

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

JAMES ELMER GROSS, SR.,)	
)	
Plaintiff,)	
v.)	2:08-cv-254-RLY-WGH
)	
R.V. VEACH, et al.,)	
)	
Defendants.)	

Entry Discussing Motion for Summary Judgment

For the reasons explained in this Entry, the defendants' motion for summary judgment must be **granted**.

Background

James Elmer Gross was formerly confined at the Federal Correctional Center in Terre Haute, Indiana ("FCC"), a prison located in this District and operated by the Federal Bureau of Prisons ("BOP"). Gross now sues nine employees and former employees of the FCC pursuant to the theory recognized in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The defendants are Randy White, Richard Welsh, Mark Bezy, David Ebbert, Jeff Ramer, Jon Evans, Thomas Smith, S. Larson, and R.V. Veach. His claim is based on the circumstances surrounding the decision to transfer him from the FCC to the United States Penitentiary in Beaumont, Texas ("USP Beaumont"). Gross alleges that this transfer violated his constitutional rights because he was improperly placed in a prison where he was subjected to a high risk of physical harm. As noted, the defendants seek resolution of Gross' claim through the entry of summary judgment.

"As stated by the Supreme Court, summary judgment is not a disfavored procedural shortcut, but rather is an integral part of the federal rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action." *Harney v. Speedway SuperAmerica, LLC*, 526 F.3d 1099, 1103 (7th Cir. 2008) (citations omitted). The question presented by the motion for summary judgment is whether, based on the evidence of record, there is any material dispute of fact that requires a trial. *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003).

The motion for summary judgment, as with any such motion, must be granted if "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Scott v. Edinburg*, 346 F.3d 752, 755 (7th Cir. 2003) (quoting **FED.R.CIV.P.** 56(c) and citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). A "material fact" is one that "might affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine only if a reasonable jury could find for the non-moving party. *Id.* If no reasonable jury could find for the non-moving party, then there is no "genuine" dispute. *Scott v. Harris*, 127 S. Ct. 1769, 1776 (2007).

"When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must — by affidavits or as otherwise provided in this rule — set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party." **FED. R. CIV. P.** 56(e)(2). The nonmoving party bears the burden of demonstrating that such a genuine issue of material fact exists. See *Harney*, 526 F.3d at 1104 (citing cases). "It is not the duty of the court to scour the record in search of evidence to defeat a motion for summary judgment; rather, the nonmoving party bears the responsibility of identifying the evidence upon which he relies." *Id.* at 1104 (citing *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 562 (7th Cir. 1996)). When the moving party has met the standard of Rule 56, summary judgment is mandatory. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Shields Enters., Inc. v. First Chicago Corp.*, 975 F.2d 1290, 1294 (7th Cir. 1992).

"In evaluating a motion for summary judgment, a court should draw all reasonable inferences from undisputed facts in favor of the nonmoving party and should view the disputed evidence in the light most favorable to the nonmoving party. The mere existence of a factual dispute, by itself, is not sufficient to bar summary judgment. Only factual disputes that might affect the outcome of the suit in light of the substantive law will preclude summary judgment. Irrelevant or unnecessary facts do not deter summary judgment, even when in dispute." *Harney*, 526 F.3d at 1104 (internal citations omitted). "If the nonmoving party fails to establish the existence of an element essential to his case, one on which he would bear the burden of proof at trial, summary judgment must be granted to the moving party." *Ortiz v. John O. Butler Co.*, 94 F.3d 1121, 1124 (7th Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997).

Discussion

Gross has been housed at a number of BOP institutions since being convicted of drug-dealing and racketeering in 2003. According to Gross, he was well-known (although wrongly-known) in the Baltimore, Maryland area as "an informant" based on an article published in the Baltimore Sun. Gross therefore had "major problems" at BOP prisons in Atwater, California, in Coleman, Florida, and in Pollack, Louisiana, before arriving at the FCC.

Gross arrived at the FCC on September 6, 2005, and remained there until he was released on a federal writ on July 26, 2006. Gross then returned to the FCC on September 13, 2006, and remained there until he was transferred to the USP Beaumont on April 25, 2007.

According to Gross, when he arrived at the FCC, he expressed concerns about his safety and was therefore immediately placed into administrative detention pending a review.¹ To "assure his own safety," Gross refused to go into general population at the FCC and sought a transfer to an institution that "did not house inmates from the Baltimore Maryland area. . . ." Specifically, Gross told FCC staff members that the Baltimore Sun had published an article identifying him as a witness for the government. Gross also alleged that although he never actually cooperated with the government, other inmates at a previous institution had threatened him based on this information. Gross was therefore considered a verified protection case and had been a verified protection case at the Coleman, the Pollock, and the Atwater facilities based on the same information. Gross does not allege that he was assaulted or the victim of physical violence while at the FCC.

Based on Gross' requests for transfer and his allegations, his Case Manager at the time, Richard Welsh, initiated two Requests for Transfer. The Unit Manager, Randy White, reviewed the requests and they were forwarded to the Warden. Case Managers and Unit Managers, however, are not delegated the final authority on transfer decisions. Rather, the Case Manager prepares the recommendation for potential transfer, which is approved by the Unit Manager and routed to the Warden. Upon the Warden's approval, the recommendation would be forwarded to the Regional Office of the BOP. The Regional Office then approves or disapproves a request for transfer. The ultimate decision to transfer an inmate must be made at the Regional level and not the institution level.

Gross was eventually transferred to the USP Beaumont. According to Gross, once he arrived at that facility he was placed in general population with inmates from the Baltimore, Maryland area who knew that he was "an informant," thus making him "particularly vulnerable to violent attacks and assaults by inmates from the Baltimore Maryland area." Gross then alleges that another inmate from Baltimore told him to "get off the compound" and threatened him. A correctional officer witnessed the exchange and placed Gross in administrative detention. Gross does not allege that he was the victim of physical violence at the USP Beaumont.²

¹ Administrative detention is a housing status that simply removes an individual from the general population. See 28 C.F.R. § 541.22 (administrative detention is defined as a "status of confinement of an inmate in a special housing unit in a cell either by self or with other inmates which serves to remove the inmate from the general population.") Inmates confined in administrative detention receive the same general privileges as inmates housed in the general population. BOP Program Statement 5270.07, Inmate Discipline and Special Housing Units, Chapter 9. Specifically, those privileges include the opportunity to participate in educational programs, library services, social services, counseling, religious guidance, and recreation.

² The court screened the complaint pursuant to 28 U.S.C. § 1915A in the Entry of October 8, 2008, and stated "Gross alleges that this transfer violated his constitutional rights because he was improperly placed in a prison where he was subjected to a high risk of physical harm, the result

Gross was then transferred from the USP Beaumont to the BOP's prison in Big Sandy, Kentucky. During his intake interview, Gross again expressed concerns about his safety from inmates from Baltimore, and he was placed in administrative detention. Gross does not allege that he was the victim of physical violence at the Big Sandy prison.

Gross proceeds here pursuant to the theory recognized in *Bivens*, which "authorizes the filing of constitutional tort suits against federal officers in much the same way that 42 U.S.C. § 1983 authorizes such suits against state officers" *King v. Federal Bureau of Prisons*, 415 F.3d 634, 636 (7th Cir. 2005). Thus, to maintain an action under 28 U.S.C. § 1331, the plaintiff "must allege a violation of the United States Constitution or a federal statute." *Goulding v. Feinglass*, 811 F.2d 1099, 1102 (7th Cir. 1987). "Section 1983 is not itself a source of substantive rights; instead it is a means for vindicating federal rights elsewhere conferred." *Ledford v. Sullivan*, 105 F.3d 354, 356 (7th Cir. 1997) (citing *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)). "[T]he first step in any [§ 1983] claim is to identify the specific constitutional right infringed." *Albright v. Oliver*, 510 U.S. 266, 271 (1994); see also *Conyers v. Abitz*, 416 F.3d 580, 586 (7th Cir. 2005) ("[C]onstitutional claims must be addressed under the most applicable provision."). Because *Bivens* creates a remedy, not a substantive right, *Abella v. Rubino*, 63 F.3d 1063, 1065 (11th Cir. 1995) (noting that "the effect of *Bivens* was to create a remedy against federal officers acting under color of federal law that was analogous to the Section 1983 action against state officials"), this same inquiry governs claims asserted pursuant to *Bivens*.

The constitutional provision pertinent to Gross' claim is the Eighth Amendment's proscription against the imposition of cruel and unusual punishment. *Helling v. McKinney*, 509 U.S. 25, 31 (1993).³ Specifically, pursuant to the Eighth Amendment, prison officials have a duty to provide humane conditions of confinement by ensuring that inmates receive adequate food, clothing, shelter, and medical care, and by taking reasonable measures to guarantee the safety of the inmates. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994); *Vance v. Peters*, 97 F.3d 987, 991 (7th Cir. 1996), cert. denied, 520 U.S. 1230 (1997). To prevail on an Eighth Amendment claim based on inadequate conditions, the prisoner must show that (1) the conditions in the prison were objectively "sufficiently serious so that a prison official's act or omission results in the denial of the minimal civilized measure of life's necessities," and (2) prison officials acted with deliberate indifference to those conditions. *Townsend v. Fuchs*, 522 F.3d 765, 773 (7th Cir. 2008) (internal citations and quotation marks omitted).

of which is that he was beaten up and placed in administrative segregation under conditions he contends amount to cruel and unusual punishment." Upon reconsideration, the court finds that Gross does not allege in his complaint that he was ever "beaten up" while in the custody of the BOP.

³Contrary to Gross' assertions in his response (dkt 38), declaration (dkt 39), and surreply (dkt 43), he did not state a claim of retaliation in his complaint.

Given the particular nature of Goss' claim and the context in which it arises, to prevail on his failure-to-protect claim, he would have to show that being transferred from the FCC to the USP Beaumont posed an excessive risk to his safety and that the defendants were deliberately indifferent to the risk. *Morris v. Ley*, 331 Fed. Appx. 417, 419, (7th Cir. 2009) (citing *Farmer*, 511 U.S. at 837; *Dale v. Potson*, 548 F.3d 563, 569 (7th Cir. 2008)). "However, a general risk of violence is not enough, for prisons are inherently dangerous places." *Id.* (citing cases). Instead, Gross must show a tangible threat to his safety or well-being. *Id.* (citing *Grieverson v. Anderson*, 538 F.3d 763, 777 (7th Cir. 2008)). Additionally, to prove deliberate indifference, Gross must show that the defendants were subjectively aware of the risk, yet failed to take reasonable measures to prevent it. See *Farmer*, 511 U.S. at 844; *Borello v. Allison*, 446 F.3d 742, 747 (7th Cir. 2008). There are a number of features of the present case which defeat Gross' claim that any involvement of the defendants in his transfer to the USP Beaumont violated the Eighth Amendment.

- Gross does not allege that he has been attacked or subjected to physical violence when placed in either the general population or administrative detention at various institutions. Instead, he alleges that he was "exposed to unreasonable risk of harm." He appears to suggest that he was threatened with harm, but fear of assault from cellmates is not an objectively serious enough injury to support a claim for damages. See *Doe v. Welborn*, 110 F.3d 520, 524 (7th Cir. 1997) (fear of assault was not "the kind of extreme and officially sanctioned psychological harm that [supports] a claim for damages under the Eighth Amendment").
- Gross' claim is that he has a "right to serve his prison sentence in a federal prison" (rather than a state institution) but that it must be a prison that houses no inmates from Baltimore/D.C. area and, ideally, a lower-security facility without any "hostile inmates." No such right exists. It is firmly established that there is no constitutional right for a federal prisoner to be housed in a particular institution, at a particular custody level, or in a particular portion or unit of a correctional institution. *Meachum v. Fano*, 427 U.S. 215, 225 (1976) (and progeny); *Olim v. Wakinekona*, 461 U.S. 238, 245-48 (1983); *Moody v. Daggett*, 429 U.S. 78, 88 n.9 (1976) (noting that prison classification and eligibility for rehabilitative programs in the federal prison system are matters delegated by Congress to the "full discretion" of federal prison officials and thus implicate "no legitimate statutory or constitutional entitlement sufficient to invoke due process"). The BOP "has the discretion to transfer federal prisoners from one place of confinement to another at any time for any reason whatsoever or for no reason at all." *Brown-Bey v. United States*, 720 F.2d 467, 470 (7th Cir. 1983); see also *Scarver v. Litscher*, 434 F.3d 972, 976-77 (7th Cir. 2006); *Shango v. Jurich*, 681 F.2d 1091, 1102 (7th Cir. 1982) ("[I]nterprison transfers obviously are not 'mindless events,' rather, '[t]ransfers between institutions ... are made for a variety of reasons and often involve no more than informed predictions as to what would best serve institutional security or the safety and welfare of the inmate.').

- It is clear in this case that Gross was seeking a transfer to a lower-security facility, specifically one that houses no one from Baltimore or Washington, D.C. The prison officials, however, were not required to comply with Gross' request, even if it were possible. Gross is quite simply not entitled to decide in which facility he will reside and the Constitution does not protect this asserted interest. See *Dale v. Poston*, 548 F.3d 563 (7th Cir. 2008) (acknowledging that "[w]ith limited social opportunities, [administrative detention] may not have been the most pleasant of experiences, but it would have eliminated the risk of an attack. Prison officials do not violate the Eighth Amendment because the mode of protection they offer does not sit well with a prisoner.").
- Gross' contention that the defendants' actions prolonged his stay in administrative segregation and that his time in administrative segregation was tantamount to cruel and unusual punishment is untenable. See *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) ("[T]he Constitution itself does not give rise to a liberty interest in avoiding transfer to more adverse conditions of confinement.").
- Further, it is clear that Gross was placed in administrative segregation for his own protection. "With limited social opportunities, that may not have been the most pleasant of experiences, but it . . . eliminated the risk of an attack. Prison officials do not violate the Eighth Amendment because the mode of protection they offer does not sit well with a prisoner. Rather, if they offer reasonable protection from the threat, they have done their duty." *Dale v. Poston*, 548 F.3d 563, 570 (7th Cir. 2008).
- Finally, in *Gross v. Unknown Director of the Bureau of Prisons*, 2008 WL 2280094 (E.D.Ky. May 30, 2008), the Eastern District of Kentucky decided this precise issue against Gross as to BOP employee-defendants from the BOP's prison in Big Sandy, Kentucky. According to Judge Caldwell, Gross failed to state a constitutional deprivation against the Big Sandy defendants when they did not transfer him to a federal facility free of inmates from the Baltimore/D.C. area, or to a lower-security facility. *Id.* at *11. Judge Caldwell found Gross' suggestion that he should be transferred to a lower-security facility "untenable" and instead determined that the BOP had acted well within its discretion in its actions regarding Gross. *Id.* This decision is fully persuasive here.

Claims such as presented in this case must be considered in light of the special environment of a prison, where administrators "must be accorded wide-ranging deference in the . . . execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Pardo v. Hosier*, 946 F.2d 1278, 1280-81 (7th Cir. 1991) (internal quotations omitted). Gross has not identified a genuine issue of material fact as to his claim against the defendants.

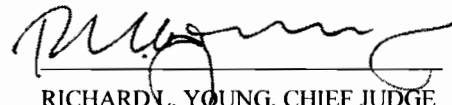
Conclusion

"Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Turner v. Safley*, 482 U.S. 78, 84-85 (1987). Nonetheless, "prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Id.* at 84. In the midst of a complex and tumultuous environment such as a prison, "[f]ederal courts must take cognizance of the valid constitutional claims of prison inmates." *Babcock v. White*, 102 F.3d 267, 275 (7th Cir. 1996)(quoting *Turner*, 482 U.S. at 84).

Although "federal courts must take cognizance of the valid constitutional claims of prison inmates," *Babcock v. White*, 102 F.3d 267, 275 (7th Cir. 1996) (quoting *Turner*, 482 U.S. at 84), no viable claim of that nature has been presented by Gross in this case. It has been explained that "summary judgment serves as the ultimate screen to weed out truly insubstantial lawsuits prior to trial." *Crawford-El v. Britton*, 118 S. Ct. 1584, 1598 (1998). This is a vital role in the management of court dockets, in the delivery of justice to individual litigants, and in meeting society's expectations that a system of justice operate efficiently. For the reasons explained in this Entry, therefore, the defendants' motion for summary judgment (dkt 30) is **granted**.

IT IS SO ORDERED.

Date: 12/10/2009


RICHARD L. YOUNG, CHIEF JUDGE
United States District Court
Southern District of Indiana