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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

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Teste:
Deputy Clerk of the United States Court of Appeals for the Seventh Circuit

Submitted August 26, 2020*
Decided September 30, 2020

Before

MICHAEL S. KANNE, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

AMY C. BARRETT, *Circuit Judge***

No. 19-2809

MWENDA MURITHI,
Plaintiff-Appellant,

v.

BRYAN GLECKLER, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Illinois.

No. 3:16-cv-00152-NJR-GCS

Nancy J. Rosenstengel,
Chief Judge.

ORDER

Mwenda Murithi, an Illinois prisoner, requested placement in protective custody after receiving threats from a prison gang. When the gang made good on its threats and

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* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. *See* FED. R. APP. P. 34(a)(2)(C).

** Circuit Judge Barrett was a member of the panel when this case was submitted but did not participate in the decision and judgment. The appeal is resolved by a quorum of the panel pursuant to 28 U.S.C. § 46(d).

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months while his grievance and appeal of her decision were pending. After the grievance was denied, the warden and assistant warden agreed with Cowan's recommendation to return him to general population.

When Murithi left protective custody, the prison was on lockdown. The day the lockdown was lifted, however, he was ambushed during lunch by a group of inmates. Murithi then made a third request for protective custody, which prison officials approved.

Murithi filed this Eighth Amendment suit against Cowan, the grievance examiner who denied his grievance against Cowan, the officials who approved Cowan's recommendations to return him to general population, and the acting director of the Illinois Department of Corrections. He contended that each defendant was deliberately indifferent to the risk that the Latin Folks would harm him.

The district court granted summary judgment for defendants. No evidence, the court began, showed that the director was personally involved in the case. Further, the other defendants who approved Cowan's recommendation reasonably relied on her investigation of the threats. As for Cowan, the court noted the dispute over her knowledge of the Latin Folks' threats but concluded that deliberate indifference could not be inferred from her response to those threats. As the court explained, the record reflected that she and other officials took reasonable measures to ensure his safety during her investigation. Though releasing Murithi from protective custody may have been negligent, no evidence suggested that the defendants acted recklessly or intentionally.

Murithi then moved for postjudgment relief, arguing that Cowan's speculation that he wanted to be near another inmate in protective custody was inaccurate and that defendants failed to thoroughly investigate his second request. He later supplemented the motion with affidavits from prisoners who said that Murithi was on the Latin Folks' "hit list." Because Murithi had moved for reconsideration within 28 days of judgment, the court construed his motion as one for relief under Federal Rule of Civil Procedure 59. The court denied his request, explaining that Murithi was merely rehashing his previous arguments and that his new affidavits did not support his claims.

On appeal, Murithi first challenges the entry of summary judgment for Cowan, arguing only that the district court improperly discredited his testimony in concluding that she was unaware of the Latin Folks' threats. This argument, however, misreads the court's rationale. The court acknowledged that Murithi's testimony created a genuine

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

MWENDA MURITHI,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 16-CV-152-NJR-DGW
	)	
BRYAN GLECKLER, TERI ANDERSON, KIMBERLY BUTLER, JACKIE LASHBROOK, and JEANETTE COWAN,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

ROSENSTENGEL, District Judge:

This matter is before the Court on the Report and Recommendation of United States Magistrate Judge Donald G. Wilkerson (Doc. 70), which recommends the Court grant Defendants' Motion for Summary Judgment (Doc. 63). Plaintiff Mwenda Murithi filed a timely objection to the Report and Recommendation (Doc. 74). For the reasons set forth below, the Court overrules Murithi's objection, adopts the Report and Recommendation, and grants Defendants' Motion for Summary Judgment.

BACKGROUND

Murithi, an inmate in the Illinois Department of Corrections ("IDOC"), brings this action under 42 U.S.C. § 1983 (Doc. 1). He alleges IDOC officials violated his Eighth Amendment rights when they failed to protect him from a violent attack by other inmates (Doc. 1). At the times relevant to his Complaint, Murithi was incarcerated at Menard Correctional Center ("Menard"), where his co-defendant in his criminal case, Tony

Serrano, was also serving part of his sentence (Doc. 64-2, p. 37). Serrano was housed three cells and three floors above Murithi (*Id.*, p. 51). In June 2014, Serrano received a kite (a note) telling him to sign-in to protective custody to avoid a physical attack (*Id.*, pp. 49-50). He yelled down to Murithi to share this information (Doc. 64-2, p. 50). A few moments after their conversation, an unidentified inmate, housed above Murithi, told Murithi to follow suit (*Id.*, pp. 51-52). Murithi believed the threats were from a gang, in retaliation for his and Serrano's cooperation with law enforcement (*Id.*, pp. 59-60).

Murithi requested placement in protective custody, writing, "Due to the facts surrounding my case, in particular the claim that I informed to the police, I was ordered to check into protective custody or face dire consequences in the form of bodily harm" (Doc. 64-1). Murithi was placed in protective custody pending IDOC's investigation of his claims (Doc. 64-2, p. 61). A counselor at Menard ultimately recommended denying Murithi's request, and Warden Kimberly Butler adopted the recommendation (Doc. 64-1). Murithi appealed the decision, and Terri Anderson,[1] the chairperson for the Administrative Review Board, affirmed the denial (*Id.*). Murithi was placed back in general population in December 2014 (Doc. 64-2, p. 89).

Murithi testified that, a few days later, Officer Dillingham from Internal Affairs (not a defendant) told him he had information that substantiated Murithi's allegations of an impending attack (Doc. 64-2, pp. 64-67). Dillingham instructed Murithi to sign in to protective custody (*Id.*, p. 69). Dillingham denies this conversation took place (Doc. 64-6).

[1] The Clerk of Court is **DIRECTED** to correct Defendants' names on the docket sheet as follows: Terri Anderson for Teri Anderson and Jacqueline Lashbrook for Jackie Lashbrook.

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Murithi also testified that Defendant Jeanette Cowan, a correctional casework supervisor, interviewed him about his concerns and said she became aware of his situation after talking to Dillingham (Doc. 64-2, p. 74). Cowan also disputes that this conversation took place (Doc. 64-3). Nevertheless, on December 4, 2014, Murithi was again placed in protective custody pending an investigation (Doc. 64-2, p. 155).

After investigating, both Cowan and Dillingham were unable to substantiate Murithi's allegations of needing protective custody (Doc. 64-1). Murithi could not give any Cowan any specifics except that he was threatened (*Id.* p. 5). Cowan offered to move Murithi's cell to "front street to assist with his issue," but Murithi declined (*Id.*). Furthermore, Cowan expressed concern that Murithi may be using protective custody to get near another inmate he previously assaulted (*Id.*). Therefore, Cowan recommended that Murithi's request for protective custody be denied (*Id.*). Assistant Warden Jacqueline Lashbrook and Warden Butler agreed with Cowan's recommendation, and Murithi returned to general population in March 2015 (*Id.*; Doc. 64-2, p. 155). In April 2015, Murithi was assaulted by multiple inmates resulting in cuts on his hands, red spots on his face, and back and shoulder pain (Doc. 64-2, pp. 99-110).

On August 1, 2018, Defendants moved for summary judgment, asserting Murithi's constitutional rights were not violated when he failed to give them enough information to establish he faced a substantial risk of serious harm. Even if he had, Defendants argued, he was provisionally placed in protective custody during the investigation of his claims. Thus, they acted reasonably and not with deliberate indifference.

THE REPORT AND RECOMMENDATION AND OBJECTION

On November 1, 2018, Magistrate Judge Wilkerson entered a Report and Recommendation on Defendants' Motion for Summary Judgment (Doc. 70). Magistrate Judge Wilkerson concluded that Defendants are entitled to summary judgment because Murithi's requests for placement in protective custody did not point to a specific or imminent threat that raised awareness of a substantial risk of serious harm (*Id.*). Alternatively, Judge Wilkerson concluded that Defendants responded to Murithi's complaints in a reasonable manner by temporarily placing him in protective custody until the resolution of their investigations (Doc. 70). Mr. Murithi filed a timely objection, arguing his conversations with Dillingham and Cowan raise a genuine issue of material fact as to whether Defendants were aware of a risk to his safety (Doc. 74).

LEGAL STANDARD

When timely objections are filed, the Court must undertake a *de novo* review of the Report and Recommendation. 28 U.S.C. § 636(b)(1)(B), (C); FED. R. CIV. P. 72(b); SDIL-LR 73.1(b); *Harper v. City of Chicago Heights*, 824 F. Supp. 786, 788 (N.D. Ill. 1993); *see also Govas v. Chalmers*, 965 F.2d 298, 301 (7th Cir. 1992). This requires the Court to look at all evidence contained in the record, give fresh consideration to those issues to which specific objections have made, and make a decision "based on an independent review of the evidence and arguments without giving any presumptive weight to the magistrate judge's conclusion." *Harper*, 824 F.Supp. at 788 (citing 12 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3076.8, at p. 55 (1st ed. 1973) (1992 Pocket Part)); *Mendez v. Republic Bank*, 725 F.3d 651, 661 (7th Cir. 2013). If only a "partial objection is

made, the district judge reviews those unobjected portions for clear error." *Johnson v. Zema Systems Corp.*, 170 F.3d 734,739 (7th Cir. 1999). The Court "may accept, reject or modify the magistrate judge's recommended decision." *Harper*, 824 F. Supp. at 788.

DISCUSSION

Murithi asserts Defendants violated his Eighth Amendment right to be free from cruel and unusual punishment. Prison officials have a duty under the Eighth Amendment to "take reasonable measures to guarantee the safety of the inmates . . ." *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984). This includes protecting inmates from violence at the hands of other inmates. *Farmer v. Brennan*, 511 U.S. 825, 833 (1994). To establish an Eighth Amendment claim, a plaintiff must show the prison official was deliberately indifferent to a "substantial risk of serious harm" to the plaintiff's safety. *O'Brien v. Indiana Dep't of Correction ex rel. Turner*, 495 F.3d 505, 508 (7th Cir. 2007). Liability exists only when a prison official had "actual knowledge" of the risk of harm. *Gevas v. McLaughlin*, 798 F.3d 475, 480 (7th Cir. 2015). This is generally established if the inmate reported "a specific threat to his safety." *Id.* "Complaints that convey only a generalized, vague, or stale concern about one's safety typically will not support an inference that a prison official had actual knowledge that the prisoner was in danger." *Id* at 481.

Summary judgment is only appropriate "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." *Spurling v. C & M Fine Pack, Inc.*, 739 F.3d 1055, 1060 (7th Cir. 2014) (*quoting* FED. R. CIV. P. 56(a)). Once the moving party has set forth the basis for summary judgment, the burden then shifts to the nonmoving party who must go beyond mere allegations and

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offer specific facts showing that there is a genuine issue of fact for trial. FED. R. CIV. P. 56(e); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 232-24 (1986).

Here, Murithi does not contest that his written requests for placement in protective custody fail to demonstrate he faced a substantial risk of serious harm. He admits his initial request in June 2014 did not contain enough information, (Doc. 64-2, pp. 140-41), and his second request on December 4, 2014 did not set forth any additional information. Moreover, Murithi does not specifically object to Judge Wilkerson's conclusion that the requests were deficient, and the Court finds no clear error in Judge Wilkerson's line of reasoning. *See Johnson*, 170 F.3d at 739.

Instead, Murithi asserts a genuine issue of material fact exists as to whether Defendants were otherwise aware of a risk to his safety. Murithi testified that Cowan told him that Dillingham told her he received credible information that members of the Latin Folk were "waiting for" Murithi but that the situation had been averted (Doc. 64-2, pp. 67, 74-75). Construing this evidence in a light most favorable to Murithi, his testimony does suggest that Cowan had actual knowledge of a risk to Murithi's safety on December 4, 2014—the date he signed into protective custody.

Even if a jury found that Defendants knew of a risk to Murithi's safety on December 4, 2014, however, Defendants were not deliberately indifferent to that risk. Rather, they took reasonable measures to ensure his safety. Murithi was allowed to sign into protective custody while Cowan and Dillingham investigated his allegations. He also could have been housed on front street, which he declined. Murithi then remained in protective custody until the investigation and appeals process concluded in March 2015.

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The fact that Defendants ultimately denied Murithi's request for protective custody after completing an investigation "is not dispositive of the fact that prison officials were therefore deliberately indifferent to [his] safety." *Boyce v. Moore*, 314 F.3d 884, 891 (7th Cir. 2002) (citation omitted); *Horshaw v. Casper*, No. 16-3789, 2018 WL 6583432, at *2 (7th Cir. Dec. 14, 2018) ("A guard who reasonably disbelieves a prisoner's assertion is not liable just because it turns out to have been true."). At most, the decision to deny Murithi's request for protective custody amounts to negligence, which falls short of proving Defendants acted with deliberate indifference. *See Guzman v. Sheahan*, 495 F.3d 852, 857 (7th Cir. 2007) (so long as officer responded reasonably to the risk, he cannot be said to have been deliberately indifferent, even if his response did not prevent harm from occurring). Indeed, Cowan's actions in investigating Murithi's allegations separate this case from others where prison officials may have known about threats to an inmate's safety and yet took no responsive action to prevent the harm. *See Horshaw*, 2018 WL 6583432, at *1-*2. Accordingly, Murithi's objection is overruled.

The Court has reviewed the remaining portions of Judge Wilkerson's Report and Recommendation (Doc. 70) for clear error and finds none, except to note that the undersigned expresses no opinion as to Magistrate Judge Wilkerson's discussion of qualified immunity, as it is not essential to the disposition of Defendants' motion.

CONCLUSION

For these reasons, Plaintiff Mwenda Murithi's Objection to Magistrate Judge Wilkerson's Report and Recommendation (Doc. 74) is **OVERRULED**, and the Court **ADOPTS** Magistrate Judge Wilkerson's Report and Recommendation (Doc. 70). The

Motion for Summary Judgment filed by Defendants is **GRANTED** (Doc. 63). This action is **DISMISSED**, and the Clerk is **DIRECTED** to enter judgment accordingly.

IT IS SO ORDERED.

DATED: December 19, 2018

Nancy J. Rosenstengel

NANCY J. ROSENSTENGEL
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

MWENDA MURITHI, Plaintiff, v. BRYAN GLECKLER, TERI ANDERSON, KIMBERLY BUTLER, JACKIE LASHBROOK, and JEANETTE COWAN, Defendants.	)	Case No. 3:16-cv-152-NJR-DGW

REPORT AND RECOMMENDATION

WILKERSON, Magistrate Judge:

This matter has been referred to United States Magistrate Judge Donald G. Wilkerson by United States District Judge Nancy J. Rosenstengel pursuant to 28 U.S.C. § 636(b)(1)(B), Federal Rule of Civil Procedure 72(b), and SDIL-LR 72.1(a) for a Report and Recommendation on the Motion for Summary Judgment filed by Defendants on August 1, 2018 (Doc. 64). For the reasons set forth below, it is **RECOMMENDED** that the Motion be **GRANTED** and that the Court adopt the following findings of fact and conclusions of law.

FINDINGS OF FACT

Plaintiff, Mwenda Murithi, was incarcerated at the Menard Correctional Center in 2014 and 2015. On June 4, 2014, he requested placement in protective custody because:

> Due to the facts surrounding my case in particular the claim that I informed to the police, I was advised to check into protective custody or face dire consequences in the form of bodily harm.
>
> (Doc. 64-1, p. 10).[1]

[1] Plaintiff elaborated on the reason why he needed protective custody in his deposition (Doc.

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He was interviewed on June 6, 2014 by Correctional Officer Andrew Dillingham, who was assigned to the intelligence unit. Plaintiff relayed the kite that Serrano had received and that he believed the threat to his safety had to do with his underlying conviction (Doc. 64-2, p. 57). Officer Dillingham found that Plaintiff was "unable or unwilling to identify or specify who he feels is threatening his safety" and recommended that protective custody be denied (Doc. 64-1, p. 9; Doc. 64-6, ¶ 3). That recommendation was followed by the Assistant Warden of Programs, Jacqueline Lashbrook, and the Warden, Kimberly Butler, who was the final decision maker at the institution (Doc. 64-1, pp. 9-10). It is undisputed that neither Lashbrook nor Butler independently determined Plaintiff's request for protective custody. Plaintiff appealed that decision to the Administrative Review Board (ARB). The ARB's representative, Terri Anderson, interviewed Plaintiff and reviewed the written material (Doc. 64-1, p. 8). The ARB noted that Plaintiff was affiliated with a security threat group (STG) but that he had no known enemies (*Id.*). After outlining Plaintiff's vague statement about the need for protection and noting he was involved in STG activity at a prior institution, the ARB determined that he did not identify "any specific individual(s) from which he has received threats" (*Id.*). The ARB recommended that the

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63-2). Plaintiff was convicted of murder along with a co-defendant, Serrano. Plaintiff was a member of the Imperial Gangsters and had shot members of a rival gang, the Spanish Cobras. Both gangs fell under the Latin Folks, an illicit umbrella organization for various Security Threat Groups in and out of prison. Serrano, who is also an inmate in the Illinois Department of Corrections, also was involved in an altercation with Plaintiff at their previous institution, Stateville CC, where they were convicted of beating up another inmate in the showers. The assault was at the behest of the Latin Folks. Both Plaintiff and Serrano were then transferred to Menard CC as a result. Throughout the beginning of 2014, Plaintiff was "screened" by various inmates in an attempt to discern his gang affiliation, his disciplinary history within the IDOC, and his underlying crime. On June 4, 2014, Serrano received a kite (a note) telling him that he should check into protective custody or he would be beaten up. On the same day, Serrano shared this information with Plaintiff by sending him a kite and talking about what he would do in the gallery (they were 3 cells and 3 floors apart) within the hearing of other inmates. A few minutes later, another inmate told Plaintiff to follow suit and seek protective custody. Plaintiff then told a gallery officer that he needed to sign into protective custody.

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non-placement be upheld and Director S.A. Godinez (or his designee) concurred on November 19, 2014 (*Id.*). It is undisputed that Plaintiff remained in protective custody until a decision was reached by the Director. He was released from protective custody on December 1, 2014.

Three days later, on December 4, 2014, Plaintiff was again interviewed by Officer Dillingham. Plaintiff stated that Dillingham told him that the Latin Folks were planning on assaulting him in the yard (Doc. 64-2, p. 66).[2] Upon Dillingham's suggestion, Plaintiff then checked into protective custody on December 4 and filled out the form on December 8, 2014 (*Id.* 68). In doing so, he stated:

> Due to a belief that I cooperated with the police in regard to my case the [redacted] ordered me to me [sic] check into P.C. This was at first assumed to be a joke[3] for they did not expressly give me a kite and had masked the messenger which led to my being denied PC the first time around[4] and being sent back to the west house. However the second time around it seems that they were going to physically attack me but I.A. pulled [me] out the cellhouse where it happened [sic]. This will unfortunately follow me all through population thus I cannot be in general pop.
>
> (Doc. 64-1, p. 6). [5]

For his part, Dillingham denies telling Plaintiff to check into protective custody and instead indicated that he was unable to substantiate the threat (*Id.*; Doc. 64-6, ¶ 3). Counselor Jeannette Cowan also interviewed him on December 8, 2014 (Doc. 64-1, p. 5). She told him that the attempted assault had been averted and asked him whether he wanted to be moved to the "front street cellhouse" (Doc. 64-2, pp. 73-4). Plaintiff declined because he believed "this shit going to

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[2] This statement is clearly hearsay if offered for the truth of the matter asserted.

[3] By correctional officers (Doc. 64-2, p. 78).

[4] That is, Plaintiff did not give officers any information on STG or gang activity (Doc. 64-2, p. 78-9).

[5] This translation of Plaintiff's handwritten statement is a best estimation.

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follow me"; she nonetheless told him that she didn't think he needed protective custody (*Id*). In the written report, she expressed concern that Plaintiff may have an ulterior motive for entering protective custody[6] (Doc. 64-1, p. 5). Warden Butler approved the decision to deny protective custody and Plaintiff appealed to the ARB (*Id.* 6). The ARB, again through Terri Anderson, found that Plaintiff presented "no new information to confirm any specific threat" and recommended that the appeal be denied (*Id.* 4). The Acting Director, Bryan Gleckler concurred through a designee on March 11, 2015 (*Id.*). It is unclear whether Plaintiff remained in protective custody during this time period.

Unfortunately, on April 4, 2015, Plaintiff was assaulted by other inmates (Doc. 64-8, p. 1). Medical personnel indicated that he reported some pain in his back and had minimal injuries (*Id.* 1, 3). He was treated for his injuries and pain (*Id.* 5). It is undisputed that he was then placed in segregation for a month for being involved in the altercation and then signed himself back into protective custody on May 4, 2015. This time, protective custody was granted (Doc. 64-1, p. 2).

CONCLUSIONS OF LAW

Summary judgment is proper only if the moving party can demonstrate "that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." FEDERAL RULE OF CIVIL PROCEDURE 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). *See also Ruffin-Thompkins v. Experian Information Solutions, Inc.*, 422 F.3d 603, 607 (7th Cir. 2005); *Black Agents & Brokers Agency, Inc. v. Near North Ins. Brokerage, Inc.*, 409 F.3d 833, 836 (7th Cir. 2005). The moving party bears the burden of establishing that no material facts are in genuine dispute; any doubt as to the existence of a genuine issue must be resolved against the moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160 (1970). *See also Lawrence v.*

[6] Like trying to be in close proximity to the victim he assaulted at Stateville CC.

Kenosha County, 391 F.3d 837, 841 (7th Cir. 2004). A moving party is entitled to judgment as a matter of law where the non-moving party "has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex,* 477 U.S. at 323. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* The Seventh Circuit has stated that summary judgment is "the put up or shut up moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of the events." *Steen v. Myers*, 486 F.3d 1017, 1022 (7th Cir. 2007) (quoting *Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852, 859 (7th Cir. 2005) (other citations omitted)).

Prison officials have a duty under the Eighth Amendment, "to protect prisoners from violence at the hands of other prisoners." *Farmer v. Brennan*, 511 U.S. 825, 833 (1994). "Being violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'" *Id.* at 834 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

To succeed on a failure-to-protect claim, an inmate must first demonstrate that he is "incarcerated under conditions posing a substantial risk of serious harm." *Farmer*, 511 U.S. at 834. Second, he must show that prison officials acted with deliberate indifference to that risk, a subjective inquiry into a prison official's state of mind. *Farmer*, 511 U.S. at 838-39. As explained in *Farmer*, "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk or serious harm exists, and he must also draw the inference." *Id.* at 837.

In making out his claim, a prisoner must demonstrate that prison officials were aware of a

specific, impending and substantial threat to his safety, often "by showing that he complained to prison officials about a specific threat to his safety." *Pope v. Shafer*, 86 F.3d 90, 92 (7th Cir. 1996) (quoting *McGill v. Duckworth*, 944 F.2d 344, 349 (7th Cir. 1991)). Not every risk of harm rises to a constitutional violation. *Pinkston v. Madry*, 440 F.3d 879, 889 (7th Cir. 2011). In June 2014, Plaintiff did not complain about a specific or imminent threat to his safety. *See Brown v. Budz*, 398 F.3d 904-911 (7th Cir. 2005) (suggesting that the substantial risks must be "so great that they are almost certain to materialize if nothing is done"). The only information he gave to Dillingham could be that a couple of inmates inquired about this criminal conviction and that an unknown inmate told him to check into protective custody because Serrano had been threatened. *See DeJesus v. Godinez*, 720 Fed.Appx. 766, 772 (7th Cir. 2017) (finding that a complaint that a specific inmate was aggressive without more did not represent an imminent risk of harm). In December, 2014, Plaintiff still could not point to any particular person or even an overt threat to his safety – just a few looks and the previous comment by the unknown inmate who yelled at him to seek protective custody. *See e.g. McKinstry v. Colbert*, 2018 WL 2944148, *4 (C.D. Ill. 2008). Even if the truth of Dillingham's statement to him is credited (which it should not be), further investigation by Dillingham and by Cowan revealed no further credible threat.[7] Plaintiff provided no details of any threat, no name, no time, no date, no location, and not even a concreate reason for any attack. *See Giles v. Tobeck*, 895 F.3d 510 (7th Cir. 2018) (stating that on summary judgment the plaintiff in that case should have shown that a *named* inmate "presented an objectively serious risk of harm"). Plaintiff's argument and evidence only suggests that there was an unspecific fear of being assaulted – such a fear cannot sustain this failure to protect claim. *See*

[7] To the extent that Plaintiff may argue that the threat of him being beaten on the yard was on-going, the failure to keep Plaintiff in protective custody could only be, at most, characterized as negligent. It is undisputed that the threat to Plaintiff was investigated and considered by Cowan and Dillingham subsequent to December 4, 2014, the date he was interviewed by Dillingham.

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Jones v. Butler, 663 Fed.Appx. 468, 470 (7th Cir. 2016) (quoting *Babcock v. White*, 102 F.3d 267, 272 (7th Cir. 1996), for the proposition that "it is the reasonably preventable assault itself, rather than any fear of assault that gives rise to a compensable claim under the Eighth Amendment.").

Even if Plaintiff did make prison officials aware of a specific, impeding, and substantial risk of harm, the prison official may be held liable only if he both knows an inmate faces a substantial risk of serious harm and "disregards that risk by failing to take reasonable measures to abate it." *Farmer*, 511 U.S. at 847. An official who knows of a substantial risk of serious harm is free from liability if he or she "responded to the situation in a reasonable manner." *Fisher v. Lovejoy*, 414 F.3d 659, 664 (7th Cir. 2005). A showing of negligence, or even gross negligence, is insufficient to prove an official acted with deliberate indifference. The standard is the "equivalent of criminal recklessness." *Grieveson v. Anderson*, 538 F.3d 763, 777 (7th Cir. 2008) (quoting *Borello v. Allison*, 446 F.3d 742, 747 (7th Cir. 2006). Plaintiff cannot show that any Defendant was deliberately indifferent to the risk of his safety because he was placed in protective custody upon request and until an investigation and the appeals were exhausted. That is, Defendants did not ignore his request, the affirmatively took steps to investigate his claims.

There is no evidence that Defendants Gleckler, Lashbrook, or Butler were aware of any risk of harm beyond Plaintiff's written request for protective custody and the recommendations of Dillingham and Cowan. In any event, it is undisputed that when Plaintiff presented himself for protective custody, his claim was investigated by Officer Dillingham and/or Cowan and, as to the June request, by Anderson. He also was provisionally placed in protective custody until an initial determination was made and through his appeals. As such, there is no evidence that nothing was done or that Defendants' response was inadequate. Their actions could not constitute deliberate indifference. And, Defendants Lashbrook, Butler, and Gleckler are entitled to rely on their

subordinate's determination because it would be patently unreasonable for them to investigate anew Plaintiff's claims without any additional reason to do so. *Wright v. Miller*, 561 Fed.Appx. 551, 554-5 (7th Cir. 2014) (noting that supervisors cannot be vicariously liable for their subordinates actions and "they cannot be liable for relying, as they reasonably did, on the recommendations of those who had concluded that there was no verifiable threat to [plaintiff's] safety."); *see also Steidl v. Gramley*, 151 F.3d 739, 741 (7th Cir. 1998) (stating that a warden is not liable for the isolated failure of subordinates to follow prison policy unless directed to by the warden); *Morris v. Ley*, 331 Fed.Appx. 417, 420 (7th Cir. 2009).

For the foregoing reasons, and because Plaintiff cannot establish that his Constitutional rights were violated, Defendants are entitled to qualified immunity. Qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law." *Estate of Escobedo v. Martin*, 702 F.3d 388, 404 (7th Cir. 2012) (quotation marks and citations omitted). In determining whether Defendants are entitled to qualified immunity, the Court must consider two questions: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?"; and, 2. was "the right clearly established?" *Pearson v. Callahan*, 555 U.S. 223, 236 (2009); *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *see also Miller v. Harbaugh*, 698 F.3d 956, 962 (7th Cir. 2012). Plaintiff has the burden of establishing that a constitutional right is clearly established. *Denius v. Dunlap*, 209 F.3d 944, 950 (7th Cir. 2000). "A constitutional right is clearly established when it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Estate of Escobedo*, 702 F.3d at 404 (citing *Saucier*, 533 U.S. at 201). Plaintiff has presented no case authority that would suggest that the Defendants' conduct was unlawful in the situation they confronted for the reasons set forth above.

RECOMMENDATIONS

For the foregoing reasons, it is **RECOMMENDED** that the Motion for Summary Judgment filed by Defendants on August 1, 2018 (Doc. 64) be **GRANTED**, that judgment be granted in favor of Defendants and against Plaintiff, and that the Court adopt the foregoing findings of fact and conclusions of law.

NOTICE REGARDING OBJECTIONS

Pursuant to 28 U.S.C. § 636(b)(1) and SDIL-LR 73.1(b), any party may serve and file written **OBJECTIONS** to this Report and Recommendation/Proposed Findings of Fact and Conclusions of Law within fourteen (14) days after service. Failure to file such **OBJECTIONS** shall result in a waiver of the right to appeal all issues, both factual and legal, which are addressed in the Report and Recommendation/Proposed Findings of Fact and Conclusions of Law. *Video Views, Inc. v. Studio 21, Ltd. and Joseph Sclafani,* 797 F.2d 538 (7th Cir. 1986).

You are not to file an appeal as to the Report and Recommendation/Proposed Findings of Fact and Conclusions of Law. An appeal is inappropriate until after the District Judge issues an Order either affirming or reversing the Report and Recommendation/Proposed Findings of Fact and Conclusions of Law of the U.S. Magistrate Judge.

DATED: November 1, 2018

Donald G. Wilkerson

DONALD G. WILKERSON
United States Magistrate Judge

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

November 17, 2020

CERTIFIED COPY
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Teste:
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Court of Appeals for the
Seventh Circuit

Before

MICHAEL S. KANNE, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

No. 19-2809

MWENDA MURITHI,
Plaintiff-Appellant,

v.

BRYAN GLECKLER, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Illinois.

No. 3:16-cv-00152-NJR-GCS

Nancy J. Rosenstengel,
Chief Judge.

ORDER

On consideration of the petition for rehearing *en banc* filed in the above-entitled cause by *pro se* appellant, Mwenda Murithi on October 19, 2020, no judge in active service has requested a vote on the petition for rehearing *en banc*. It is, therefore, ORDERED that rehearing *en banc* is **DENIED**.

Appendix D