. DEFENDANTS

PROPOSED FINDINGS AND RECOMMENDATIONS

INSTRUCTIONS

The following partial recommended disposition has been sent to United States District Judge James M. Moody, Jr. Any party may serve and file written objections to this recommendation. Objections should be specific and should include the factual or legal basis for the objection. If the objection is to a factual finding, specifically identify that finding and the evidence that supports your objection. An original and one copy of your objections must be received in the office of the United States District Court Clerk no later than fourteen (14) days from the date of the findings and recommendations. The copy will be furnished to the opposing party. Failure to file timely objections may result in waiver of the right to appeal questions of fact.

If you are objecting to the recommendation and also desire to submit new, different, or additional evidence, and to have a hearing for this purpose before the District Judge, you must, at the same time that you file your written objections, include the following:

1. Why the record made before the Magistrate Judge is inadequate.

2. Why the evidence proffered at the hearing before the District Judge (if such a Hearing is granted) was not offered at the hearing before the Magistrate Judge.

(APPENDIX "F")

3. The detail of any testimony desired to be introduced at the hearing before the District Judge in the form of an offer of proof, and a copy, or the original, of any documentary or other non-testimonial evidence desired to be introduced at the hearing before the District Judge.

From this submission, the District Judge will determine the necessity for an additional evidentiary hearing, either before the Magistrate Judge or before the District Judge.

Mail your objections and "Statement of Necessity" to:

Clerk, United States District Court
Eastern District of Arkansas
600 West Capitol Avenue, Suite A149
Little Rock, AR 72201-3325

DISPOSITION

I. Introduction

Plaintiff Reginald Dunahue is a state inmate incarcerated at the East Arkansas Regional Unit of the Arkansas Department of Correction, who filed this pro se 42 U.S.C. § 1983 action alleging numerous unconstitutional conditions of confinement.

Having reviewed Plaintiff's Complaint, the Court finds Defendants Kelly, Reed, and Andrews should be dismissed, together with all the claims except Plaintiff's failure to protect claims against Defendants Knott and Crawford.

II. Screening

The Prison Litigation Reform Act (PLRA) requires federal courts to screen prisoner complaints seeking relief against a governmental entity, officer, or employee. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that: (a) are legally frivolous or malicious; (b) fail to state a claim upon which relief may be

granted; or (c) seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b).

An action is frivolous if "it lacks an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989). Whether a plaintiff is represented by counsel or is appearing pro se, his complaint must allege specific facts sufficient to state a claim. See Martin v. Sargent, 780 F .2d 1334, 1337 (8th Cir.1985). An action fails to state a claim upon which relief can be granted if it does not plead "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). In reviewing a pro se complaint under § 1915(e)(2)(B), the Court must give the complaint the benefit of a liberal construction. Haines v. Kerner, 404 U.S. 519, 520 (1972). The Court must also weigh all factual allegations in favor of the plaintiff, unless the facts alleged are clearly baseless. Denton v. Hernandez, 504 U.S. 25, 32 (1992).

Additionally, to survive a court's 28 U.S.C. § 1915(e)(2) and 42 U.S.C. § 1997e(c)(1) screening, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009), citing Twombly, 550 U.S. at 570. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Twombly, 550 U.S. at 556-7. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of entitlement to relief." Id.

III. Facts and Analysis

In order to support a claim for relief against Defendants pursuant to 42 U.S.C. § 1983, Plaintiff must allege that a person acting under the color of state law deprived him of some Constitutional right. Griffin-El v. MCI Telecommunications Corp., et al., 835 F.Supp. 1114, 1118 (E.D.MO 1993). Plaintiff alleges numerous unconstitutional conditions of confinement against all Defendants. His allegations against Defendants Kelly, Reed, and Andrews, however, are based on their supervisory positions as Director and Chief Deputy Director of the ADC and Warden of the East Arkansas Regional Unit. Supervisor liability is limited in § 1983 actions, and a supervisor cannot be held liable on a theory of respondeat superior for his or her employees' allegedly unconstitutional actions. See White v. Holmes, 21 F.3d 277, 280 (8th Cir. 1994). A supervisor incurs liability only when personally involved in the constitutional violation or when the corrective inaction constitutes deliberate indifference toward the violation. Choate v. Lockhart, 7 F.3d 1370, 1376 (8th Cir. 1993). In this case, Plaintiff does not allege any knowledge or personal involvement by these Defendants with respect to his failure to protect claims.

In addition, Plaintiff's other allegations against all the Defendants should be dismissed without prejudice, as they concern various conditions of confinement and other incidents unrelated to the failure to protect incident. These allegations may be asserted in separate lawsuits.

IV. Conclusion

IT IS, THEREFORE, RECOMMENDED that:

1. Defendants Kelly, Reed, and Andrews be DISMISSED from this action, without prejudice.

2. All claims other than the failure to protect claims against Defendants Knott and Crawford be DISMISSED without prejudice.

IT IS SO RECOMMENDED this 14th day of February, 2018.

JEROME T. KEARNEY
UNITED STATES MAGISTRATE JUDGE

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