

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DONALD HARRIS	:	CIVIL ACTION
	:	
vs.	:	
	:	
HARMON, SGT; ZELENK, C/O;¹	:	
AND MAINZER, C/O	:	NO. 94-1614
	:	

MEMORANDUM

DUBOIS, J.

OCTOBER 17, 1997

I. BACKGROUND

Plaintiff, Donald Harris, filed two complaints, pro se, under 42 U.S.C. § 1983 alleging violations of his Eighth Amendment rights and seeking compensatory and punitive damages from defendants, Superintendent Donald Vaughn, Sergeant Earl Harmon, Corrections Officer Lawrence Zelenak, Corrections Officer Joseph Mainzer, Hearing Examiner J. Kevin Kane, Lieutenant Charles A. Judge, and Corrections Officer Ronald Rago. All of the defendants were employed at State Correctional Institution (“SCI”)-Graterford at the times of the incidents in question. The two suits were consolidated by Order dated November 16, 1994.

By Order dated June 17, 1997, defendants were granted summary judgment on three of plaintiff’s claims. By Order dated September 4, 1997, the Court granted defendant Vaughn’s motion for summary judgment. In a separate Order of the same date, the Court granted plaintiff’s motion to withdraw his claim related to confinement in administrative custody. As a result of those orders, all of the claims against defendants Vaughn, Kane, Judge, and Rago were dismissed or withdrawn,

¹ The correct spelling of defendant’s name is “Zelenak.”

and they are no longer defendants in the consolidated cases.

One claim remains in the consolidated cases -- plaintiff's claim that while incarcerated at SCI-Graterford, the remaining defendants, Harmon, Zelenak, and Mainzer, failed to protect him from an assault by his cell mate, Edward Kirkland. That claim arises from an assault and other events which occurred on the afternoon of December 20, 1993.

This Court held a non-jury trial on September 11, 1997. Based on the findings of fact and conclusions of law that follow, the Court finds in favor of plaintiff against defendant Mainzer in the amount of \$3,500.00. The Court finds in favor of defendants, Harmon and Zelenak, and against plaintiff.

II. FINDINGS OF FACT

1. In December 1993, plaintiff was a prisoner at SCI-Graterford.
2. At the time in question, the afternoon of December 20, 1997, defendants Harmon, Zelenak, and Mainzer were working as corrections personnel on B Wing of M Block of the Restricted Housing Unit ("RHU") at SCI-Graterford. Defendant Harmon held the rank of Sergeant and defendants Mainzer and Zelenak both held the rank of Corrections Officer I.
3. On December 20, 1993, plaintiff shared Cell 220, on the upper tier of B Wing of M Block of the RHU at SCI-Graterford, with Kirkland. Both inmates were confined in the RHU in disciplinary custody.
4. Cell 220 had a bunk bed with upper and lower bunks. When plaintiff arrived in Cell 220 in early December 1993, Kirkland was already there and he had selected the lower bunk. Plaintiff occupied the upper bunk.

5. During the afternoon of December 20, 1993, Kirkland became angry at plaintiff for hanging his damp socks over the edge of the upper bunk bed, close to Kirkland's face. Trial Transcript [hereinafter "T.T."], September 11, 1997, at 13-14.

6. After an exchange of words with plaintiff over the hanging of the socks, Kirkland threw the socks onto the upper bunk, went to the cell door, and began calling for a guard, demanding that he and plaintiff be separated, and loudly threatening plaintiff. T.T., September 11, 1997, at 20-21, 87, 111, 166-67.

7. For at least ten minutes, Kirkland shouted for a guard or the sergeant and threatened to physically harm or kill plaintiff if they were not separated. T.T., September 11, 1997, at 15, 20, 93. During this time, Kirkland became increasingly agitated and aggressive. T.T., September 11, 1997, at 17, 20, 93.

8. On the afternoon of December 20, 1993, defendant Mainzer was escorting prisoners to and from the shower on the upper tier of B Wing of M Block of the RHU, thereby passing repeatedly in front of plaintiff's cell. T.T., September 11, 1997, at 15, 47, 234.

9. On the afternoon of December 20, 1993, defendant Harmon was working in the sergeant's office, an enclosed office, on the upper tier of B Wing of M Block of the RHU. T.T., September 11, 1997, at 183-84.

10. On the afternoon of December 20, 1993, defendant Zelenak was working on the lower tier of B Wing of M Block of the RHU. T.T., September 11, 1997, at 109, 185, 237.

11. During the time Kirkland was shouting, defendant Mainzer went to Cell 220 and asked Kirkland what was wrong. T.T., September 11, 1997, at 20, 44, 47-48. Kirkland told defendant Mainzer that he would hurt the plaintiff if they were not separated. T.T., September 11,

1997, at 20-21, 44, 50-51.

12. Plaintiff testified at trial that defendant Mainzer responded that he would “look into it or something to that effect.” T.T., September 11, 1997, at 49. Kirkland testified that defendant Mainzer said he would get the sergeant to look into the problem. T.T., September 11, 1997, at 170, 172.

13. Defendant Mainzer could recall only that an inmate in one cell - he could not remember which one - asked for a cell change that afternoon. Defendant Mainzer could not recall whether it was one of the inmates in Cell 220 who requested the cell change. T.T., September 11, 1997, at 232-234. After talking to the inmate who requested a cell change, defendant Mainzer promptly notified defendant Harmon, who was in the enclosed sergeant's office, that an inmate wanted a cell change. He did not tell defendant Harmon that Kirkland was threatening to harm the plaintiff. T.T., September 11, 1997, at 187, 223-224.²

14. Defendant Harmon testified that an officer, whose name he could not recall, told him that the “inmates in [Cell] 220 were not getting along.” T.T., September 11, 1997, at 187. In response, defendant Harmon said he would investigate the incident later, during his normal rounds. T.T., September 11, 1997, at 188, 213.

15. Defendant Harmon did not observe Kirkland's behavior or hear him shouting on the afternoon of December 20, 1993 because defendant Harmon was working in the enclosed sergeant's office, and it was noisy in M Block of the RHU. T.T., September 11, 1997, at 187-88.

²Defendant Mainzer first stated that he had not entered defendant Harmon's office on the afternoon of December 20, 1993. He then revised his answer to state "Maybe to tell him that an inmate wouldn't -- wanted a cell change." Defendant Mainzer could not recall any other details of his interaction with defendant Harmon on the afternoon in question before the fight. T.T., September 11, 1997, 223-224.

16. Defendant Zelenak was working on the lower tier of the RHU on the afternoon of December 20, 1993. He did not observe Kirkland's behavior or hear him shouting, nor did he interact with plaintiff or Kirkland prior to the fight.

17. As defendant Mainzer was leaving defendant Harmon's office, Kirkland attacked plaintiff, and they became involved in a physical fight. T.T., September 11, 1997, at 69, 188, 225.

18. Defendant Mainzer quickly realized that a fight had broken out and immediately returned to defendant Harmon's office and informed him of what was happening. Defendant Harmon alerted defendant Zelenak. The three defendants then ran to Cell 220. T.T., September 11, 1997, at 188, 225, 245.

19. At trial, defendant Mainzer testified that he could not remember whether either of the inmates who were fighting was the same person who had requested a cell change. He did remember that only one inmate had requested a cell change on the afternoon of December 20, 1993. T.T., September 11, 1997, at 232-234.

20. Defendants Harmon, Zelenak and Mainzer ordered the two (2) inmates to stop fighting. When that did not work, they intervened and ended the fight between plaintiff and Kirkland a few minutes after it began. T.T., September 11, 1997, at 189, 225, 245-47.

21. Plaintiff and Kirkland were then placed in separate cells. T.T., September 11, 1997, at 166, 189.

22. Both plaintiff and Kirkland were disciplined for fighting and not obeying an order from corrections officers. T.T., September 11, 1997, at 22, 227-28.

23. X-rays showed that plaintiff suffered a fractured right zygoma (cheek bone) in the fight. T.T., September 11, 1997, at 24; Plaintiff's Exhibit 3.

24. Inmate cell changes were not customarily made during the 2:00 PM to 10:00 PM shift which defendants were working. Cell changes were customarily made during the 6:00 AM to 2:00 PM shift. T.T., September 11, 1997, at 186.

25. A cell change could be made on the defendants' shift, only by the sergeant, if he or a corrections officer determined that an inmate was in immediate physical danger. T.T., September 11, 1997, at 173, 193-194, 224, 226.

26. At trial, Kirkland testified as a witness for the defense. During his testimony, he was hostile and belligerent. He spoke loudly and was particularly agitated when testifying about the fight with plaintiff on December 20, 1993 and the events which preceded it. T.T., September 11, at 177.

27. Plaintiff and the inmate witnesses appearing on his behalf testified that Kirkland had shouted and was both hostile and belligerent during the period before the fight when he threatened to harm or kill plaintiff if they were not separated. T.T., September 11, at 17, 20, 87-88, 93, 112. Kirkland's conduct in open court was substantially similar to Kirkland's conduct as described by plaintiff and the inmate witnesses.

28. Defendant Harmon testified that if he had observed, or it had been reported to him, that Kirkland was behaving as he did while testifying, defendant Harmon would have concluded that there was an "immediate threat of harm" to plaintiff. T.T., September 11, at 207-210.

29. Plaintiff and Kirkland had no history of a compatibility problem. Defendants' Exhibit 14 and T.T., September 11, at 199.

30. Plaintiff was released from custody on September 10, 1997, after completing his prison term.

III. CONCLUSIONS OF LAW -- LIABILITY

1. This Court has jurisdiction under 28 U.S.C. § 1331.
2. To succeed in a claim under 42 U.S.C. § 1983, a plaintiff is required to establish that the illegal action was taken by a person acting under color of state law and that it deprived the plaintiff of a constitutional right. 42 U.S.C. § 1983 (1994).
3. Defendants do not dispute that, as corrections officers, they were acting under color of state law. Plaintiff has alleged that he was deprived of his right to be free from cruel and unusual punishment under the Eighth Amendment.
4. To establish a claim of failure to protect from assault under the Eighth Amendment, plaintiff must meet two requirements. First, he must show that the deprivation was, objectively, “sufficiently serious.” Farmer v. Brennan, 511 U.S. 825, 114 S. Ct. 1970, 1977 (1994) (citations omitted). For a failure to protect claim, this means that plaintiff must show “he [was] incarcerated under conditions posing a substantial risk of serious harm.” Id. (citations omitted). Second, plaintiff must show that a defendant acted with “deliberate indifference” to his safety. Id. at 1977.
5. Violence suffered at the hands of another prisoner can constitute serious harm under the Eighth Amendment. Farmer, 114 S.Ct. at 1976; Jensen v. Clarke, 94 F.3d 1191, 1197, 1198 (8th Cir. 1996).
6. The Court finds that plaintiff suffered serious harm in that his right cheek bone was fractured during the fight with Kirkland. See, e.g., Hamilton v. Leavy, 117 F.3d 742, 745 (3d Cir. 1997) (broken jaw from assault by another inmate as basis for claim of failure to protect); Reece v. Groose, 60 F.3d 487, 491 (8th Cir. 1995) (broken hand is serious harm).
7. The Court finds that because Kirkland was loudly and aggressively threatening to

harm plaintiff for at least ten minutes prior to the physical confrontation, plaintiff was objectively incarcerated under conditions which created a “substantial risk of serious harm.” See e.g., Farmer, 114 S.Ct. at 1977 (“Being violently assaulted in prison is simply not ‘part of the penalty that criminal offenders pay for their offenses against society.’”) (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)); Babcock v. White, 102 F.3d 267, 271 (7th Cir. 1996) (“[I]t is the reasonably preventable assault . . . that gives rise to a compensable claim under the Eighth Amendment.”); Grimsley v. MacKay, 93 F.3d 676, 681 (10th Cir. 1996) (“Prison officials have a constitutional duty to take reasonable measures to protect prisoners against current threats of attack . . .”).

8. To fulfill the second requirement, the plaintiff must show that each defendant acted with “deliberate indifference.” In this instance, deliberate indifference is the equivalent of “recklessly disregarding the risk,” Farmer, 114 S.Ct. at 1978, which is proven through a two-part subjective test. Plaintiff must show that each defendant knew of and disregarded “an excessive risk to inmate health or safety; the official must both be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw that inference.” Id. at 1979. Even if defendants knew of the risk, they would not be liable if they took reasonable measures to prevent the harm but it still occurred. Id. at 1982-83.

9. While not ignoring the subjective nature of the test, “[a] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.” Id. at 1981. A plaintiff may establish that a defendant knew of a substantial risk from circumstantial evidence. Hamilton, 117 F.3d at 747.

10. Defendant Mainzer passed by plaintiff’s cell repeatedly while escorting prisoners to and from the shower. During that time, Kirkland was shouting for a guard and threatening to harm

or kill plaintiff. Kirkland also became more aggressive and combative during that time.

11. When defendant Mainzer stopped to ask Kirkland what the problem was, Kirkland told defendant Mainzer that he would hurt plaintiff if the two were not separated.

12. Despite this, defendant Mainzer did not accurately report the situation to defendant Harmon or take steps to protect plaintiff. Instead, he only told defendant Harmon that an inmate wanted to change cells.

13. The Court finds that since Kirkland told defendant Mainzer that he would hurt plaintiff, the “substantial risk of serious harm” to plaintiff was “obvious” and defendant Mainzer knew of that risk but was deliberately indifferent to it.

14. Defendant Harmon could not hear Kirkland shouting on the afternoon of December 20, 1993, and did not learn of the dispute between plaintiff and Kirkland until after the fight started. The Court finds, therefore, that defendant Harmon did not know that plaintiff was at “substantial risk of serious harm” from Kirkland, and defendant Harmon did not fail to protect plaintiff from assault.

15. Defendant Zelenak could not hear Kirkland shouting on the afternoon of December 20, 1993, and did not learn of the dispute between plaintiff and Kirkland until after the fight started. The Court finds, therefore, that defendant Zelenak did not know that plaintiff was at a “substantial risk of serious harm” from Kirkland, and defendant Zelenak did not fail to protect plaintiff from assault.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW -- DAMAGES

1. After the fight on December 20, 1993, plaintiff was taken to the SCI-Graterford dispensary and examined. X-rays taken a few days later showed that plaintiff had suffered a fracture

of the right zygoma (cheekbone). T.T., September 11, 1997, at 24; Plaintiff's Exhibit 3.

2. Plaintiff was examined or treated at the SCI-Graterford dispensary on December 20, 21, 22, 24 and 27, 1993, and on January 3, 4, 7, 10, 26, and 31, 1994 for the injuries received in the fight. Although plaintiff was seen in the dispensary at SCI-Graterford on numerous occasions thereafter, the records do not disclose any complaints, examination, or treatment related to the fight.

3. Plaintiff sustained a fracture of his right cheek bone and abrasions of the face in the fight on December 20, 1993.

4. Plaintiff recovered from the injuries sustained in the fight shortly after January 31, 1994.

5. The Court awards plaintiff \$3,500.00 in compensatory damages for his pain and suffering in his claim against defendant Mainzer.

V. DISCUSSION

Plaintiff presented one claim at the trial of this case -- that while incarcerated at SCI-Graterford, defendants Harmon, Zelenak and Mainzer failed to protect him from an assault by his cell mate, Edward Kirkland, on the afternoon of December 20, 1993. It is plaintiff's position that, in failing to protect him from the assault, defendants subjected him to cruel and unusual punishment in violation of the Eighth Amendment.

To establish a failure to protect claim under the Eighth Amendment, plaintiff must meet two requirements. First, he must show that the deprivation was, objectively, "sufficiently serious." Farmer, 114 S.Ct. at 1977. For a failure to protect claim, this requires plaintiff to establish that he was incarcerated under conditions posing a substantial risk of serious harm. Second, plaintiff must

establish that a defendant acted with "deliberate indifference" to his safety.

There is no doubt that plaintiff meets the first requirement for a failure to protect claim. He established that, as a result of the assault, he suffered a fractured cheekbone. Thus, the Court concludes that, with respect to the assault on the afternoon of December 20, 1993, plaintiff was incarcerated under conditions posing a substantial risk of serious harm.

The Court next turns to the evidence with respect to the second requirement of plaintiff's failure to protect claim -- establishing deliberate indifference. The Court finds the testimony of Kirkland with respect to his conduct before and during plaintiff's assault to be credible. It was, in essence, corroborated by the testimony of plaintiff and the inmate witnesses. However, because of credible testimony from defendants Harmon and Zelenak that they had no knowledge of the dispute until the fight actually broke out, the Court does not find credible the testimony of plaintiff or the inmate witnesses that Harmon and Zelenak heard and/or saw Kirkland threaten plaintiff before the fight.

The Court credits the testimony of defendant Harmon that he did not hear or observe anything out of the usual with respect to plaintiff or Kirkland on the afternoon of December 20, 1993 until after the fight broke out. The Court also credits the testimony of defendant Zelenak that he was working on the lower tier of B Wing of M Block (the fight occurred on the upper tier) and neither heard nor saw anything involving plaintiff and Kirkland until after the fight broke out, and he was summoned to the upper tier by defendant Harmon.

The Court next turns to the testimony of defendant Mainzer. It is admitted that defendant Mainzer was escorting prisoners to and from the shower on the upper tier of B wing of M Block of the RHU on the afternoon of December 20, 1993. In doing so, he passed repeatedly in front of

plaintiff's cell and was in a position to hear and see Kirkland as he shouted and threatened plaintiff.

Defendant Mainzer could recall virtually nothing of the events which preceded the assault on the afternoon of December 20, 1993 - he could recall only that an inmate in one cell, he could not recall which one, asked for a cell change. When asked whether either of the inmates involved in the fight was the same inmate who asked for the cell change, he said he could not remember. After first stating that he could not recall entering defendant Harmon's office on the afternoon of December 20, 1993, defendant Mainzer revised his answer to state "Maybe to tell him that an inmate wouldn't - wanted a cell change." He could not recall saying anything else to defendant Harmon.

Accepting defendant's Mainzer's testimony as to his work activities on the afternoon of December 20, 1993, the Court concludes that he knew of an excessive risk to plaintiff's safety and disregarded it. Based on defendant Mainzer's testimony and the testimony of the inmates with respect to the conduct of Kirkland preceding and during the assault, the Court finds that defendant Mainzer was deliberately indifferent to the danger faced by plaintiff.

In reaching this conclusion, the Court relies in substantial part on Kirkland's demeanor on the witness stand. During his testimony, he was hostile and belligerent. He spoke loudly and was particularly agitated when testifying about the fight with plaintiff and the events which preceded it. His demeanor on the witness stand was consistent with the descriptions given by plaintiff and the inmate witnesses of Kirkland's conduct on the afternoon of December 20, 1993. Perhaps of most significance, defendant Harmon testified that if he had observed, or it had been reported to him, that Kirkland was behaving on December 20, 1993 as he behaved while testifying, defendant Harmon would have concluded that there was an immediate threat of harm to plaintiff.

VI. CONCLUSION

For all the foregoing reasons, the Court finds in favor of the plaintiff, Donald Harris, and against the defendant, Corrections Officer Joseph Mainzer, in the amount of \$3,500.00. The Court finds in favor of the defendants, Sergeant Earl Harmon and Corrections Officer Lawrence Zelenak, and against the plaintiff.

An appropriate Order follows.