APPENDIX

A

United States Court of Appeals'
opinion

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
August 24, 2020
Lyle W. Cayce
Clerk

No. 19-40470

CHRISTOPHER BRYAN TORRES,

Plaintiff—Appellant,

versus

BRAD LIVINGSTON; WILLIAM STEPHENS; KELVIN SCOTT; EDGAR BAKER, JR.; TODD FUNAI; FRANCES SIMS; JONATHAN ENDSLEY,

Defendants—Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
No. 6:17-CV-196

Before SMITH, WILLETT, and DUNCAN, *Circuit Judges*.

JERRY E. SMITH, *Circuit Judge*:

Christopher Torres sued a correctional officer and several staff members and administrators per 42 U.S.C. § 1983 (and state tort law) for allegedly failing to protect him from an attack by another inmate in violation of the Eighth Amendment. The defendants successfully moved to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The district court denied Torres's motion to alter or amend the judgment per Federal Rule of Civil Procedure 59(e). We affirm.

I.

Torres worked as an inmate janitor in an administrative segregation unit. During mealtimes in that unit, the floor officer—in this case, Jonathan Endsley—opens a row of seven inmates' food tray slots in quick succession. Once the slots are open, the inmate janitor delivers each inmate a food tray. Inmates often request that officers pass through miscellaneous items, such as books, newspapers, and magazines. Usually, the officer directs an inmate janitor to fulfill those requests. After the food trays are distributed, the officer closes the slots.

While Endsley and Torres were delivering meals, Angel Sanchez, one of the inmates, requested that Endsley retrieve pictures from the floor outside his cell. Endsley directed Torres to pick up the photos. Torres complied willingly, noting that Sanchez "appeared harmless and asked in the right tone." When Torres reached to grab the pictures off the ground, however, Sanchez stabbed him on the right side of his neck. Torres claims that, as a result, he has breathing, speech, eating, and drinking problems, continually has to clear his throat, has a persistent cough, and gets headaches. He alleges that a neurologist has said that his medical complications are "lifelong" and "irreparable."

Torres contends that the district court erred in dismissing his § 1983 claims.[1] We review the 12(b)(6) dismissal *de novo*. *Jackson v. City of Hearne*, 959 F.3d 194, 200 (5th Cir. 2020). "To plead a constitutional claim under § 1983, [Torres] must allege that a state actor violated a constitutional right." *Id.*

A.

Torres avers that Endsley's alleged failure to protect his health and

[1] Torres does not expressly challenge the dismissal without prejudice of his pendent state-law claims.

safety violated the Eighth Amendment. "The Supreme Court has held that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." *Cantu v. Jones*, 293 F.3d 839, 844 (5th Cir. 2002). Accordingly, "prison officials have a duty to protect prisoners from violence at the hands of other prisoners." *Id.* A prison official may be held liable under the Eighth Amendment only if he "ha[s] a sufficiently culpable state of mind, which, in prison-conditions cases, is one of 'deliberate indifference' to inmate health or safety." *Id.* (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)).

"Deliberate indifference is an extremely high standard to meet. A prison official displays deliberate indifference only if he (1) knows that inmates face a substantial risk of serious bodily harm and (2) disregards that risk by failing to take reasonable measures to abate it." *Taylor v. Stevens*, 946 F.3d 211, 221 (5th Cir. 2019). "Deliberate indifference cannot be inferred merely from a negligent or even a grossly negligent response to a substantial risk of serious harm." *Williams v. Banks*, 956 F.3d 808, 811 (5th Cir. 2020) (brackets omitted).

Torres does not offer any facts suggesting that Endsley knew of and disregarded a substantial risk to his health and safety. By all accounts, Endsley was unaware that Torres was in danger, and Torres does not allege that there was anything that would have caused Endsley to foresee that Sanchez would assault him. In fact, Torres remarked that Sanchez "appeared harmless and asked in the right tone" to pick up the pictures. Although Torres alleges that inmates in administrative segregation have weapons and a history of attacking people, he provides no specific examples, nor does he point to any other case in which that was alleged. In sum, Torres failed to allege that Endsley was negligent, much less that he consciously disregarded any risk of

serious harm.[2]

B.

Torres also appeals the denial of his Rule 59(e) motion, which we review for abuse of discretion. *Trevino v. City of Fort Worth*, 944 F.3d 567, 570 (5th Cir. 2019) (per curiam). "Under Rule 59(e), amending a judgment is appropriate (1) where there has been an intervening change in the controlling law; (2) where the movant presents newly discovered evidence that was previously unavailable; or (3) to correct a manifest error of law or fact." *Demahy v. Schwarz Pharma, Inc.*, 702 F.3d 177, 182 (5th Cir. 2012) (per curiam). "A motion to reconsider based on an alleged discovery of new evidence should be granted only if (1) the facts discovered are of such a nature that they would probably change the outcome; (2) the facts alleged are actually newly discovered and could not have been discovered earlier by proper diligence; and (3) the facts are not merely cumulative or impeaching." *Ferraro v. Liberty Mut. Fire Ins. Co.*, 796 F.3d 529, 534 (5th Cir. 2015).

Torres moved to alter or amend the judgment based on the affidavit of a fellow inmate who claimed to have witnessed at least one food-slot attack a week, and often more than one a day, over the past fifteen years. Torres contended that, in light of the history of inmate food-slot attacks, the court should have concluded that the defendants were subjectively aware of the risk to Torres but failed to take reasonable measures. The court did not abuse its discretion in denying that motion. It reasonably found that the inmate's claim to have witnessed roughly a thousand food-slot assaults was not credi-

[2] Because Torres does not allege facts that amount to a constitutional violation, his claims of failure to train or supervise, against the other defendants, also necessarily fail. *See Whitley v. Hanna*, 726 F.3d 631, 648 (5th Cir. 2013) ("All of [the plaintiff's] inadequate supervision, failure to train, and policy, practice, or custom claims fail without an underlying constitutional violation.").

ble and that even if it was, it did not demonstrate that the defendants were aware of a specific danger to Torres. All pending motions are denied as moot.

AFFIRMED.

APPENDIX

B

Final Judgment
of the U.S. District Court

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

CHRISTOPHER TORRES	§	
v.	§	CIVIL ACTION NO. 6:17cv196
BRAD LIVINGSTON, ET AL.	§	

FINAL JUDGMENT

The above-styled civil rights lawsuit having come before the Court for consideration, and a decision having been duly rendered, it is hereby

ORDERED that the above-entitled and numbered cause of action is **DISMISSED WITH PREJUDICE** for failure to state a claim upon which relief may be granted. It is further

ORDERED that any state law claims raised by the Plaintiff are **DISMISSED WITHOUT PREJUDICE** to their refiling in state court, with the statute of limitations suspended for 30 days following the date of entry of final judgment.

So **ORDERED** and **SIGNED August 24, 2018.**

Ron Clark, Senior District Judge

APPENDIX

C

U.S. Magistrate's
Findings and Recommendations

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

CHRISTOPHER BRYAN TORRES	§	
v.	§	CIVIL ACTION NO. 6:17cv196
BRAD LIVINGSTON, ET AL.	§	

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

The Plaintiff Christopher Torres, a prisoner of the Texas Department of Criminal Justice, Correctional Institutions Division proceeding *pro se*, filed this civil rights lawsuit under 42 U.S.C. §1983 complaining of alleged deprivations of his constitutional rights. The lawsuit was referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges. As Defendants, Torres names former TDCJ-CID Director William Stephens, Regional Director Kelvin Scott, Warden Edgar Baker, Major Todd Funai, Lt. Frances Sims, and Officer Jonathan Endsley.

I. The Plaintiff's Complaint

The operative pleading is Torres' second amended complaint filed January 29, 2018 (docket no. 25). In this amended complaint, Torres states that on June 27, 2015, he was working as an inmate janitor, known as an SSI (support services inmate). He explains that the Michael Unit administrative segregation building has six pods, known as A through F Pods. Every pod other than F Pod had two guards per shift, one on the floor and one in the control picket. F Pod sometimes had two floor officers as well as a picket officer.

Torres states that there were supposed to be six SSI's on his work shift in charge of cleaning the pods. He was assigned to F Pod. His duties included sweeping, mopping, and emptying trash

cans. On June 27, 2015, he finished helping the floor officer feed the inmates housed on F Pod and left to get hypercaloric snacks for some diabetic inmates on F Pod. As he passed by D Pod on his way to the kitchen, Officer Endsley, who was the floor officer for D Pod, asked him to come help feed the prisoners on D Pod. Torres explains that for some reason, there was no SSI on D Pod that morning.

Torres states that Officer Endsley did what most of the officers do during feeding time, explaining this procedure as follows:

> Endsley would simply just open the food tray slot door of every cell (one right after another) on a particular row of seven cells, then he would wait at the end of that row while I would have to hand each ad. seg. inmate a food tray through their opened food slot (or just leave it on their opened food slot if they were not at the slot) and I would have to come back shortly later with a bucketful of drink and pour a cupful of it into the cups of said ad. seg. inmates who would be holding their cups through their opened food slot; the food slots of Michael's ad. seg. cell doors were about five inches wide by about 1 ½ feet long.

Torres goes on to explain that many times, while the food slots were still open, the inmates would ask the floor officer pass items such as books, newspapers, magazines, photo albums, and food back and forth between the cells. He states that most of the time, the floor officer would tell the inmates to "have the SSI do it for you," so the SSI working there (whether Torres or someone else) would pass along whatever the inmates requested.

Once the SSI finished passing out the food and drink, and the requested items were passed, Torres explains that the floor officer would walk by and close all of the food slots. The floor officer and SSI would then go to the next row of cells and repeat the procedure. No supervisors were present while feeding was going on, but would come make their rounds after feeding was completed. Torres states that there was no supervisor present on June 27, 2015, when he began helping Officer Endsley feed D Pod.

After feeding One Row on D Pod, Torres states that he and Officer Endsley proceeded to Two Row. Officer Endsley was a few steps ahead and Torres saw him open the slot for the cell of inmate Angel Sanchez. Sanchez reached out through his food slot and pointed to some pictures

laying on the floor just outside of Sanchez's cell door. He asked Officer Endsley to get the pictures for him, and Endsley replied "the SSI will get them for you. Ask him."

Torres states that Officer Endsley went on ahead to open the cell doors. Torres handed Sanchez his food tray and Sanchez asked him to get the pictures. Torres states that Officer Endsley had told him to pass items on One Row and he had heard Endsley tell Sanchez to ask Torres to get the pictures. He also indicates that he "felt sorry for Sanchez because he appeared harmless and spoke in the right tone."

Torres states that he reached down and attempted to get the pictures off the floor and Sanchez stabbed him in the right side of the neck with what appeared to be a two-foot long pole with a four-inch sharpened barbed-tip nail in it. He felt the nail hit his neck bone and later learned that the nail went between his carotid artery and jugular vein. He had to be airlifted to the hospital in Tyler and now has a visible three-inch scar.

Within a week or so, Torres states that he was interviewed by a lady from the Office of the Inspector General. She told him the only thing he could do was press criminal charges against Sanchez, which Torres interpreted as meaning that he could not grieve the dangerous working conditions which had led to the stabbing. During this interview, Torres stated that he could barely talk because of the stabbing in the neck.

Between June and September of 2015, Torres states that his mind was clouded and at first he had problems eating and drinking. He has now just about regained his voice back and is able to eat and drink normally, but he still coughs about every half hour and must constantly clear his throat. He gets sharp headaches when he coughs and suffers residual headaches between coughing spells. He has been prescribed medications, but these do not help.

Torres states that when he began work as an SSI, he was never told that TDCJ has policies on properly feeding inmates in administrative segregation. He was never warned that he could be attacked through a food slot when the slot was open. He believed that he had to help officers feed the inmates and there was never any posted rule prohibiting SSI's from helping the floor officers

feed inmates. Neither he nor any other SSI that he knows of ever received a disciplinary case for helping the floor officers feed the inmates.

Torres further states that Officer Endsley had just begun working in the Michael Unit administrative segregation building a few weeks before the stabbing. He contends that Officer Endsley fed in this way because he and other guards are either trained or given tacit authorization to do so.

According to Torres, he is not the first person to be assaulted through a food tray slot in administrative segregation. He asserts that the supervisory defendants knew of the risks that such an assault would take place and indicates that Sanchez was in administrative segregation at the Michael Unit because he had previously stabbed an officer at the Telford Unit in the eye through a food slot door. Because the Defendants knew that the possibility of assault posed an excessive risk of harm, Torres argues that these Defendants were deliberately indifferent to his safety in that they failed to take measures to guarantee that Torres could not and would not be assaulted by any inmate confined in administrative segregation while he worked there.

Torres contends that Officer Endsley is actually responsible for the stabbing because Endsley failed to follow the TDCJ Administrative Segregation Plan, which requires that safety precautions be followed in serving meals to administrative segregation prisoners. Each supervisor is also responsible for the stabbing because floor officers had for years done the same things Endsley did, meaning the supervisors failed to adequately supervise their subordinates to ensure that the Administrative Segregation Plan was being fully enforced and that these subordinates were properly trained. Torres also invokes the supplemental jurisdiction of the Court with regard to state law claims. He seeks nominal, compensatory, and punitive damages.

II. The Defendants' Motion to Dismiss

In their motion to dismiss, the Defendants argue that Officer Endsley cannot be held liable for failing to protect Torres from being stabbed because Endsley was unaware that Torres was in any kind of danger when he bent to pick up the pictures off the ground. There was nothing apparent in

the area which posed a general threat to Torres' safety, nor anything noticeable which would have caused Endsley to reasonably foresee that Sanchez would assault Torres. Although Torres indicates that Sanchez was sent to administrative segregation at the Michael Unit for a stabbing carried out at another unit, the Defendants assert that Torres offers nothing to suggest that Officer Endsley knew this.

The Defendants state that while prison officials like Officer Endsley should try to prevent these types of incidents, they cannot prevent all of them. Torres does not indicate that he told Officer Endsley that he felt unsafe while assisting him. The Defendants assert that Torres' claims do not rise to the level of showing that Officer Endsley was deliberately indifferent to his safety.

The Defendants further maintain that Torres failed to show any personal involvement by the supervisory Defendants. While Torres claims these Defendants had knowledge of persons being hurt through food slot doors in the past, he does not claim that they had any knowledge pertaining to this incident. The purpose of food slot doors is to minimize the risks of dangerous encounters with inmates in administrative segregation, but this does not mean that all dangerous encounters are preventable. The Defendants assert that the mere knowledge that prison is a dangerous place or that some inmates may be dangerous is insufficient to demonstrate a particularized knowledge of a substantial risk of serious harm. They maintain that the failure to follow TDCJ rules and regulations is not itself a constitutional claim. With regard to the state law claims, the Defendants argue that the Texas Tort Claims Act does not provide for recovery against individuals employed by the State, but instead against the governmental unit responsible for allegedly causing the harm. They also invoke the defense of Eleventh Amendment immunity; however, Torres specifies in his response that he is suing the Defendants only in their individual capacities.

III. Torres' Response to the Motion to Dismiss

In his response, Torres sets out the facts and again asserts that he was not the first inmate to be assaulted through a food slot, a fact which the Defendants knew. He argues that Sanchez stabbed

him because Officer Endsley failed to take unspecified "reasonable measures" to ensure that Sanchez could not attack Torres.

Torres further asserts that Lt. Sims failed to take reasonable measures to ensure that Sanchez could not assault him and failed to supervise to subordinates to ensure that the Administrative Segregation Plan was enforced. He states that Major Funai and Warden Baker failed to take reasonable measures to ensure that no administrative segregation inmate attacked any SSI, failed to adequately train and supervise his subordinates, failed to ensure that the safety precautions in the Administrative Segregation Plan were followed, and allowed officers on his watch to be trained to feed administrative segregation inmates the way that Endsley did when Torres was stabbed. Regional Director Kelvin Scott, former TDCJ-CID Director William Stephens, and Executive Director Brad Livingston failed to take reasonable measures to ensure that no administrative segregation inmate could attack any SSI during feeding, and failed to adequately train and supervise their subordinates.

Torres again complains that no staff member ever warned him that he could be assaulted by an inmate through the food slot in the door or that a policy existed on properly feeding inmates. He stated that he had seen other SSI's help feed prisoners and that he signed a document acknowledging that he had to obey the orders of the guards.

Torres states that he is suing the Defendants only in their individual capacities, meaning the Eleventh Amendment does not apply. He cites cases regarding liability under state law and asserts that he has stated a claim upon which relief may be granted because each defendant knew that inmates in segregation sometimes have weapons in their cells and sometimes attack people through the food slots. He argues that each of the supervisory defendants helped create the risk through inadequate supervision of subordinates, failure to train subordinates, and authorizing floor officers to order SSI inmates to help feed segregated prisoners.

Even though the Defendants argue that Endsley could not have foreseen the stabbing, Torres maintains that Endsley ordering him to help feed the inmates placed Torres within range of being

assaulted. He further states that Endsley telling him to pass items for the inmates was not a reasonable measure to ensure his safety. Torres contends that there was an indicator in place above Sanchez's cell door with the letters SA, for "staff assaultive" on it, so there was something which could have caused Officer Endsley to foresee that Sanchez might assault Torres. He contends that assaults through food slots are so pervasive as to amount to "a sufficiently imminent danger of harm."

IV. Discussion

A. General Standards for Rule 12(b)(6) Motions on Failure to State a Claim

Fed. R. Civ. P. 12(b)(6) allows dismissal if a plaintiff fails "to state a claim upon which relief may be granted." In order to survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead enough facts to state a claim to relief which is plausible on its face. Severance v. Patterson, 566 F.3d 490, 501 (5th Cir. 2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). The Supreme Court stated that Rule 12(b)(6) must be read in conjunction with Fed. R. Civ. P. 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Id. at 555.

Fed. R. Civ. P. 8(a) does not require "detailed factual allegations but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Ashcroft v. Iqbal, 556 U.S. 662, 677-78, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). A pleading offering "labels and conclusions" or a "formulaic recitation of the elements of a cause of action" will not suffice, nor does a complaint which provides only naked assertions that are devoid of further factual enhancement. Courts need not accept legal conclusions as true, and threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, are not sufficient. Id. at 678.

A plaintiff meets this standard by pleading "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. A complaint may be dismissed if a plaintiff fails to "nudge [his] claims across the line from conceivable to plausible,"

or if the complaint pleads facts merely consistent with or creating a suspicion of the defendant's liability. Id.; *see also* Rios v. City of Del Rio, Tex., 444 F.3d 417, 421 (5th Cir. 2006).

Pro se plaintiffs are held to a more lenient standard than are lawyers when analyzing a complaint, but *pro se* plaintiffs must still plead factual allegations which raise the right to relief above the speculative level. Chhim v. University of Texas at Austin, 836 F.3d 467, 469 (5th Cir. 2016). "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." Iqbal, 556 U.S. at 678.

If the facts alleged in a complaint do not permit the court to infer more than the mere possibility of misconduct, a plaintiff has not shown entitlement to relief. Id. (citing Fed. R. Civ. P. 8(a)(2)). Dismissal is proper if a complaint lacks a factual allegation regarding any required element necessary to obtain relief. Rios, 444 F.3d at 421.

B. Cruel and Unusual Punishment

The Eighth Amendment's prohibition against cruel and unusual punishment imposes upon prison officials a duty to protect prisoners from violence at the hands of other inmates. Cantu v. Jones, 293 F.3d 839, 844 (5th Cir. 2002). However, prison officials are not expected to prevent all inmate-on-inmate violence; rather, they can be held liable for their failure to protect an inmate only when they are deliberately indifferent to a substantial risk of serious harm. Farmer v. Brennan, 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994).

A prison official is deliberately indifferent if he knows of an excessive risk to inmate health or safety and disregards that risk. The official "knows of" the risk only if he is aware of facts from which he can infer the existence of a substantial risk of harm, and he in fact draws the inference. Id. at 839-40.

In Adames v. Perez, 331 F.3d 508, 513 (5th Cir. 2003), the plaintiff Ciro Cid Adames, a TDCJ prisoner, was placed in administrative segregation because of his affiliation with a gang called the Texas Syndicate. He began to have second thought about his membership in the gang and

informed Captain Richard Crites about some illegal activities of the gang. A few weeks later, Adames was assaulted by a member of the Texas Syndicate.

On the day of the attack, Adames was handcuffed and taken to his cell from the shower by Officer Villareal. Officer Garcia stood by the cell preparing to open the door. Before Adames and Villareal could proceed to the cell, they were attacked by inmate Jesse Lopez, who had escaped from his cell. Lopez stabbed Adames some 13 times before complying with the officers' orders to stop.

Adames later sued Villareal, Garcia, Crites, and two wardens, Perez and Boothe. The case went to trial, and the jury found Villareal and Garcia not liable; however, they determined Crites, Perez, and Boothe were responsible for failing to protect Adames.

On appeal, the officials argued the evidence was insufficient to support the jury's verdict. Because no post-verdict motion for judgment as a matter of law challenging the sufficiency of the evidence had been filed, this claim was reviewed on appeal only for plain error. Delano-Pyle v. Victoria County, Texas, 302 F.3d 567. 573-74 (5th Cir. 2002).

The Fifth Circuit determined that: (1) the existence of other incidents of inmate escapes from cells, in which the named defendants were not involved, did not show the problem of such escapes was so pervasive the defendants must have known of the danger; (2) evidence indicating some correctional officials were not following proper procedures did not impute liability to the captain or the wardens; (3) evidence showing Adames was labeled in his prison file as a "potential victim" did not impute liability because this designation only meant Adames had at some point been involved in an altercation with another prisoner, which would not lead a prison official to conclude the prisoner was at a substantial risk of serious harm in the future; (4) evidence showing Boothe had received e-mail messages about inmates at other units who had escaped from their cells did not cause him to conclude inmates at the McConnell Unit were in any danger, even if this evidence should have caused Boothe to so conclude; and, (5) Captain Crites was not deliberately indifferent to Adames' safety absent a showing he was aware of facts from which he could infer other members of the Texas Syndicate had learned of the conversation between Crites and Adames. Because there

was no evidence the prison officials were subjectively aware Adames faced a substantial risk of serious harm, the Fifth Circuit vacated the judgment in Adames' favor and remanded for a new trial.

In the same way, the fact that other prisoners may have carried out assaults through their food slot doors, in which none of the named Defendants had any personal involvement, does not itself show that the problem was so pervasive that the Defendants must have known of the danger. Research has not uncovered a single other case in the State of Texas in which a prisoner brought suit complaining that another inmate assaulted him through the food slot.

In Prado v. Grounds, civil action no. 5:14cv130, the plaintiff and another SSI were assisting an officer in feeding administrative segregation inmates at the Telford Unit. An administratively segregated prisoner ran off of the recreation yard without being handcuffed, took a steel slot bar off of a food storage cart, and assaulted the plaintiff from behind, knocking him unconscious. Other officers told the plaintiff he had fallen, but he later learned from his inmate co-worker what had actually happened.

The plaintiff brought suit against the warden and the two picket officers who had allegedly opened the recreation yard gate, allowing the assailant to leave the recreation yard unrestrained. They then opened the assailant's cell door, allowing him to run back into his cell after the assault. He claimed that the Telford Unit officers had an illegal custom, policy or practice of permitting administratively segregated inmates to walk unescorted and unrestrained from the recreation yard back to their assigned cells.

The Court determined that the plaintiff's claim against the warden lacked merit because he failed to show any policy or custom implemented by the warden under which unconstitutional practices occurred. Although the plaintiff argued that a custom or policy existed permitting segregated inmates to walk without escort from the yard back to their cells, he offered nothing to show that the warden knew of or implemented such a policy in violation of prison regulations. The Court also determined that the plaintiff's claims of failure to train or supervise were wholly conclusory.

With regard to the picket officers, the Court cited Adames v. Perez and stated that the plaintiff had offered no factual basis upon which to conclude that these officers knew of and disregarded a substantial risk to his health or safety. Instead, the allegations did not rise above the level of negligence, which is not sufficient to set out a constitutional claim.

C. Officer Endsley

Torres has offered nothing to suggest that Officer Endsley knew of and disregarded a substantial risk to his health and safety. Even assuming that Officer Endsley was aware from a designator on the cell that Sanchez was staff assaultive, this still does not show deliberate indifference in the mere fact that Endsley had Torres give Sanchez a tray of food or that Endsley told Sanchez to ask Torres to pick up the pictures in front of his cell.[1]

Torres complains that Officer Endsley did not follow unspecified "safety precautions" pursuant to Post Order 07.006, as set out in the TDCJ Administrative Directive Plan, but does not identify what procedures he believes Officer Endsley was required to follow but did not.[2] Nor has he demonstrated that any such failure to follow these procedures amounted to deliberate indifference to his safety rather than negligence. Dorsey v. Rubiola, civil action no. 5:09cv12, 2009 WL 3834048 (S.D.Miss., Nov. 16, 2009) (mere negligence in failing to protect a prisoner from assault, knowledge of isolated incidents, or failure to follow standard procedures do not form the basis of a deliberate indifference - failure to protect claim), *citing* Hill v. Thomas, 326 F.App'x 736, 2009 WL 1181504 (5th Cir., May 1, 2009); *accord,* Adames, 331 F.3d at 512.

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[1]Although Torres complains that no officer ever told him that he could be assaulted through the food slot, he concedes that he saw Sanchez reach "his whole arm" out of the slot.

[2]Post Order 07.006 concerns policies and procedures for administrative segregation officers, including feeding meals. The Post Order is not in any pleadings in this case and the Court therefore does not consider it for any purpose in determining the Defendants' motion to dismiss. However, the Court notes in passing that the feeding procedures set out in the Post Order specifically provide for and do not prohibit the use of inmate workers serving food. *See* Post Order 07.006, Exhibit J to Plaintiff's Motion for Summary Judgment (docket no. 48-3, p. 35) in Flores v. Trevino, civil action no. 2:13cv298 (S.D.Tex., motion filed September 26, 2014).

By way of contrast, in Rodriguez v. Lozano, 108 F.App'x 823, 2004 U.S. App. LEXIS 11929, 2004 WL 1367514 (5th Cir., June 17, 2004), inmate Raul Rodriguez awakened to find his cell door open. When he stepped out, he was confronted by three or four other inmates, who dragged him into his cell, closed the door, and assaulted him. His assailants left the cell, but twice returned to beat him further. Rodriguez offered evidence, including affidavits from inmate witnesses, stating the picket officer opened his cell door to allow the assailants to enter and knew the inmates were attacking him, but did nothing. On appeal, the Fifth Circuit affirmed the denial of the picket officer's motion for summary judgment. *See also* Horton v. Cockrell, 70 F.3d 397, 401 (5th Cir. 1995) (deliberate indifference found where no action taken after inmate Horton repeatedly complained that inmate Jackson had threatened him several times, approached him in an assaultive manner, assaulted another inmate, and attempted to start a race riot).

Unlike Rodriguez, Torres offers no factual basis to suggest that Officer Endsley had actual knowledge of but disregarded a substantial risk to his health or safety. The Fifth Circuit has made clear that conclusory allegations of deliberate indifference are not sufficient to overcome a motion to dismiss or motion for judgment on the pleadings. *See* Taylor v. Books A Million, Inc., 296 F.3d 376, 378 (5th Cir. 2002); Oliva v. Rupert, 555 F.App'x 287, 2014 U.S. App. LEXIS 1490, 2014 WL 278428 (5th Cir., January 24, 2014), *citing* Fernandez-Montes v. Allied Pilots Ass'n, 987 F.2d 278, 284 (5th Cir. 1993).

Instead, Torres' allegations at best do not rise above the level of negligence, which does not set out a constitutional claim. A prison guard violates a prisoner's Eighth Amendment right to be free from cruel and unusual punishment only if he is deliberately indifferent in protecting a prisoner from other inmates. Marble v. Padilla-Vasquez, 3 F.3d 439, 1993 U.S. App. LEXIS 39015, 1993 WL 347207 (5th Cir., August 19, 1993), *citing* Wilson v. Seiter, 501 U.S. 294, 297-98, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991). Torres has failed to make such a showing.

Even if Torres could demonstrate that Officer Endsley violated TDCJ rules and regulations, such as by asking him to pass items for the administratively segregated inmates, this does not by

itself show deliberate indifference to his safety. Payne v. Collins, 986 F.Supp. 1036, 1062 (E.D.Tex. 1997); Myers v. Klevenhagen, 97 F.3d 91, 94 (5th Cir. 1996). Because Torres' pleadings fall short of stating a deliberate indifference claim against Officer Endsley, his claim against Officer Endsley should be dismissed.

D. The Supervisory Defendants at the Unit

Torres names Lt. Sims, Major Funai, and Warden Berger as supervisory defendants at the Michael Unit at the time the incident occurred. He asserts that these defendants (1) failed to take unspecified "reasonable measures" to ensure that Sanchez could not attack Torres; (2) failed to adequately supervise their subordinates to ensure that the Administrative Segregation Plan was enforced; (3) failed to properly train the guards to take reasonable measures such as following safety precautions when serving meals to ensure that no segregated inmate attacked an SSI; (4) allowed guards to be trained to feed segregated inmates the way that Endsley was doing when Torres was attacked; and (5) tacitly authorized guards to feed administratively segregated inmates the way Endsley was feeding them when Torres was attacked.

In order to hold a supervisor liable on a theory of failure to train or supervise, the plaintiff must show (1) the supervisor either failed to train or supervise the subordinate official; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiff's rights; and (3) the failure to train or supervise amounts to deliberate indifference. Smith v. Brenoettsy, 158 F.3d 908, 911-12 (5th Cir. 1998). A showing of deliberate indifference normally requires the plaintiff to demonstrate a pattern of similar violations and that the failure to train reflects a deliberate or conscious choice to endanger constitutional rights. Estate of Davis ex rel. McCully v. City of North Richland Hills, 406 F.3d 375, 383 (5th Cir. 2005).

In order for liability to attach on a claim of inadequate training, the plaintiff must allege with specificity how a particular training program is defective. Roberts v. City of Shreveport, 397 F.3d 287, 293 (5th Cir. 2005). Torres has wholly failed to do so. Instead, he simply points to an oblique line in TDCJ Administrative Directive 03.50 reading "safety precautions shall be followed in serving

meals [to administratively segregated prisoners] pursuant to PO-07.006, 'Administrative Segregation Officer.'" He does not specify what safety precautions he believes could or should have been followed, much less shown that failure to do so amounted to deliberate indifference.

The fact that an assault occurred is not itself proof of inadequacy of training or that appropriate safety precautions were not followed. Id. (noting that "mere proof that the injury could have been prevented if the officer had received better or additional training cannot, without more, support liability.")

Likewise, in the context of a claim of failure to supervise, a plaintiff must show an actual failure to supervise, a causal link between this failure and an alleged constitutional violation, and that the failure to supervise amounts to deliberate indifference. Proof of deliberate difference requires the showing of a pattern of similar violations arising from training that is so clearly inadequate as to be obviously likely to result in a constitutional violation. Brown v. Callahan, 623 F.3d 249, 255 (5th Cir. 2010), *citing* Estate of Davis, 406 F.3d at 381-82; Roberts, 397 F.3d at 292. Torres' conclusory assertion that a pattern existed is insufficient to set out a deliberate indifference claim. *See, e.g.*, Peterson v. City of Fort Worth, Texas, 588 F.3d 838, 851 and n.4 (5th Cir. 2009) (27 complaints of excessive force over four years in Fort Worth was not sufficient to establish a pattern); Pineda v. City of Houston, 291 F.3d 325, 329 (5th Cir. 2002) (11 incidents of warrantless searches in Houston was not sufficient to establish a pattern).

Torres' pleadings fail to adequately allege either an actual failure to train or supervise or that any such failure amounted to deliberate indifference. Nor does he identify any "reasonable safety precautions" which these Defendants were deliberately indifferent for failing to implement. Torres offers nothing but conclusions to suggest that Officer Endsley was not following proper feeding procedures, much less that Lt. Sims, Major Funai, or Warden Baker were aware of or deliberately indifferent to any such improprieties. His allegations against Lt. Sims, Major Funai, and Warden Baker fail to state a claim upon which relief may be granted.

E. The Regional, Division, and Executive Directors

In his response to the motion to dismiss, Torres contends that Regional Director Kelvin Scott, former TDCJ-CID Director William Stephens, and TDCJ Executive Director Brad Livingston failed to take reasonable measures to ensure that no administratively segregated prisoner could attack an SSI inmate while being fed, failed to adequately supervise their subordinates to ensure that the Administrative Segregation Plan was being enforced as to meals, failed to have guards properly trained to take reasonable measures such as following the safety precautions of the Administrative Segregation Plan and Post Order 07.006, allowed guards to be trained to serve meals in the way that Officer Endsley did, and tacitly authorized their subordinates to feed meals in the way that Officer Endsley did.

As with the unit supervisors, Torres' pleadings fail to state a claim upon which relief may be granted for failure to train or supervise against the Regional Director, the former TDCJ-CID Director, and the TDCJ Executive Director. *See also* Zarnow v. City of Wichita Falls, Texas, 614 F.3d 161 (5th Cir. 2010) (the misconduct of the subordinate must be conclusively linked to the action or inaction of the supervisor, and the supervisory actor must have shown deliberate indifference by disregarding a known consequence of his action or inaction); Spiller v. City of Texas City Police Department, 130 F.3d 162, 167 (5th Cir. 1997) (conclusory allegations of failure to train or supervise do not give rise to §1983 liability).

Torres does not state what reasonable measures or precautions he believes these Defendants were deliberately indifferent for failing to implement. Nor are his allegations sufficient to state a claim for deliberate indifference against these Defendants with regard to tacit authorization for the feeding procedures used by Officer Endsley. The Fifth Circuit has explained that deliberate indifference requires a showing of more than negligence or even gross negligence, and actions by officials that are merely "inept, erroneous, ineffective, or negligent" do not amount to deliberate indifference. Estate of Davis, 496 F.3d at 382.

In addition, Torres failed to show that Officer Endsley committed a constitutional violation. The Fifth Circuit has held that a failure to train or supervise claim requires an underlying constitutional violation. Kitchen v. Dallas County, Texas, 759 F.3d 468, 483 (5th Cir. 2014); Gibbs v. King, 779 F.2d 1040, 1046 n.6 (5th Cir.), *cert. denied*, 476 U.S. 1117 (1986) (there can be no supervisory liability absent primary liability). Torres has failed to state a claim upon which relief may be granted against Officer Endsley or any of the supervisory Defendants.

V. State Law Claims

In his second amended complaint, Torres invokes the supplemental jurisdiction of the court over his state law claims. The doctrine of supplemental jurisdiction, formerly known as pendent jurisdiction, codified in 28 U.S.C. §1367, provides in relevant part that where a federal district court has original jurisdiction, that court shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy. However, the district court may decline to exercise supplemental jurisdiction if the court has dismissed all claims over which it has original jurisdiction.

The Fifth Circuit has explained that under this statute, where the district court has dismissed all federal claims before trial, the general rule is to dismiss any pendent claims. Bass v. Parkwood Hospital, 180 F.3d 234, 246 (5th Cir. 1999). All of Torres' federal claims are amenable to dismissal; thus, the district court should decline to exercise supplemental jurisdiction over his state law claims of negligence and dismiss these claims without prejudice, tolling the statute of limitations during the pendency of the claims and for 30 days after it is dismissed, as provided in 28 U.S.C. §1367(d). *See* Jinks v. Richland County, S.C., 538 U.S. 456, 461, 123 S.Ct. 1667, 155 L.Ed.2d 631 (2003) (upholding tolling provision for state law claims originally brought in federal court).

VI. Conclusion

In proceeding under Fed. R. Civ. P. 12(b)(6), a plaintiff with an arguable claim is ordinarily accorded notice of a pending motion to dismiss for failure to state a claim and an opportunity to amend the complaint before the motion is ruled upon. These procedures alert him to the legal theory

underlying the defendants' challenge, and enable him meaningfully to respond by opposing the motion to dismiss on legal grounds or by clarifying his factual allegations so as to conform with the requirements of a valid cause of action. This adversarial process also crystallizes the pertinent issues and facilitates appellate review of a trial court dismissal by creating a more complete record of a case. Neitzke v. Williams, 490 U.S. 319, 329-30, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989).

Torres was given a meaningful opportunity to respond by the Defendants' motion to dismiss, giving him the chance to reply to this motion or to amend his complaint. He filed a lengthy and detailed reply which the Court has carefully reviewed. Viewing Torres' pleadings with the liberality befitting his *pro se* status and taking his factual and non-conclusory allegations as true, Torres has failed to state a claim upon which relief may be granted because he has not set out sufficient factual matter, accepted as true, to state a claim for relief which is plausible on its face. *Iqbal*, 556 U.S. at 678. The Defendants' amended motion to dismiss should be granted.

RECOMMENDATION

It is accordingly recommended that the Defendants' amended motion to dismiss (docket no. 26) be granted and the above-styled civil action dismissed with prejudice for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). Torres' state law claims should be dismissed without prejudice to his right to proceed on these claims in state court, with the statute of limitations suspended on these claims for 30 days following the date of entry of final judgment. 28 U.S.C. §1367(d).

A copy of these findings, conclusions and recommendations shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions, and recommendations must file specific written objections within 14 days after being served with a copy. In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the Magistrate Judge's proposed findings, conclusions, and recommendation where the disputed determination is found.

An objection which merely incorporates by reference or refers to the briefing before the Magistrate Judge is not specific, and the district court need not consider frivolous, conclusive, or general objections. *See* Battle v. United States Parole Commission, 834 F.2d 419, 421 (5th Cir. 1987).

Failure to file specific written objections will bar the objecting party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted and adopted by the district court except upon grounds of plain error. Douglass v. United Services Automobile Association, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

So ORDERED and SIGNED this 23rd day of July, 2018.

JOHN D. LOVE
UNITED STATES MAGISTRATE JUDGE

APPENDIX

D

United States Court of Appeals'
denial on petition for panel rehearing

United States Court of Appeals for the Fifth Circuit

No. 19-40470

CHRISTOPHER BRYAN TORRES,

Plaintiff—Appellant,

versus

BRAD LIVINGSTON; WILLIAM STEPHENS; KELVIN SCOTT; EDGAR BAKER, JR.; TODD FUNAI; FRANCES SIMS; JONATHAN ENDSLEY,

Defendants—Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 6:17-CV-196

ON PETITION FOR REHEARING

Before SMITH, WILLETT, and DUNCAN, *Circuit Judges*.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

APPENDIX

E

U.S. District Judge's
Memorandum

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

CHRISTOPHER TORRES	§	
v.	§	CIVIL ACTION NO. 6:17cv196
BRAD LIVINGSTON, ET AL.	§	

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE AND ENTERING FINAL JUDGMENT

The Plaintiff Christopher Torres, an inmate of the Texas Department of Criminal Justice, Correctional Institutions Division proceeding *pro se*, filed this civil rights lawsuit under 42 U.S.C. §1983 complaining of alleged violations of his constitutional rights. This Court referred the case to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges. The named Defendants are former TDCJ-CID Director William Stephens, Regional Director Kelvin Scott, Warden Edgar Baker, Major Todd Funai, Lt. Frances Sims, and Officer Jonathan Endsley.

I. Background

Torres states that he was a support services inmate (SSI) at the Michael Unit, working in the administrative segregation department. He explains that on the day in question, June 27, 2015, there were supposed to be six SSI's on his work shift, with one assigned to each pod, A through F.

Torres states that he was assigned to work on F Pod that day. After he finished helping the floor officer feed the inmates, he left to get some hypercaloric snacks for the diabetic inmates on the pod. As he passed by D Pod on his way to the kitchen, Officer Endsley asked him to come help feed the inmates on that pod because there was no SSI on D Pod that morning.

According to Torres, Officer Endsley did what most of the officers do doing feeding time. He stated that Endsley would open the food tray slot in the door of each cell, one right after the other, and then wait at the end of the row. The SSI would hand each prisoner a food tray through the opened food slot, or leave it on the slot door if the prisoner was not at the slot. The SSI would then come back and pour drinks as the inmates held their cups out of the food slot. Torres states that the food slot is about five inches wide by 18 inches long.

While the food slots were open, Torres states that the prisoners would often ask the floor officer to pass items such as books, newspapers, magazines, photo albums, or food back and forth between the cells. When this happened, he asserts that the floor officer would normally tell the prisoners to have the SSI do it for them, so the SSI working on the floor would pass along whatever the prisoners requested.

Once the food and drink was given out and all of the requested items were passed, Torres states that the floor officer would walk by and close all of the food slots. The floor officer and the SSI would then go to the next row of cells and repeat the procedure. Torres states that the supervisors were not present during feeding, but would come make rounds afterwards. There was no supervisor present on June 27, 2015, when he began helping Officer Endsley feed D Pod.

On that date, Torres states that he and Officer Endsley fed One Row and went up to Two Row. Officer Endsley opened the food slot for an inmate named Angel Sanchez. Sanchez reached out of the slot and pointed to some pictures on the floor outside of his cell, asking Officer Endsley to get them for him. Officer Endsley replied "the SSI will get them for you. Ask him."

Torres states that he handed Sanchez his food tray and Sanchez asked him to get the pictures. When he reached down to get them, Torres states that Sanchez stabbed him in the neck with what appeared to be a two-foot long pole with a four-inch sharpened nail in it. As a result, he had to be airlifted to the hospital in Tyler.

Between June and September of 2015, Torres asserted that his mind was clouded and he had problems eating and drinking at first. He stated he has almost regained his voice back but still coughs every half hour and must constantly clear his throat, resulting in severe headaches.

Torres contended that when he began work as an SSI, he was never told that TDCJ-CID has policies on properly feeding inmates in administrative segregation, nor that he could be attacked through a food slot when it was open. He stated that he believed he had to help officers feed the prisoners and there was never any posted rule prohibiting SSI's from helping officers feed the inmates.

According to Torres, Officer Endsley had just started working in the Michael Unit administrative segregation area a few weeks earlier and fed the prisoners in this manner because Endsley and other guards are trained or authorized to do so. Torres stated that he is not the first person to be assaulted through a food slot in administrative segregation and that the supervisory prison officials knew of the risks that such an assault would take place. Furthermore, Torres claimed that Sanchez was in administrative segregation for having stabbed an officer through a food slot door. He argued that the Defendants knew of an excessive risk of harm and thus were deliberately indifferent to his safety in that they failed to take measures to guarantee that Torres could not and would not be assaulted by any prisoner in administrative segregation while he worked there.

Torres further maintained that Officer Endsley was responsible for the stabbing because the officer failed to follow the TDCJ Administrative Segregation Plan, which requires that unspecified "safety precautions" be followed in serving meals to prisoners. He asserted that each supervisor is also liable because the floor officers had followed the same procedures for years, meaning the supervisors failed to adequately supervise their subordinates to ensure that the Administrative Segregation Plan was being followed and that the subordinates were properly trained.

For relief, Torres sought nominal, compensatory, and punitive damages. He also invoked the supplemental jurisdiction of the Court for state law claims.

II. The Defendants' Motion to Dismiss

The Defendants filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) arguing the stabbing was not foreseeable and Officer Endsley was unaware that Torres was in any sort of danger. The Defendants further contend that Torres failed to show any personal involvement by the supervisory officials and that the mere knowledge that prison is a dangerous place is insufficient to demonstrate a particularized knowledge of a substantial risk of serious harm. Finally, the Defendants argued that the Texas Tort Claims Act does not provide for recovery by the individuals employed by the State but against the governmental unit responsible for the harm.

III. Torres' Response to the Motion to Dismiss

Torres filed a response setting out the facts and again arguing that he was not the first inmate to be stabbed through a food slot. He asserted that Sanchez stabbed him because Officer Endsley refused to take unspecified "reasonable measures" to protect him. Torres stated that the fact Officer Endsley ordered him to help feed inmates placed him within range of being stabbed and that Officer Endsley telling him to pass items for inmates was not a reasonable measure to ensure his safety. He stated that there was an indicator above Sanchez's door reading "S.A.," for "staff assaultive."

Torres further insisted that the supervisory officials failed to take reasonable measures to ensure that Sanchez could not stab him and that they failed to adequately train and supervise their subordinates or to ensure that the Administrative Segregation Plan was followed. He complained that no staff member had ever warned him that he could be assaulted through a food slot or that a policy existed on properly feeding inmates. Torres argued that assaults through food slots are so pervasive as to amount to a sufficiently imminent danger of harm, though he offered nothing to substantiate this claim.

IV. The Report of the Magistrate Judge

The Magistrate Judge set out the facts of the case and the legal standards applicable to Rule 12(b)(6) motions to dismiss. In order to survive a motion to dismiss, the Magistrate Judge said, a plaintiff must plead factual content which allows the court to draw the reasonable inference that the

defendant is liable for the misconduct alleged and which raises the right to relief above the speculative level. *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). Thus, there must be more than a sheer possibility that the defendant acted unlawfully. *Id.* at 678. Conclusions and naked assertions devoid of further factual enhancement are not sufficient. *Id.*; *see also Severance v. Patterson*, 566 F.3d 490, 501 (5th Cir. 2009).

The Magistrate Judge further stated that prison officials can be held liable for their failure to protect an inmate from injury only if they are deliberately indifferent to a substantial risk of serious harm. *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). A prison official is deliberately indifferent if he knows of an excessive risk to inmate health or safety and disregards that risk. The official "knows of" the risk only if he is aware of facts from which he can infer the existence of a substantial risk of harm, and he in fact draws the inference. A showing that the official should have perceived the risk but did not is not sufficient. *Id.* at 839-40.

The Magistrate Judge looked to *Adames v. Perez*, 331 F.3d 508, 513 (5th Cir. 2003), in which a Texas prisoner was assaulted by another inmate who had escaped from his cell. A jury found in the prisoner's favor against some of the defendants, but the Fifth Circuit vacated this judgment and remanded for a new trial. In so doing, the Fifth Circuit determined that the existence of other incidents in which prisoners had escaped from their cells, in which the named defendants were not involved, did not show that the problem of such escapes was so pervasive that the defendants must have known of the danger.

The Magistrate Judge determined Torres' pleadings did not set out a claim of deliberate indifference against Officer Endsley because the Plaintiff offered nothing to suggest that Endsley knew of and disregarded a substantial risk to Torres' health or safety. Likewise, the Magistrate Judge concluded that Torres' pleadings failed to adequately allege either an actual failure to train or supervise or that any such failure amounted to deliberate indifference. The Magistrate Judge observed that Torres did not state what reasonable means or precautions he believed the supervisory Defendants should have implemented and that in the absence of a showing that Officer Endsley

committed a constitutional violation, Torres cannot sustain a claim of supervisory liability. With regard to Torres' state law claims, the Magistrate Judge stated that because Torres had not set out a viable claim under federal law, the district court should decline to exercise supplemental jurisdiction over the state law claims. The Magistrate Judge thus recommended that the Defendants' motion to dismiss be granted and that the lawsuit be dismissed.

V. Torres' Objections to the Report

In his objections, Torres first points to a number of alleged discrepancies between his allegations and the summary of these allegations in the Magistrate Judge's Report, including, for example, the fact that while the Magistrate Judge had stated that "the floor officer would walk by and close all the food slots," Torres had alleged that the floor officer would "quickly come by and quickly close every food slot one right after another." A review of the pleadings shows that the Magistrate Judge adequately summarized Torres' allegations and the purported discrepancies to which Torres points are not so significant as to warrant rejecting the Report.

Torres asserts that it is long-standing, pervasive, and well-documented that inmates have weapons in their cells and attack people through the food slots, pointing to *Jones v. Bock*, 549 U.S. 199, 127 S.Ct. at 910, 166 L.Ed.2d 798 (2007), *Gerber v. Sweeney*, 292 F.Supp.2d 700 (E.D.Pa. 2003), and *Hill v. Snyder*, 2015 U.S. Dist. LEXIS 83845, 2015 WL 3948863 (S.D. Ind., June 29, 2015). As a result, he contends that each defendant was deliberately indifferent to Torres' safety because they "failed to make and/or take adequately reasonable measures (which includes having such adequate reasonable measures adequately enforced by each defendant) to guarantee that Torres could not and would not be attacked by any inmate confined in administrative segregation while Torres was assigned to work there."

Torres argues that people being attacked through food slots is "long-standing and pervasive throughout TDCJ" so as to constitute a sufficiently imminent danger likely to cause harm, which Officer Endsley was obligated to guard Torres from but failed to do so.

Torres contends that Officer Endsley knew that Torres was not the first inmate to get assaulted through a food slot and that inmates have weapons in their cells, although he fails to explain his basis for this assertion regarding Officer Endsley's knowledge. *Adames*, 331 F.3d at 513 (evidence that some state inmates had escaped from their cells did not show a "longstanding and pervasive problem" of which the prison officials must have been aware).

Although Torres repeatedly asserts that inmates stabbing officials or other inmates through the food slot is a "longstanding and pervasive problem," he offers nothing to substantiate this contention other the conclusory assertion itself. As the Magistrate Judge stated, research has not uncovered any other cases in the State of Texas in which a prisoner brought suit complaining that another inmate assaulted him through the food slot. None of the three cases cited by Torres - *Jones*, *Gerber*, or *Hill* - involve prisoners assaulting other prisoners or guards through the food slots in their cell doors, nor are any of these cases from the State of Texas.

Torres argues that the Magistrate Judge's Report "never disputes Torres' factual allegations that Lt. Sims, Major Funai, and Warden Baker knew that unit-wide, region-wide, system-wide, and nation-wide, ad.seg. inmates have weapons in their cells and that ad.seg. inmates attack people through the food slots." The fact other assaults may have happened in other states or at other units in the past does not show this was a long-standing and pervasive problem of which the prison officials must have been aware, and Torres has offered nothing beyond conclusions to show that the officials must have known of a sufficiently imminent danger. *Adames*, 331 F.3d at 513.

Torres complains that no staff member ever warned him about attacks from other inmates through food slots, but fails to show how the lack of such a warning amounted to deliberate indifference to his safety rather than at most mere negligence or carelessness. Furthermore, as the Magistrate Judge observed, Torres states that he saw Sanchez put his whole arm through the food slot as Sanchez gestured toward the pictures on the floor; thus, Torres was necessarily aware that Sanchez could reach out of the food slot if he wished.

Torres complains that there was no posted rule prohibiting SSI's from handing food trays to inmates in administrative segregation cells or from pouring drinks into their cups, but he offers nothing to suggest that any such prohibition exists at all, much less that the failure to have such a prohibition amounts to deliberate indifference. He states that he should not have to identify what "reasonable measures" he believes should be taken to ensure that he cannot and will not be assaulted, although he faults the Defendants for failing to implement such measures.

VI. Discussion

Torres' claims are based on the assertion that the Defendants were deliberately indifferent to his safety. The Fifth Circuit has held that prison officials have a duty to protect inmates from violence at the hands of other prisoners, but not every injury suffered by a prisoner at the hands of another rises to the level of a constitutional violation. *Horton v. Cockrell*, 70 F.3d 397, 400 (5th Cir. 1995). The plaintiff prisoner must prove both that he is incarcerated under conditions "posing a substantial risk of serious harm" and that the prison official's state of mind is one of "deliberate indifference" to the inmate's health or safety. *Id.* at 401, *citing Farmer*, 511 U.S. at 837. Prison authorities must protect not only against current threats, but also must guard against "sufficiently imminent dangers" that are likely to cause harm "in the next week or month or year." *Id.* at 401.

In *Farmer*, the Supreme Court explained that

> [A] prison official cannot be held liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. ...
>
> But an official's failure to alleviate a significant risk which he should have perceived, but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.

Farmer, 511 U.S. at 837-38; *see also Reeves v. Collins*, 27 F.3d 174, 176 (5th Cir. 1994).

Those allegations in Torres' pleadings which are factual and not conclusory, when taken as true, do not set out factual content allowing the Court to draw the reasonable inference that the defendants are liable for the misconduct alleged and which raise the right to relief above the

speculative level. His pleadings do not show that any of the named Defendants were deliberately indifferent to his safety under the standards set out by the Supreme Court in *Farmer* because these pleadings are insufficient to shown that Officer Endsley or the supervisory officers must have known of an imminent danger posed by the fact that Torres was helping to feed inmates on D Pod. *Iqbal*, 556 U.S. at 678 (threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, are not sufficient). Torres' objections are without merit.

VII. Conclusion

The Supreme Court has stated that where the defendants have filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a plaintiff with an arguable claim is ordinarily accorded notice of a pending motion to dismiss for failure to state a claim and an opportunity to amend the complaint before the motion is ruled upon. These procedures alert him to the legal theory underlying the defendants' challenge, and enable him meaningfully to respond by opposing the motion to dismiss on legal grounds or by clarifying his factual allegations so as to conform with the requirements of a valid cause of action. This adversarial process also crystallizes the pertinent issues and facilitates appellate review of a trial court dismissal by creating a more complete record of a case. *Neitzke v. Williams*, 490 U.S. 319, 329-30, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989).

As the Magistrate Judge correctly observed, Torres was given a meaningful opportunity to respond by the Defendants' motion to dismiss, giving him the chance to reply to this motion or to amend his complaint. In response, Torres filed a lengthy and detailed reply to the motion to dismiss. The Magistrate Judge reviewed the pleadings and issued a Report recommending that the lawsuit be dismissed, to which Torres filed objections.

The Court has conducted a careful *de novo* review of those portions of the Magistrate Judge's proposed findings and recommendations to which the Plaintiff objected. *See* 28 U.S.C. §636(b)(1) (District Judge shall "make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made.") Upon such *de novo* review,

the Court has determined the Report of the Magistrate Judge is correct and the Plaintiff's objections are without merit. It is accordingly

ORDERED that the Plaintiff's objections are overruled and the Report of the Magistrate Judge (docket no. 30) is **ADOPTED** as the opinion of the District Court. It is further

ORDERED that the Defendants' amended motion to dismiss (docket no. 26) is **GRANTED** and the above-styled civil action is **DISMISSED WITH PREJUDICE** for failure to state a claim upon which relief may be granted. It is further

ORDERED that any state law claims raised by the Plaintiff are **DISMISSED WITHOUT PREJUDICE** to their refiling in state court, with the statute of limitations suspended for 30 days following the date of entry of final judgment. 28 U.S.C. §1367(d). Finally, it is

ORDERED that any and all motions which may be pending in this civil action are hereby **DENIED**.

So **ORDERED** and **SIGNED August 24, 2018.**

Ron Clark

Ron Clark, Senior District Judge

APPENDIX

F

Respondents' brief on appeal

Case No. 19-40470

In the United States Court of Appeals for the Fifth Circuit

CHRISTOPHER BRYAN TORRES,

Plaintiff - Appellant,

v.

BRAD LIVINGSTON; WILLIAM STEPHENS; KELVIN SCOTT; EDGAR BAKER JR; TODD FUNAI; FRANCES SIMS; JONATHAN ENDSLEY,

Defendants - Appellees

On Appeal from the United States District Court for the Eastern District of Texas, Tyler Division
Cause No. 6:17-CV-196

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Certificate of Interested Persons

Appeal Number: 19-40470

Christopher Bryan Torres v. Brad Livingston, et al.,

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fed. R. App. P. 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

- Christopher Bryan Torres, TDCJ No. 1142645, Plaintiff-Appellant
- Brad Livingston, William Stephens, Kelvin Scott, Edgar Baker Jr., Todd Funai, Frances Sims, and Jonathan Endsley
- P. Trent Peroyea, Counsel for Defendants-Appellees Livingston, Stephens, Scott, Baker, Funai, Sims, and Endsley

/s/P. Trent Peroyea
P. Trent Peroyea
Assistant Attorney General
Counsel for Appellees
Livingston, Stephens, Scott
Baker, Funai, Sims, & Endsley

Statement Regarding Oral Argument

Oral Argument Not Requested

Appellees submit that the legal arguments, issues on appeal, and statement of the record are adequately presented in the briefs of the parties, and oral argument is not necessary. If, however, the Court requests oral argument, Appellees will be prepared to present their arguments to the Court.

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Cases

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Statement Regarding Jurisdiction

Appellant Christopher Torres did timely appeal the district court's order of final judgment. The District court denied Appellant's Rule 59(e) motion on April 4, 2019. Appellant filed his notice of appeal on May 16, 2019. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

Issue Presented

Issue One: Whether the District court erred in granting Defendant's Amended Motion to Dismiss?

Issue Two: Whether the district court abused its discretion when it denied Appellant's Motion for Reconsideration?

Statement of the Case

Appellant Christopher Torres is an inmate incarcerated in the Texas Department of Criminal Justice (TDCJ). He brings suit under 42 U.S.C. § 1983 alleging that Defendant Endsley, a correctional officer for TDCJ, failed to protect him from an attack by a fellow prisoner. ROA 168 at 178. Plaintiff Torres also sues several TDCJ staff for failing to protect him from this attack. ROA 168 at 178. Torres is requesting a Declaratory Judgment along with nominal, compensatory, and punitive damages. ROA 168 at 178-179.

Torres states that on Saturday, June 27, 2015, he was performing his duties as an inmate janitor in the administrative segregation building of TDCJ-CID's Michael Unit located in Tennessee Colony, Texas. ROA 168 at 170. During this time, Defendant

Endsley, the floor officer on duty, asked Torres to help him feed the administrative segregation inmates.[1] ROA 168 at 170-171. Defendant Endsley opened the food tray slots on every cell in a row of seven cells, then Torres would hand each administrative segregation inmate a food tray through their opened food slot. ROA 168 at 171. While the food slots were open, some of the inmates would request for Defendant Endsley to pass things like books, newspapers, and magazines. ROA 168 at 171. Torres states that Defendant Endsley responded to these inmates by saying, "Have the SSI [Torres] do it for you." *Id.* Torres would then pass through whatever was requested by that inmate. *Id.* When Endsley and Torres arrived as inmate Sanchez's cell door, Sanchez asked Defendant Endsley to retrieve pictures laying on the floor just outside of his cell for him. ROA 168 at 172. Endsley responded by saying that (Torres) would get the pictures for him. *Id.* Torres alleges that when he reached down to grab the pictures off the ground, inmate Sanchez stabbed him on the right side of the neck with a two-foot pole that had a barbed-tip nail on the end. *Id.* Torres alleges that Defendant Endsley violated his Eighth Amendment rights by failing to protect him from the stabbing. ROA 168 at 178. Torres brings negligence and deliberate indifference claims arising out of the incident.

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[1] Inmates housed in administrative segregation do not go to the cafeteria to eat meals; rather, meals are brought and served to them in their cells.

The Appellees filed an Amended Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) on March 1, 2018. The Magistrate Judge assigned to the case issued a Report and Recommendation to Dismiss the case with prejudice for failure to state a claim upon which relief may be granted. ROA 219. The Presiding Judge issued a Memorandum adopting the report and recommendation of the magistrate judge and entering final judgment. ROA 256, 266. The Plaintiff filed a motion for reconsideration on October 11, 2018. ROA 267. The District Court denied this motion on April 4, 2019. The Appellant filed his notice of Appeal on Monday, May 16, 2019. ROA 303.

Summary of the Argument

The district court properly dismissed Torres's suit. Torres, a TDCJ inmate, filed suit *pro se* and *in forma pauperis*. As such, his action is subject to the Prison Litigation Reform Act (the "PLRA"). The PLRA amended § 28 U.S.C. 1915 to require the district court to dismiss *in forma pauperis* prisoner civil rights suits if the court determines that the action is frivolous or malicious or does not state a claim upon which relief may be granted. *See* § 28 U.S.C. 1915(e)(2)(B)(i) & (ii). Torres has failed to demonstrate any error in the district court's holding that Torres failed to state a claim upon which relief may be granted. Further, the district court in this case was well within its discretion when it denied Torres' Motion for reconsideration. For these reasons, this court should affirm the district court's judgment.

Argument and Authorities

A. Standard of Review

The Prison Litigation Reform Act (PLRA) amended § 1915 to require the district court to dismiss *in forma pauperis* (IFP) prisoner civil rights suits if the court determines that the action is frivolous or malicious or does not state a claim upon which relief may be granted. § 28 U.S.C. 1915(e)(2)(B)(ii). The lower court dismissed this case due to Appellant's failure to state a claim under which relief may be granted. ROA 256, 266. As the language of § 28 U.S.C. 1915(e)(2)(B)(ii) tracks the language of Federal Rule of Civil Procedure 12(b)(6), appellate courts analyzing such dismissals should do so under a *de novo* standard of review. *Black v. Warren*, 134 F.3d 732, 734 (5th Cir. 1998).

The lower court also dismissed the Appellant's Rule 59(e) Motion for Reconsideration. The standard of review for denial of a Rule 59(e) motion is abuse of discretion. *Midland W. Corp. v. F.D.I.C.*, 911 F.2d 1141, 1145 (5th Cir. 1990). Under this standard, the district court's decision and decision-making process need only be reasonable. *Ruiz v. Lynaugh,* 811 F.2d 856, 861 (5th Cir. 1987).

B. Torres fails to state a claim against any of the Appellees under § 1983.

To avoid dismissal for failure to state a claim, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." In re Katrina Canal Breaches Litig., 495 F.3d 191, 205 (5th Cir. 2007), cert. denied, 552 U.S. 1182 (2008) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). The "[f]actual allegations

must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Id. (quoting Twombly, 550 U.S. at 555). This standard is referred to as the "flexible plausibility standard." Ashcroft v. Iqbal, 556 U.S. 662, 129 (2009).

In deciding a motion to dismiss for failure to state a claim, a court must accept well-pleaded factual allegations as true and view them in a light most favorable to the plaintiff. Calhoun v. Hargrove, 312 F.3d 730, 733 (5th Cir. 2002). The Court is instructed to look to the substance of the complaint, setting aside statements of "bare legal conclusions, with no suggestion of supporting facts." Wesson v. Oglesby, 910 F.2d 278, 281 (5th Cir. 1990). The Court is authorized "...to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless." Neitzke v. Williams, 490 U.S. 319, 327 (1989).

1. Appellant fails to state a claim that Appellee Endsley failed to protect him under Section 1983.

When the "State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney v. Winnebago Cnty. Dep't of Social Serv.*, 489 U.S. 189, 199–200 (1989); *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982) ("When a person is institutionalized—and wholly dependent on the State[,] ... a duty to provide certain services and care does exist"). The rationale for this principle is that when the State restrains an individual's liberty in a manner that renders him unable to

care for himself, the Eight Amendment and Due Process Clause impose an affirmative duty to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety. *See DeShaney*, 489 U.S. at 200; *Youngberg*, 457 U.S. at 315–16; *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976); "The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *DeShaney*, 489 U.S. at 200.

The Eighth Amendment expressly prohibits the infliction of "cruel and unusual punishments." *U.S. Const. Amend. VIII.* It not only proscribes excessive sentences but also protects inmates from inhumane treatment and conditions while imprisoned. *See Wilson v. Seiter*, 501 U.S. 294, 298 (1991); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). A plaintiff must prove both that he is incarcerated under conditions "posing a substantial risk of serious harm" and that prison official's state of mind is one of "deliberate indifference" to the inmate's health and safety. *Id.* at 401. "Deliberate indifference", as it is used in the Eighth Amendment context, comprehends more than mere negligence but less than the purposeful or knowing infliction of harm...it requires a showing of subjective recklessness as used in criminal law." *Farmer v. Brennan*, 511 U.S. 825, 836 (1994) (internal quotations omitted); *Hare v. City of Corinth*, 74 F.3d 633, 647–48 (5th Cir. 1996). To act with deliberate indifference "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." *Farmer*, 511 U.S. at 835.

Prison officials are not liable for failure to protect if (1) "they were unaware of even an obvious risk to inmate health or safety," (2) "they did not know of the underlying facts indicating a sufficiently substantial danger," (3) "they knew of the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent," or (4) "they knew of a substantial risk to inmate health or safety...[and] responded reasonably to the danger, even if the harm was not ultimately averted." *Farmer* at 844–45. The Fifth Circuit has stated that "deliberate indifference is an extremely high standard to meet." *Domino v. Texas Dep't of Criminal Justice*, 239 F3d 752, 756 (5th Cir. 2001). It "cannot be inferred merely from a negligent or even grossly negligent response to a substantial risk of serious harm." *Thompson v. Upshur County, TX*, 245 F.3d 447, 459 (5th Cir. 2001). The Fifth Circuit has also held that the basis of § 1983 liability "must amount to an intentional choice, *not merely an unintentionally negligent oversight.*" *Rhyne v. Henderson County*, 973 F.2d 386, 392 (5th Cir. 1992) (emphasis added). "[A]ctions and decisions by prison officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference." *Hernandez v. Tex. Dep't of Protective & Reg. Servs.*, 380 F.3d 872, 883 (5th Cir. 2004) (quoting *Alton v. Tex. A&M Univ.*, 168 F.3d 196, 201 (5th Cir. 1999)). Deliberate indifference encompasses only unnecessary and wanton infliction of pain repugnant to the conscience of mankind. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

While Torres' injury is very unfortunate, Appellee Endsley cannot be held liable for failing to protect Torres from being stabbed through a food slot by inmate Sanchez.

Appellee Endsley was unaware of the fact that Torres was in any kind of danger when he bent to pick up the pictures on the ground. There was nothing in the area that posed a general threat to Torres' safety or anything noticeable that would cause Endsley to reasonably foresee that Sanchez would attack Torres. Torres also alleges that Sanchez was transferred to administrative segregation for stabbing an officer in the eye through his open food slot door, but does not indicate that Endsley had personal knowledge of this fact. ROA 168 at 176-177. But even if this is taken as true, the conditions surrounding Torres in the moments leading up to the stabbing did not pose a substantial risk of serious harm that Endsley would have known about, and do not come close to the high standard needed to establish deliberate indifference.

While prison officials like Appellee Endsley should try to prevent these types of altercations, they cannot prevent all of them. Torres does not allege that he gave any indication to Appellee Endsley that he felt unsafe while assisting him. The legal conclusion of deliberate indifference must rest on facts clearly evincing "obduracy and wantonness, not inadvertence or error in good faith." *Whitley v. Albers, 475* U.S. 312, 319, (1986). Torres' pleading does not indicate that Appellee Endsley had any of kind desire for the wanton infliction of pain to be brought upon Torres, nor does he indicate Endsley had knowledge of Sanchez's history of violent behaviors. An official's failure to alleviate a significant risk which he should have perceived, but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment. *Farmer*, 511 U.S. at 837-38; *see also Reeves v. Collins*, 27 F.3d 174, 176 (5th

Cir. 1994). Even if Torres' allegation that he was stabbed by inmate Sanchez while helping Appellee Endsley is taken as true, it does not meet the high standard of deliberate indifference under the 8th Amendment.

Other cases ruled on by the 5th Circuit support dismissal of these claims. In *Adames*, a Texas prisoner was assaulted by another inmate who had escaped from his cell. A jury found in the prisoner's favor against some of the defendants, but the Fifth Circuit vacated this judgment and remanded for a new trial. In so doing, the Fifth Circuit determined that the existence of other incidents in which prisoners had escaped from their cells, in which the named defendants were not involved, did not show that the problem of such escapes was so pervasive that the defendants must have known of the danger. Adames *v. Perez*, 331 F.3d 508, 513 (5th Cir. 2003). Torres' pleadings do not set out a claim of deliberate indifference against Officer Endsley because the Appellant offered nothing to suggest that Endsley knew of and disregarded a substantial risk to Torres' health or safety. The Trial Court did not err in dismissing Torres' claims against Appellee Endsley for failure to state a claim upon which relief can be granted.

2. **Appellant's Negligence Claim**

Torres indicates he is suing Appellees in their individual capacities. ROA 168 at 169-170. To the extent Torres is suing Appellees in their individual capacities under the Texas Tort Claims Act, he cannot sue in this manner because the Tort Claims Act "does not provide for recovery against individuals employed by the State. A person making a claim under the [act] must sue the governmental unit responsible for allegedly causing

the harm to [waive] sovereign immunity." *Aguilar v. Chastain*, 923 S.W.2d 740, 744 (Tex. App—Tyler 1996, writ denied). State employees are simply not proper parties under the act when they are sued in their individual capacity, as Torres sues Appellees here. ROA 168 at 169-170. Torres' petition has no basis in law because he cannot sue Appellees in their individual capacities under the Texas Tort Claims Act. The District court did not err in declining to exercise supplemental jurisdiction over these state law claims.

3. Plaintiff fails to allege any personal involvement of Appellees Livingston, Stephens, Scott, Baker Jr., Funai, and Sims

A section 1983 plaintiff must establish a causal connection between an alleged constitutional deprivation and each defendant whom he would hold responsible. *Lozano v. Smith*, 718 F.2d 756, 768 (5th Cir. 1983). Absent personal involvement by the defendant, a plaintiff may not recover under § 1983. *Thompson v. Steele*, 709 F.2d 381, 382 (5th Cir. 1983). A civil rights plaintiff cannot simply make generalized allegations or assert legal or constitutional conclusions to satisfy these requirements. *Murphy v. Kellar*, 950 F.2d 290, 292 (5th Cir. 1992). To sustain his complaint, a plaintiff must instead state particular facts specifying the personal involvement of *each* defendant. *Fee v. Herndon*, 900 F.2d 804 (5th Cir.) cert. denied, 498 U.S. 908 (1990). These facts must create an affirmative link between the claimed injury and each of the defendant's conduct. *Rizzo v. Goode*, 423 U.S. 362, 371-72, 377 (1976).

Although Torres lists Livingston, Stephens, Scott, Baker Jr., Funai, and Sims as Defendants, he alleges no facts relating to them regarding the alleged incident. While Torres alleges the Appellees had knowledge of people getting hurt through food slot doors in the past, he does not claim they had any knowledge pertaining to this incident. The purpose of food slot doors is to minimize the risks of dangerous encounters with inmates housed in administrative segregation. But this does not mean that all dangerous encounters are preventable. Knowledge that prison can be a dangerous place, or that some inmates may be dangerous, is insufficient to demonstrate a particularized knowledge of substantial risk of serious harm. To the extent that Torres is suing Livingston based on his role as former Executive Director of TDCJ, his claim has no basis in law because supervisory officials may not be held liable for their subordinates' actions under any theory of vicarious liability under § 1983. *Thibodeaux v. Arceneaux*, 768 F.2d 737, 739 (5th Cir. 1985) (per curiam). Similarly, his claim lacks an arguable basis in law to the extent he is suing Stephens as the former Director of TDCJ-CID, Scott as the Region 2 Director of TDCJ-CID, or Baker, Jr. as the Former Senior Warden of the Michael Unit. Torres' claims against these supervisory Appellees fail to set forth specific facts demonstrating their personal involvement in the alleged wrongdoing.

Assuming arguendo he is able to show their personal involvement, Torres did not state what reasonable means or precautions he believed the supervisory Appellees should have implemented, and that in the absence of a showing that Officer Endsley committed a constitutional violation, Torres cannot sustain a claim of supervisory

liability. Torres cites a portion of a TDCJ-CID's Administrative Directive as follows "...Safety precautions shall be followed in serving meals." ROA 168 at 176-177. While it is unclear what kind of safety precautions Torres believes were not followed, failing to comply with an internal agency policy does not state a claim for relief under § 1983. *Marsh v. Jones*, 53 F3d 707, 711-12 (5th Cir. 1995).

Although Torres repeatedly asserts that inmates stabbing officials or other inmates through the food slot is a "longstanding and pervasive problem," he offers nothing to substantiate this contention other the conclusory assertion itself. Research has not uncovered any other cases in the State of Texas in which a prisoner brought suit complaining that another inmate assaulted him through the food slot. None of the three cases cited by Torres - *Jones*, *Gerber*, or *Hill* - involve prisoners assaulting other prisoners or guards through the food slots in their cell doors, nor are any of these cases from the State of Texas.

Torres argues that Appellees "never dispute Torres' factual allegations that Lt. Sims, Major Funai, and Warden Baker knew that unit-wide, region-wide, system-wide, and nation-wide, ad.seg. inmates have weapons in their cells and that ad.seg. inmates attack people through the food slots." The fact that other assaults may have happened in other states or at other units in the past does not show this was a long-standing and pervasive problem of which the prison officials must have been aware, and Torres has offered nothing beyond conclusions to show that the officials must have known of a sufficiently imminent danger. *Adames*, 331 F.3d at 513.

Torres complains that no staff member ever warned him about attacks from other inmates through food slots but fails to show how the lack of such a warning amounted to deliberate indifference to his safety rather than at most mere negligence or carelessness. Furthermore, Torres states that he saw Sanchez put his whole arm through the food slot as Sanchez gestured toward the pictures on the floor; thus, Torres was necessarily aware that Sanchez could reach out of the food slot if he wished.

Torres complains that there was no posted rule prohibiting SSI's from handing food trays to inmates in administrative segregation cells or from pouring drinks into their cups, but he offers nothing to suggest that any such prohibition exists at all, much less that the failure to have such a prohibition amounts to deliberate indifference. He states that he should not have to identify what "reasonable measures" he believes should be taken to ensure that he cannot and will not be assaulted, although he faults the Appellees for failing to implement such measures. Torres did not state what reasonable means or precautions he believed the supervisory Appellees should have implemented and that in the absence of a showing that Officer Endsley committed a constitutional violation, Torres cannot sustain a claim of supervisory liability. Further, Torres' pleadings fail to adequately allege either an actual failure to train or supervise or that any such failure amounted to deliberate indifference. Because he has not satisfied this requirement under § 1983, he fails to state a cognizable claim. The Trial Court did not err in dismissing Torres' claims against Appellees Livingston, Stephens, Scott, Baker, Jr., Funai, and Sims for failure to state a claim upon which relief can be granted.

In closing, Torres was given a meaningful opportunity to respond to the Defendants' motion to dismiss, giving him the chance to reply to the motion to dismiss or to amend his complaint. He filed a lengthy and detailed reply which the District Court carefully reviewed. ROA 196. The District Court viewed Torres' pleadings with the liberality befitting his pro se status and taking his factual and non-conclusory allegations as true, yet found he failed to state a claim upon which relief may be granted because he has not set out sufficient factual matters, accepted as true, to state a claim for relief which is plausible on its face. Iqbal, 556 U.S. at 678. The Trial Court did not err in dismissing Torres' claims against all Appellees.

C. Torres' Motion for Reconsideration was properly denied.

After the final judgment in this case was entered, Torres filed a motion to alter or amend the judgment under Fed. R. Civ. P. 59. The district denied this motion. ROA 267, 295. The District Court did not abuse its discretion in denying Appellant's Motion for reconsideration.

In this motion, Torres states that he has new evidence in the form of an affidavit from an inmate named Daniel Reyna. The affidavit states that over the course of 16 years, from 1995 to 2011, he was housed in administrative segregation at the Allred Unit, the Telford Unit, and the Eastham Unit. Reyna claims that he witnessed "with my own eyes" many assaults taking place through the food slots, at least one a week and sometimes twice a day at the Eastham and Telford Units. In his motion, Torres argues

that this affidavit shows that the danger of assaults through the food slots is so long-standing and pervasive that such assaults are long-standing, pervasive, well-documented, or expressly noted by prison officials unit-wide, region-wide, system-wide, and nation-wide. ROA 267, 288.

The District Court reviewed Reyna's affidavit. The District Court noted that it "shows that he claims to have witnessed at least one attack per week through a food slot over a 16-year period, alleging that sometimes the attacks were as often as two per day. This means that at the rate of one per week, Reyna would himself have witnessed over 800 assaults over this time period, likely closer to 1,000 when the weeks of multiple assaults per day which he claimed to have seen are added in." ROA 295 at 299.

Reyna's affidavit claims that these were assaults which he witnessed personally, which would mean that these assaults would have occurred in the section he was located, on the row to which he was housed. Torres' original complaint states that the administrative segregation section at the Michael Unit has six pods, each of which has six sections which contain two rows each, for a total of 72 rows in administrative segregation. ROA 31 at 33. The District Court further noted that, "[i]f assaults occurred at the Michael Unit at the same rate which Reyna claims to have observed elsewhere, being one per week per row, the Michael Unit administrative segregation area alone would have experienced over 59,000 assaults during the 16-year period covered by Reyna's affidavit; however, as the Magistrate Judge observed, research reveals not a single case in the State of Texas, other than the present one, in which a prisoner filed

suit alleging he was assaulted by another prisoner through the food slot." ROA 295 at 300.

Torres also argues in his Motion that the Court failed to apply the correct legal standard set out in *Farmer*. ROA 267 at 271-272. He does that by reasserting allegations that he already made in his previous pleadings. ROA 267.

He closes his motion by asking that his case be reopened and that the Court change its ruling on the merits. ROA 267 at 279-280.

The Fifth Circuit has stated that relief under Rule 59(e) is appropriate where there has been an intervening change in controlling law, the movant presents newly discovered evidence which was previously unavailable, or to correct a manifest error of law or fact. *Schiller v. Physicians Res. Grp. Inc.*, 342 F.3d 563, 567 (5th Cir.2003). A Rule 59(e) motion cannot be used to raise arguments that could and should have been made before the judgment issued. *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 864 (5th Cir. 2003).

A motion to alter or amend the judgment based on the discovery of new evidence should be granted only if: (1) the facts discovered are of such a nature that they would probably change the outcome; (2) the facts alleged are actually newly discovered and could not have been discovered earlier by proper diligence; and (3) the facts are not merely cumulative or impeaching. *Infusion Res. Inc. v. Minimed, Inc.*, 351 F.3d 688, 696-97 (5th Cir. 2003).

The requirement that the facts be of such a nature that they would probably change the outcome necessarily includes a requirement that the newly discovered

evidence must be credible. *See, e.g., Daniels v. Pipefitters Association Local Union No. 597*, 983 F.2d 800, 803 (7th Cir. 1993) (holding in the context of a Rule 60(b)(2) motion that district courts may consider the credibility of evidence before granting motions for reconsideration because such motions are decided by judges rather than juries and "to hold otherwise would mean that the district court would have to order a new trial no matter how incredible the evidence.").

The District Court correctly concluded that "Reyna's affidavit, attesting to witnessing close to if not over a thousand assaults on other units carried out through cell food slots, none of which formed the basis for a lawsuit in federal court, appears to have little credibility and thus cannot form the basis for alteration or amendment of the judgment of dismissal. Even were the affidavit credible, however, it does not rise to the level of requiring that Rule 59 relief be granted. The affidavit demonstrates little more than the well- known fact that, as Justice Thomas observed, "prisons are necessarily dangerous places; they house society's most antisocial and violent people in close proximity to one another. Regrettably, some level of brutality and sexual aggression among [prisoners] is inevitable no matter what the guards do ... unless all prisoners are locked in their cells 24 hours a day and sedated." *Farmer*, 511 U.S. at 858-59 (Thomas, J., concurring)." ROA 295 at 301-302.

As noted by the District Court, the fact of other assaults in which the Defendants were not involved and which, according to Reyna's affidavit, occurred at other units and not the Michael Unit, does not show that the Defendants were necessarily aware

of a specific danger posed to Torres. *See Adames*, 331 F.3d at 513. It is clear that Reyna's affidavit is self-serving and lacks little credibility. The District Court correctly concluded that this affidavit "does not show that the danger of Torres being assaulted through the food slot was so obvious that the Defendants were deliberately indifferent by failing to take some unspecified action to protect Torres from harm in the normal course of his day's work." ROA 295 at 302. Further, the District Court correctly concluded that Torres has not shown that the supervisory defendants were deliberately indifferent to his safety by failing to discourage support service inmates from performing normal duties by assisting in the feeding of segregated prisoners. ROA 256. The Appellant has not shown that the District Court applied incorrect legal standards. Further, the District Court did not abuse its discretion in finding that Torres' motion to alter or amend the judgment has not met the standards of Rule 59(e).

Conclusion

Because Torres fails to state a claim on which relief may be granted, the district court properly dismissed his suit. This Court should affirm the ruling of the lower court.

Respectfully submitted.

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ATTORNEYS FOR APPELLEES

Notice of Electronic Compliance

I, **P. Trent Peroyea**, Assistant Attorney General of Texas, certify that I have electronically submitted for filing a true and correct copy of **Brief of Appellees**, in accordance with the Electronic Case Files System of the Fifth Circuit Court of Appeals on November 5, 2019. Counsel further certifies that 1) required privacy redactions have been made in compliance with the Fifth Circuit Rule 25.2.13; and 2) the electronic submission is an exact copy of the paper document in compliance with Rule 25.2.1.

/s/ P. Trent Peroyea
P. Trent Peroyea
Assistant Attorney General

Certificate of Service

I, **P. Trent Peroyea**, Assistant Attorney General of Texas, hereby certify that a copy of the **Brief of Appellees** has been served on November 5, 2019, by placing the same in the United States Mail, first class, postage prepaid, on November 5, 2019, addressed to:

Christopher Bryan Torres, #1142645
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/s/ P. Trent Peroyea
P. Trent Peroyea
Assistant Attorney General

Certificate of Compliance

As required by Federal Rule of Appellate Procedure 32(a)(7)(C), and pursuant to 5th Cir. Rule 25.2, I certify that:

1. This brief complies with the type-volume limitations of Rule 32(a)(7)(B) because this brief contains 3,073 words as calculated by Microsoft Word.

2. This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Garamond font.

3. The electronic version of this brief is an exact copy of the paper version, includes the required privacy redactions under 5th Cir. Rule 25.2.13, and has been scanned and reported free of viruses by the most recent version of a commercial virus-scanning program.

/s/ P. Trent Peroyea
P. Trent Peroyea
Assistant Attorney General

APPENDIX

G

Torres' § 1983 complaint

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CHRISTOPHER TORRES, a/k/a Christopher Muhammad, Plaintiff Pro Se	§	
v.	§	
BRAD LIVINGSTON, Executive Director, TDCJ;	§	
WILLIAM STEPHENS, Director, TDCJ-CID;	§	
	§	CIVIL ACTION NO.
KELVIN SCOTT, TDCJ-CID's Region II Regional Director;	§	6:17-cv-196-RC-JDL
EDGAR BAKER, JR., Senior Warden, TDCJ-CID's Michael Unit;	§	***Jury Demand***
	§	
TODD FUNAI, Major, Michael Unit's Administrative Segregation Building;	§	
FRANCES SIMS, Shift Lieutenant, Michael Unit's Ad. Seg. Building; and,	§	
	§	
JONATHAN ENDSLEY, Correctional Officer, Michael Unit's Ad. Seg. Building	§	
each in their **individual** capacity Defendants.	§	

PLAINTIFF TORRES' SECOND PROPOSED AMENDED COMPLAINT

This is a civil rights action filed by Christopher Torres, a/k/a Christopher Muhammad, a state prisoner, for a Declaratory Judgment and [nominal, compensatory, and punitive] damages under 42 U.S.C. § 1983, alleging each of the above mentioned Defendants failed to protect him from an attack by a fellow prisoner in violation of the Eighth Amendment to the United States Constitution. Torres also alleges deliberate indifference and state law claims of gross negligence.

I.

JURISDICTION

1. The Court has jurisdiction over Torres' claim of violation of his federal constitutional rights under 28 U.S.C. §§ 1331 and 1343(a)(3). The venue is proper pursuant to 28 U.S.C. § 1391(b).

2. The Court has supplemental jurisdiction over Torres' state law claim(s) under 28 U.S.C. § 1367.

II.
PARTIES

3. Plaintiff Torres was incarcerated at the TDCJ-CID's Michael Unit during the events described in this complaint.

4. Defendant Jonathan Endsley ("Endsley") was the D-Pod, Administrative Segregation ("Ad. Seg.") correctional officer on the Michael Unit on the morning of June 27, 2015. He is sued in his individual capacity.

5. Defendant Frances Sims ("Lt. Sims") was Michael Unit's ad. seg. Shift Lieutenant on the morning of June 27, 2015. She is sued in her individual capacity.

6. Defendant Todd Funai ("Major Funai") was the Major in charge of Michael Unit's Ad. Seg. building on the morning of June 27, 2015. He is sued in his individual capacity.

7. Defendant Edgar Baker, Jr. ("Warden Baker") was Michael Unit's Senior Warden on the morning of June 27, 2015. He is sued in his individual capacity.

8. Defendant Kelvin Scott ("Scott") was Regional Director of TDCJ-CID's Region Two on the morning of June 27, 2015. He is sued in his individual capacity.

9. Defendant William Stephens ("Stephens") was Director of TDCJ-CID on the morning of June 27, 2015. He is sued in his individual capacity.

10. Defendant Brad Livingston ("Livingston") was Executive Director of TDCJ on the morning of June 27, 2015. He is sued in his individual capacity.

11. At all times mentioned in this (proposed) amended complaint each Defendant

acted under color of state law.

III.
FACTS

12. On Saturday morning, June 27, 2015, while performing part of my job duties as an inmate janitor (referred to as an "SSI") in the ad. seg. building of TDCJ-CID's Michael Unit in Tennessee Colony, Texas, I was stabbed in the neck by a fellow prisoner whose name is Angel Sanchez ("Sanchez").

13. Sanchez was an inmate housed in D-Pod, 8-cell of Michael's ad. seg. building.

14. Michael's ad. seg. building has six "Pods" (Pods "A" through "F"), each Pod having six sections of cells, each section having two rows of seven single-man cells: Every Pod has eighty-four cells.

15. With the exception of F-Pod, everyday each Pod was assigned just two guards per shift: one guard ("floor officer") worked on the Pod's floor, the other worked in the Pod's control picket ("picket officer"). Some days F-Pod had two floor officers and a picket officer.

16. On the shift I was assigned to work on, there were six SSIs in charge of cleaning the Pods——one SSI per Pod. I was assigned to F-Pod.

17. My job duties as an SSI in Michael's ad. seg. building included sweeping, mopping, emptying trash cans, and according to the "Safety sheet" (or other TDCJ document which fully detailed what my job duties were, which) I had to sign when first working in there, there was a sentence saying something about "I shall obey orders of the ad. seg. guards."

18. On June 27, 2015, after I finished helping the F-Pod floor officer feed ad. seg. inmates housed there, I left F-Pod to get some "hyper-caloric" snacks from the ad. seg. kitchen for some diabetic inmates on F-Pod, and as I passed by D-Pod on my way to the said kitchen, Endsley, who was the floor officer that morning on D-Pod, told me to come help him feed the ad. seg.

inmates on D-Pod whenever I finished bringing the snacks to the F-Pod inmates. For whatever reason, there was no SSI for D-Pod that morning.

19. When I began helping Endsley feed the D-Pod inmates, Endsley did as most all other floor officers do during ad. seg. feeding times on the Michael Unit, and on the Units of TDCJ-CID's Region Two, and on Units throughout all of TDCJ-CID and the TDCJ: Endsley would simply just open the food tray slot doors of every cell (one right after another) on a particular row of seven cells, then he would wait at the end of that row while I would have to hand each ad. seg. inmate a food tray through their opened food slot (or just leave it on their opened food slot if they were not at the slot) and I would have to come back shortly later with a bucketful of drink and pour a cupful of it into the cups of said ad. seg. inmates who would be holding their cups through their opened food slot; the food slots of Michael's ad. seg. cell doors were about five inches wide by about 1½ feet long.

20. Many times (during feeding times) while the said food slots were still opened, the ad. seg. inmates would ask the floor officer to pass things (like books, newspapers, magazines, photo albums, food, atc.) back and forth to the cells on that said row being fed, and most of the times the floor officer would answer the ad. seg. inmates by saying something like, "Have the SSI do it for you," and I (or other SSI working) would pass whatever the ad. seg. inmate requested to be passed.

21. After I (and/or another SSI) would finish handing a tray to, and pouring a drink into the cup of, every ad. seg. inmate through their opened food slot, and after passing things back and forth on that row, the floor officer would quickly come by and quickly close every food slot (one right after another) and then the floor officer and I would go to the next row of cells and feed those ad. seg. inmates just like in ¶¶ 19 and 20.

22. When the floor officers fed just like in ¶¶19 and 20, there would be no supervisor present until after the ad. seg. inmates were all fed; only then would supervisors make their rounds.

23. On June 27, 2015, while I began helping Endsley feed on D-Pod, there was no supervisor present.

24. Just before I was stabbed by Sanchez, Endsley and I fed in the manner in ¶19 on Section One, Row One, and Endsley gave the usual "Have the SSI do it for you" response to those inmates when they requsted to have things passed from one cell to another while the food slots were opened, and when Endsley and I finished on that row, we proceeded to feed Two Row the same way.

25. Endsley was a few steps ahead of me when I got to Two Row, and when he opened the food slot of Sanchez's cell door I seen Sanchez put an entire arm out through his opened food slot, and while Sanchez used that said arm to point down towards some pictures that lay on the floor just outside Sanchez's cell door I heard Sanchez ask Endsley to get the said pictures for him (Sanchez) and then I seen and heard Endsley tell Sanchez that "the SSI [which was me] will get it for you. Ask him."

26. As Endsley went quickly towards cells 9 through 14 to quickly open each of those cells' food slot, I was then in front of Sanchez's cell and I handed him his lunch tray and Sanchez then asked me to get the said pictures.

27. Since Endsley had me pass things back and forth on One Row, and since I heard Endsley tell Sanchez to ask me to get the pictures, and since I felt sorry for Sanchez [because he appeared harmless and spoke in the right tone], I reached down to get the pictures.

28. As I reached down and attempted to get the pictures off the floor, Sanchez stabbed me on the right side of my neck with what appeared to be about a two-foot-long pole [made out of tightly rolled up newspaper or magazine

pages] which had about a four-inch, sharpened, barbed-tip nail on it.

29. I felt the nail hit my neck bone, and according to the surgeon's report [at East Texas Medical Center in Tyler, Texas, where I had to be airlifted to], the nail went right between the carotid artery and the internal jugular vein, and I now have a visible three-inch-long scar from the surgeon's incision.

30. Within about a week of the said June 27, 2015 stabbing, a lady who told me she was an official with the TDCJ-OIG (Office of Inspector General) interviewed me about the said stabbing incident.

31. The said O.I.G. official said her name was Ms. Gray (or Grey) and during her interview of me, she insisted that I give her a written statement about what happened, which I finally did give (a brief one), and she said to me that the "**only**" thing I could do about the stabbing incident is press "**criminal**" charges on Sanchez, which I interpreted as her representing that I could not grieve the dangerous working conditions that led to me being stabbed.

32. At the time of the said interview, I lost 95% of my voice and was unable to talk normally; if I did talk, I had to do so with alot of effort and I would get dizzy after about a minute of talking, and I would run out of breath before completely saying a sentence.

33. From the time I awoke from the surgery [to remove the nail out of my neck] on June 27, 2015, to about the time I had to have further surgery in late September 2015 [to semi-fix the paralyzed right vocal cord], my mind was clouded because I am in prison for something I did **not** do and then I thought I would forever no longer have my normal voice back, and I also thought I would forever have the breathing and speech problems I had after awakening after the initial surgery. I also had initial problems eating and drinking.

34. While I have just about regained my voice back and am just about able to

normally eat and drink, till this very day I still have to constantly clear my throat, I still must cough about every half-hour, and I get sharp headaches when I must cough, and I have a residual headache in between times I have to cough.

35. TDCJ's medical personnel have prescribed medications for what I am still going through in ¶34, but the medications do not help at all.

36. Since the stabbing incident in ¶12, I have had several hospital appointments and during my October 10, 2017 appointment with a neurologist [Neel Patel, M.D.], that neurologist told me that the medical problems in ¶34 are "**life-long**" and "**irreparable**".

37. When I began as an SSI in Michael Unit's ad. seg., I was never informed by any staff member that TDCJ had a policy on properly feeding ad. seg. inmates.

38. Nor was I ever warned by any staff member of the fact that I could be assaulted/attacked by an ad. seg. inmate through an ad. seg. inmate's food tray slot door when a cell's food tray slot door was opened.

39. I was under the impression that——because I seen the other Michael Unit ad. seg. SSIs helping floor officers feed ad. seg. inmates [as described in ¶¶19-22], and because the "Safety sheet" or document in ¶17 said something about me having to do what ad. seg. guards tell me, and because in 2010 when I was assigned to work in the ad. seg. kitchen I seen ad. seg. SSIs help floor officers feed ad. seg. inmates [as described in ¶¶19-22], and because floor officers would tell me to help them feed ad. seg. inmates——I had to help the floor officer feed the ad. seg. inmates.

40. Additionally, there was never any posted rule prohibiting SSIs from helping floor officers feed ad. seg. inmates.

41. And neither I, nor any other SSI that I know of, ever received any disciplinary case for helping a floor officer feed ad. seg. inmates in ad. seg.

42. Endsley had just begun working in Michael Unit's ad. seg. building about a few weeks before Sanchez stabbed me.

43. Endsley fed as described in ¶¶19-21 because that is how he [and other ad. seg. guards on Michael Unit, and throughout TDCJ-CID's Region Two, and throughout all TDCJ-CID and TDCJ] are trained to, and/or are given tacit authorization to, feed the ad. seg. inmates——and this caused each supervisory defendant's failure to protect me from the attack/assault by Sanchez.

44. I was not the first individual to ever get assaulted/attacked in ad. seg. by an ad. seg. inmate through an ad. seg. inmate's opened food tray slot door on the Michael Unit, or TDCJ-CID's Region Two prison units, or on prison units throughout TDCJ-CID, or TDCJ, or the entire prison system of this country——and each defendant knew this before I was attacked by Sanchez.

45. Each defendant realized/knew that, in ad. seg., ad. seg. inmates attacking/assaulting anyone through ad. seg. inmates' opened food slot doors posed excessive risk of harm to me because it is long-standing, pervasive, well-documented, or expressly noted by prison officials in the past——whether it's officials from Michael Unit, or TDCJ-CID's Region Two, or TDCJ-CID, or TDCJ, or from jail and prison systems all over this country——that people are known to get assaulted/attacked by ad. seg. inmates through ad. seg. inmates' food slot doors whenever an ad. seg. inmate's cell's food slot door is opened.

46. Sanchez was in Michael Unit's ad. seg. after being transferred there after he stabbed an officer in the eye through his opened food slot door when Sanchez was in ad. seg. on another TDCJ-CID Unit [i.e. the Telford Unit in New Boston, Texas].

47. Each defendant realized/knew that, in ad. seg., ad. seg. inmates attacking/assaulting anyone through ad. seg. inmates' opened food slot doors posed

excessive risk of harm to me because during ad. seg. cell searches, it is longstanding, pervasive, well-documented, or expressly noted by prison officials in the past——whether it's officials from Michael Unit, or TDCJ-CID's Region Two, or TDCJ-CID, or TDCJ, or from jail and prison systems all over this country——that weapons, including spears like the one Sanchez used on me, are found inside ad. seg. cells.

48. Each defendant knew about the facts in ¶¶45 and 47, but within their respective areas of responsibility, was deliberately indifferent to, or callously disregarded, such serious/excessive risk to my safety when they each, within their respective areas of responsibility, failed to make and/or take adequately reasonable measures——which includes having such adequate reasonable measures adequately enforced by each defendant——to guarantee that I [c]ould not be, and/or would not be, attacked/assaulted by any inmate confined in ad. seg. while I was assigned to work in ad. seg.

49. Defendant Endsley, having already known/realized the facts in ¶¶45 and 47 before Sanchez stabbed me, is actually responsible for Sanchez stabbing me while I helped Endsley feed Sanchez because Endsley failed to follow and enforce TDCJ's Administrative Directive (AD)-03.50 (2013)(i.e. TDCJ's Ad. Seg. Plan § IV.F Meals (2012)) which says: "Safety precautions shall be followed in serving meals" [to ad. seg. inmates] "pursuant to PO-07.006, 'Administrative Segregation Officer.'"

50. Because for years floor officers——on Michael Unit, on umits all throughout TDCJ-CID's Region Two, and on units all throughout TDCJ-CID and TDCJ——fed like Endsley fed when Sanchez stabbed me [as described in ¶¶19-26], each supervisory defendant is also actually responsible for Sanchez stabbing me [while I helped Endsley feed Sanchez] because each supervisory defendant, within their respective areas of responsibility, failed to adequately

supervise their respective subordinate(s) to ensure that AD-03.50 (i.e. Ad. Seg. Plan § IV.F (Meals)) was being fully enforced on every shift on the Michael Unit, as well as on every shift on every unit throughout TDCJ-CID's Region Two, the TDCJ-CID, and TDCJ.

51. Each supervisory defendant is also actually responsible for Sanchez stabbing me [while I helped Endsley feed Sanchez] because each supervisory defendant, within their respective areas of responsibility, failed to ensure that their respective subordinate(s) properly trained floor officers to take the "Safety precautions" in AD-03.50's Ad. Seg. Plan § IV.F (Meals), and the supervisory defendants failed to ensure [within their respective areas of responsibility] that such proper training was done on every shift on the Michael Unit, as well as on every shift on the units throughout TDCJ-CID's Region Two, the TDCJ-CID, and TDCJ.

52. I was stabbed in the neck by Sanchez because each defendant, within their respective areas of responsibility, was either plainly incompetent to, or knowingly failed to, perform their federal constitutional duty to protect me from attacks by any ad. seg. inmate while I worked in ad. seg as an SSI.

IV.
Plaintiff invokes this Court's supplemental jurisdiction under 28 U.S.C. § 1367

53. At the time Sanchez stabbed me, all of the Defendants were TDCJ employees and are therefore liable to damages pursuant to TEXAS GOVERNMENT CODE § 497.096 because each Defendant, within their respective areas of responsibility, negligently implemented AD-03.50's Ad. Seg. Plan § IV.F (Meals) with intentional, wilful or wanton negligence, or it was performed with conscious indifference or reckless disregard for my safety and this caused Sanchez to stab me.

54. Each Defendant is liable under § 497.096 for negligent implementation of any other TDCJ policy critcal to ensuring prisoner safety [that Torres is not aware of at this time] because it was done with intentional, wilful or wanton negligence, or performed with conscious indifference or reckless disregard for my safety and this caused Sanchez to stab me.

55. Within their respective areas of responsibility, each Defendant's said acts or omissions rose to the level of gross negligence and this too caused Sanchez to stab me.

V.
Legal Claims

56. Torres re-alleges and incorporates by reference ¶¶1 through 55.

57. The failure to protect violated Torres' rights and constituted cruel and unusual punishment under the Eighth Amendment to the United States Constitution, and it was gross negligence under Texas law.

58. Torres has no plain, adequate or complete remedy at law to redress the wrongs described herein. Torres has suffered, and continues to suffer, physical, mental and emotional injury due to Defendants' conduct.

VI.
Prayer For Relief

WHEREFORE, Torres respectfully prays that this Court enter judgment granting Torres:

59. A declaration that the acts and omissions described herein violated Torres' rights under the Constitution and laws of the United States and constituted gross negligence under Texas law.

60. Nominal damages in the amount of $10,000 (Ten Thousand $US Dollars) against each Defendant, jointly and severally, or to be determined by the jury.

61. Compensatory damages in the amount of $294,000 (Two Hundred and Ninety-Four Thousand $US Dollars) against each Defendant, jointly and severally, or to

62. Punitive damages in the amount of $196,000 (One Hundred and Ninety-Six Thousand $US Dollars) against each Defendant, jointly and severally, or to be determined by the jury.

63. Alternatively, Torres requests "presumed damages" that may also be determined by the jury.

64. A jury trial on all issues triable by jury.

65. Plaintiff's costs in this suit.

66. Plaintiff requests to recover pre-judgment and post-judgment interest, and any other relief, both special and general, to which Torres may be justly entitled.

67. Any additional relief this Court deems just, proper and equitable.

Date: January 24, 2018

Respectfully submitted,

Christopher Torres, a/k/a
Christopher Muhammad
#1142645
WYNNE Unit
810 FM 2821
Huntsville, TX 77349

Plaintiff Pro Se

VERIFICATION

I have read the foregoing proposed amended complaint and hereby verify that the matters alleged therein are true, except as to matters alleged on information and belief, and, as to those, I believe them to be true. I certify under penalty of perjury that the foregoing is true and correct.

Executed at Huntsville, Texas on January 24, 2018.

Christopher Torres, a/k/a
Christopher Muhammad

CERTIFICATE OF SERVICE

I, Christopher Torres, a/k/a Christopher Muhammad, hereby declare and certify, under penalty of perjury, that on January 24, 2018 a copy of this amended complaint was served upon the Defendants by placing a copy of same in the U.S. mailbox on the WYNNE Unit, postage pre-paid, and addressed to:

P. Trent Peroyea,
Assistant Attorney General of Texas
P.O. Box 12548
Austin, TX 78711-2548

_____

Christopher Torres, a/k/a
Christopher Muhammad

APPENDIX

H

U.S. District Court's denial
on RULE 59(e) motion

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

CHRISTOPHER TORRES	§	
v.	§	CIVIL ACTION NO. 6:17cv196
BRAD LIVINGSTON, ET AL.	§	

ORDER DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND THE JUDGMENT

The Plaintiff Christopher Torres, proceeding *pro se*, filed this civil rights lawsuit under 42 U.S.C. §1983 complaining of alleged deprivations of his constitutional rights. As Defendants, Torres named former TDCJ-CID Director William Stephens, Regional Director Kelvin Scott, Warden Edgar Baker, Major Todd Funai, Lt. Frances Sims, and Officer Jonathan Endsley.

The Defendants filed a Fed. R. Civ. P. 12(b)(6) motion to dismiss, which was granted and the lawsuit was dismissed. Torres filed a timely motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e).

I. Background

Torres complained that on June 27, 2015, he was a staff support inmate (SSI) helping Officer Endsley feed D Pod in the Michael Unit administrative segregation wing. Officer Endsley would go down the row and open every cell food slot door, wait for Torres to feed the inmates, and go back and close the doors. Torres stated that it was common practice for inmates to ask that items to be passed from cell to cell and for the officer to tell the inmate to "have the SSI do it for you."

After he and Officer Endsley fed One Row, Torres stated that they went on to Two Row. Endsley opened the food slot door of an inmate named Angel Sanchez. Sanchez reached out through the food slot door and pointed to some pictures on the floor in front of his cell and asked Officer Endsley to get them for him. Endsley replied "the SSI will do it for you. Ask him."

Torres states that when he handed Sanchez his food tray, Sanchez asked him to get the pictures. He bent down to get the pictures off the floor and Sanchez stabbed him in the neck with what appeared to be a two foot long pole with a barbed nail tip.

In his lawsuit, Torres contended that the TDCJ supervisory officials knew of the risks that such an assault took place but failed to take measures to guarantee that Torres could not be assaulted by any prisoner confined in administrative segregation while he worked there. He also complained that the supervisors failed to train and supervise their subordinates to ensure that the TDCJ Administrative Segregation Plan was followed.

Torres further asserted that Officer Endsley failed to follow the Administrative Segregation Plan, which requires that safety precautions be followed in serving meals to administratively segregated prisoners. He claimed that he was not the first person to be assaulted through a food tray slot in administrative segregation, and stated that Sanchez had been sent to administrative segregation at the Michael Unit because he had stabbed a guard through a food slot at the Telford Unit, although he does not substantiate this assertion. Torres maintained that he was never warned he could be attacked through a food slot when the slot was open. There were no posted rules prohibiting SSI's from helping the floor officer feed inmates.

The Defendants filed a motion to dismiss arguing that Officer Endsley was unaware that Torres was in any kind of danger when he bent to pick up the pictures from the floor. Even if Sanchez had previously carried out a stabbing at another unit, the Defendants stated that Torres offered nothing to show that Officer Endsley was aware of this.

The Defendants contended that while prison officials like Officer Endsley should try to prevent these types of incidents, they cannot prevent all of them. They noted that Torres never told Officer Endsley that he felt unsafe.

The Defendants further maintained that Torres did not show any personal involvement by the supervisory officials and that the mere knowledge that prison is a dangerous place is not sufficient to demonstrate particularized knowledge of a substantial risk of serious harm. The

Defendants also asserted that Torres' state law claims lacked merit because the Texas Tort Claims Act provided for recovery against governmental units, not individuals employed by the State, and that claims against them in their official capacities are barred by the Eleventh Amendment.

In his response to the motion to dismiss, Torres asserted the Defendants failed to take reasonable measures to protect him from assault. He contended the supervisory Defendants failed to train and supervise their subordinates and that he was never warned that he could be assaulted through a food slot.

Torres argued that Officer Endsley ordering him to help feed the inmates placed him within range of being assaulted and that Endsley telling him to pass items for the inmates was not a reasonable measure to ensure his safety. He stated that there was an indicator above Sanchez's cell door saying "SA," for "staff assaultive," which he claimed was something which could have caused Endsley to foresee that Sanchez might assault Torres. He contended that assaults through food slots are so pervasive as to amount to a sufficiently imminent danger of harm.

II. The Report of the Magistrate Judge

After review of the pleadings, the Magistrate Judge issued a Report recommending that the lawsuit be dismissed. The Magistrate Judge set out the standards applicable to motions to dismiss and stated a prison official is deliberately indifferent if he has actual knowledge of an excessive risk to inmate health or safety and disregards that risk. The official knows of the risk only if he is aware of facts from which he can infer the existence of a substantial risk of harm and he in fact draws the inference. *Farmer v. Brennan*, 511 U.S. 825, 839-40, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994).

The Magistrate Judge further stated that the fact that other prisoners may have carried out assaults through the food slot doors, in which none of the named Defendants had any personal involvement, did not show that the problem was so pervasive that the Defendants must have known of the danger. *Adames v. Perez*, 331 F.3d 508, 513 (5th Cir. 2003). The Magistrate Judge concluded that Torres failed to demonstrate that any failure by Officer Endsley to follow unspecified "safety procedures" amounted to deliberate indifference rather than simply negligence because Torres

offered nothing to suggest that Endsley had actual knowledge of but disregarded a substantial risk to his health or safety.

The fact an assault occurred is not itself proof of inadequacy of training or that the appropriate safety precautions were not followed. Torres' pleadings failed to adequately allege either an actual failure to train or supervise, much less that any such failure amounted to deliberate indifference. With regard to the state law claims, the Magistrate Judge determined that all of Torres' federal claims were subject to dismissal, and the district court should decline to exercise supplemental jurisdiction over the state law claims. The Magistrate Judge therefore recommended that the lawsuit be dismissed with prejudice for failure to state a claim as to the federal law claims and without prejudice to proceeding in state court as to the state law claims.

III. The Objections and Final Judgment

In his objections, Torres argued that it was "long-standing, pervasive, and well-documented" that inmates have weapons in their cells and attack people through the food slots, but he offered nothing to substantiate this conclusion. The Magistrate Judge's research did not turn up a single other case in which a prisoner brought suit complaining that another prisoner had assaulted him through the food slot. While Torres cited three cases, none of these were from the State of Texas, nor did they involve prisoners assaulting other prisoners or guards through the food slot.

The Magistrate Judge also determined that Torres failed to show that such assaults were a long-standing and pervasive problem of which the prison officials must have been aware, and that he likewise failed to show that any failure to warn him about attacks from other inmates amounted to deliberate indifference rather than negligence or carelessness. Torres stated that he saw Sanchez put his whole arm out of the food slot and thus was necessarily aware that Sanchez could reach out of the food slot if he wished.

Although Torres contended that there was no posted rule prohibiting support service inmates such as himself from handing out food trays to inmates in segregation or from pouring drinks in their cups, he offered nothing to suggest that these activities were in fact prohibited or that the failure to

have such a prohibition amounted to deliberate indifference. He argued that although he faults the Defendants for failing to implement "reasonable measures" to ensure he would not be assaulted, he should not have to identify what these "reasonable measures" might be.

The District Court overruled Torres' objections and entered final judgment dismissing the lawsuit, concluding that Torres' well-pleaded factual allegations, even taken as true, did not set out factual content allowing the Court to draw the reasonable inference that the Defendants were liable for the harm alleged and which raised the right to relief above the speculative level.

IV. The Motion to Alter or Amend the Judgment

After the final judgment was entered, Torres filed a motion to alter or amend the judgment under Fed. R. Civ. P. 59. In this motion, Torres states that he has new evidence in the form of an affidavit from an inmate named Daniel Reyna, who states that over the course of 16 years, from 1995 to 2011, he was housed in administrative segregation at the Allred Unit, the Telford Unit, and the Eastham Unit. During this time, Reyna claims that he witnessed "with my own eyes" many assaults taking place through the food slots, at least one a week and sometimes twice a day at the Eastham and Telford Units. Torres argues that this affidavit shows that the danger of assaults through the food slots is so long-standing and pervasive that such assaults are long-standing, pervasive, well-documented, or expressly noted by prison officials unit-wide, region-wide, system-wide, and nation-wide.

A review of Reyna's affidavit shows that he claims to have witnessed at least one attack per week through a food slot over a 16-year period, alleging that sometimes the attacks were as often as two per day. This means that at the rate of one per week, Reyna would himself have witnessed over 800 assaults over this time period, likely closer to 1,000 when the weeks of multiple assaults per day which he claimed to have seen are added in.

Reyna's affidavit maintains that these were assaults which he witnessed personally, meaning they must have occurred in the section in which he was confined, on the row in which he was housed. Torres' original complaint states that the administrative segregation section at the Michael

Unit has six pods, each of which has six sections which contain two rows each, for a total of 72 rows in administrative segregation. If assaults occurred at the Michael Unit at the same rate which Reyna claims he observed them elsewhere, being one per week per row, the Michael Unit administrative segregation area alone would have experienced over 59,000 assaults during the 16-year period covered by Reyna's affidavit; however, as the Magistrate Judge observed, research reveals not a single case in the State of Texas, other than the present one, in which a prisoner filed suit alleging he was assaulted by another prisoner through the food slot.

Torres also argues that the Court failed to apply the correct legal standard set out in *Farmer*. He asserts that the supervisory defendants each knew of the risk of assault through the food slots but tacitly authorized the floor officers to have inmates help the officers feed segregated prisoners and pass items. Torres argues that the Court should have "drawn on its common sense" and reasoned that because each defendant knew that the possibility of an assault through the food slot existed and failed to take reasonable measures to ensure that Torres could not be attacked during feeding time or while he was working in segregation, then each defendant must be liable for failing to protect Torres from assault.

Torres contends that the fact that Officer Endsley opened the food slots "quickly" shows that the officer must have known of the danger of assault but took no action. He complains that none of the supervisory defendants did anything to discourage support service inmates from helping floor officers feed segregated prisoners. Torres states that the fact that prison officials know that weapons have been found in prisoners' cells demonstrates their knowledge of the risk and their disregard of this risk, although he concedes that he approached Sanchez's cell and bent over after seeing Sanchez reach his whole arm out of the cell slot, which was the immediate action placing him in range of assault. He asks that his case be reopened and that the Court change its ruling on the merits.

IV. Discussion

The Fifth Circuit has stated that relief under Rule 59(e) is appropriate where there has been an intervening change in controlling law, the movant presents newly discovered evidence which was

previously unavailable, or to correct a manifest error of law or fact. *Schiller v. Physicians Res. Grp. Inc.*, 342 F.3d 563, 567 (5th Cir.2003). A Rule 59(e) motion cannot be used to raise arguments could and should have been made before the judgment issued. *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 864 (5th Cir. 2003).

A motion to alter or amend the judgment based on the discovery of new evidence should be granted only if: (1) the facts discovered are of such a nature that they would probably change the outcome; (2) the facts alleged are actually newly discovered and could not have been discovered earlier by proper diligence; and (3) the facts are not merely cumulative or impeaching. *Infusion Res. Inc. v. Minimed, Inc.*, 351 F.3d 688, 696-97 (5th Cir. 2003).

The requirement that the facts be of such a nature that they would probably change the outcome necessarily includes a requirement that the newly discovered evidence must be credible. *See, e.g., Daniels v. Pipefitters Association Local Union No. 597*, 983 F.2d 800, 803 (7th Cir. 1993) (holding in the context of a Rule 60(b)(2) motion that district courts may consider the credibility of evidence before granting motions for reconsideration because such motions are decided by judges rather than juries and "to hold otherwise would mean that the district court would have to order a new trial no matter how incredible the evidence.")

Reyna's affidavit, attesting to witnessing close to if not over a thousand assaults on other units carried out through cell food slots, none of which formed the basis for a lawsuit in federal court, appears to have little credibility and thus cannot form the basis for alteration or amendment of the judgment of dismissal. Even were the affidavit credible, however, it does not rise to the level of requiring that Rule 59 relief be granted. The affidavit demonstrates little more than the well-known fact that, as Justice Thomas observed, "prisons are necessarily dangerous places; they house society's most antisocial and violent people in close proximity to one another. Regrettably, some level of brutality and sexual aggression among [prisoners] is inevitable no matter what the guards

do ... unless all prisoners are locked in their cells 24 hours a day and sedated." *Farmer*, 511 U.S. at 858-59 (Thomas, J., concurring).[1]

The fact of other assaults in which the Defendants were not involved and which, according to Reyna's affidavit, occurred at other units and not the Michael Unit, does not show that the Defendants were necessarily aware of a specific danger posed to Torres. *Adames*, 331 F.3d at 513. A self-serving affidavit which strains the bounds of credulity does not show that the danger of Torres being assaulted through the food slot was so obvious that the Defendants were deliberately indifferent by failing to take some unspecified action to protect Torres from harm in the normal course of his day's work. He has not shown that the supervisory defendants were deliberately indifferent to his safety by failing to discourage support service inmates from performing normal duties by assisting in the feeding of segregated prisoners. Nor has he shown that the district court applied incorrect legal standards. Torres' motion to alter or amend the judgment has not met the standards of Rule 59(e) and it is accordingly

ORDERED that the Plaintiff's motion to alter or amend the judgment (docket no. 38) is **DENIED**.

So Ordered and Signed
Apr 4, 2019

Ron Clark, Senior District Judge

[1]In addition, if such assaults were as widespread and commonplace as Reyna's affidavit claims, this fact would most likely be universally known by every prisoner incarcerated in TDCJ, in which case Torres has not shown that the purportedly newly discovered evidence was previously unavailable. Furthermore, if these assaults were widespread and universally known, Torres does not explain why Officer Endsley would have been deliberately indifferent by failing to explain it to him, nor he had so little heed for his own safety as to go over to the cell door and bend over next to the food slot without watching it, rather than gathering up the pictures in such a way as to observe the inmate in the cell and protect himself from possible assault.