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6 **UNITED STATES DISTRICT COURT**  
78 EASTERN DISTRICT OF CALIFORNIA  
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10 ROBERT LEE JENKINS,

CASE NO. 1:07-cv-01223 DLB PC

11 v. Plaintiff,

ORDER DENYING PLAINTIFF'S MOTION  
12 PERRY, et al., FOR SUMMARY JUDGMENT  
13 Defendants. (Docs. 19, 24)14  
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16 **Order on Plaintiff's Motion for Summary Judgment**17 **I. Background**

18 Plaintiff Robert Lee Jenkins ("Plaintiff") is a state prisoner proceeding pro se and in forma  
19 pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This action is proceeding on  
20 Plaintiff's amended complaint, filed May 1, 2008, against defendants Lt. Perry, Sergeant Bradford,  
21 and Sergeant Chalabian for violation of the Eighth Amendment of the United States Constitution.  
22 On April 15, 2009, Plaintiff filed a motion for summary judgment against defendants Perry,  
23 Bradford, Chalabian and Williams.<sup>1</sup> (Doc. 19.) Defendants Perry, Bradford and Chalabian  
24 ("Defendants") filed an opposition on May 4, 2009. (Doc. 20.) Plaintiff's reply, served May 18,  
25 2009 and filed May 21, 2009, is untimely and not considered by the Court. Local Rule 78-230(m).  
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29 <sup>1</sup> Captain Williams was dismissed without prejudice from this action by order filed June 15, 2009. (Doc.  
29.) This motion proceeds against the remaining three defendants.

1           **II. Plaintiff's Motion for Summary Judgment**

2           **A. Legal Standard**

3           Summary judgment is appropriate when it is demonstrated that there exists no genuine issue  
4           as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R.  
5           Civ. P. 56(c). Under summary judgment practice, the moving party

6           [A]lways bears the initial responsibility of informing the district court  
7           of the basis for its motion, and identifying those portions of "the  
8           pleadings, depositions, answers to interrogatories, and admissions on  
9           file, together with the affidavits, if any," which it believes  
10          demonstrate the absence of a genuine issue of material fact.

11          Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). It is the moving party's burden to establish that  
12          there exists no genuine issue of material fact and that the moving party is entitled to judgment as a  
13          matter of law. British Airways Board v. Boeing Co., 585 F.2d 946, 951 (9th Cir. 1978).

14          "When the moving party does not have the burden of proof on the issue, he need show only  
15          that the opponent cannot sustain his burden at trial." Calderone v. United States, 799 F.2d 254, 259  
16          (6th Cir. 1986) (quoting from W. Schwarzer, Summary Judgment Under the Federal Rules: Defining  
17          Issues of Material Fact 99 F.R.D. 465, 487 (1984)). "But where the moving party has the burden -  
18          the plaintiff on a claim for relief or the defendant on an affirmative defense - his showing must be  
19          sufficient for the court to hold that no reasonable trier of fact could find other than for the moving  
20          party." Id. Here, plaintiff must demonstrate there is no triable issue as to the matters alleged in his  
21          complaint. Id. This requires plaintiff to establish beyond controversy every essential element of his  
22          failure to protect claim. Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986). Plaintiff's  
23          evidence is judged by the same standard of proof applicable at trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

24           **B. Undisputed Facts**

25          There are no undisputed facts.

26           **C. Eighth Amendment Claim**

27          In his verified first amended complaint, Plaintiff alleges that on August 2, 2005, a fight  
28          occurred between Plaintiff and inmate Neeley during a class in vocational masonry. (Doc. 8, p.4.)  
29          Plaintiff contends that Captain Williams and defendants Perry and Bradford were informed of the

1 incident afterwards. (Id., p.5.) Rather than conduct an investigation, defendants Perry and Bradford  
2 referred the matter to the Men's Advisory Council. (Id.) Plaintiff alleges that the next day inmate  
3 Neeley, who is caucasian, was "jumped" by caucasian inmates. Plaintiff alleges that the day after  
4 he was also "jumped and beaten" (Id.) Plaintiff alleges that defendant Sgt. Chalabian walked in  
5 after the attack on Plaintiff and stated "I see they already got to him." (Id., p.6.) Plaintiff contends  
6 that defendants failed to protect him from the subsequent attack on August 4, 2005 by not conducting  
7 a proper investigation after the April 2, 2005 incident.

8 To constitute cruel and unusual punishment in violation of the Eighth Amendment, prison  
9 conditions must involve "the wanton and unnecessary infliction of pain . . ." Rhodes v. Chapman,  
10 452 U.S. 337, 347 (1981). Although prison conditions may be restrictive and harsh, prison officials  
11 must provide prisoners with food, clothing, shelter, sanitation, medical care, and personal safety.  
12 Id.; Toussaint v. McCarthy, 801 F.2d 1080, 1107 (9th Cir. 1986); Hoptowit v. Ray, 682 F.2d 1237,  
13 1246 (9th Cir. 1982). Prison officials have a duty to take reasonable steps to protect inmates from  
14 physical abuse. Hoptowit, 682 F.2d at 1250 (9th Cir. 1982); Farmer v. Brennan, 511 U.S. 825, 833  
15 (1994). To establish a violation of this duty, the inmate must establish that prison officials were  
16 deliberately indifferent to a substantial risk of serious harm to the inmates's safety. Farmer, 511 U.S.  
17 at 834. The deliberate indifference standard involves an objective and a subjective prong. First, the  
18 alleged deprivation must be, in objective terms, "sufficiently serious . . ." Farmer at 834 (citing  
19 Wilson v. Seiter, 501 U.S. 294, 298 (1991)). Second, the prison official must "know[] of and  
20 disregard[] an excessive risk to inmate health or safety." Id. at 837.

21 Plaintiff argues that he is entitled to judgment as a matter of law on his failure to protect  
22 claim. The events giving rise to this action occurred at Pleasant Valley State Prison.<sup>2</sup> (Doc. 19, p.2,  
23 ¶2.) Plaintiff attests that an incident between himself and another inmate on August 2, 2005 in  
24 vocations "brick masonry". (Id., p.4.) The incident started with an argument between Plaintiff and  
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27 <sup>2</sup> The Court treats Plaintiff's entire motion for summary judgment as verified. Nevertheless, declarations  
28 offered in support of a motion for summary judgment "must be made on personal knowledge, set out facts that would  
be admissible in evidence, and show that the affiant is competent to testify on the matters stated." Fed. R. Civ. P.  
56(e)(1). The requirements of personal knowledge and competence to testify may be inferred from the declaration  
itself. Barthelemy v. Air Lines Pilots Ass'n, 897 F.2d 999, 1018 (9th Cir. 1990).

1 inmate Neeley. (Id., p.2, ¶¶3, 4, 6.) Fifteen minutes later the institution was then placed on lock-  
2 down status while defendant Perry, defendant Bradford and Captain Williams discussed the incident.  
3 (Id., p.4.) Defendants Perry and Bradford learned that there was an argument between Plaintiff, who  
4 is black, and inmate Neeley, who is white. (Id.) Defendant Perry did not interview Plaintiff nor  
5 inmate Neeley. (Id.) Defendant Perry and Captain Williams placed the Men's Advisory Council in  
6 charge of the investigation. (Id., p.2, ¶5.) Plaintiff attests that the white representatives and black  
7 representatives of the Men's Advisory Council agreed that "each race would deal with each inmate."  
8 (Id., p.4.) Plaintiff attests that defendant Perry, defendant Bradford and Captain Williams agreed  
9 with the decision. (Id.) The following day inmate Neeley was attacked. (Id.) The day after Plaintiff  
10 was attacked. (Id.) Plaintiff attests that defendants were aware of the planned attack on Plaintiff and  
11 allowed the Men's Advisory Council to see it through. (Id., p.6.) Plaintiff contends that they are  
12 liable for failing to protect him from a known and substantial risk of harm, in violation of the Eighth  
13 Amendment.

14 In opposition, Defendants argue that there are triable issues of fact that preclude granting  
15 plaintiff's motion. Defendants submit evidence that after the August 2, 2005 incident both Plaintiff  
16 and inmate Neeley were interviewed and both inmates denied any involvement. (Doc. 20, Perry  
17 Decl. ¶3; Bradford Decl. ¶3.) Defendants submit evidence that on August 4, 2005, the masonry  
18 instructor reported to defendant Bradford that he thought Plaintiff had been assaulted outside his  
19 classroom. (Doc. 20, Perry Decl. ¶4; Bradford Decl. ¶4.) Defendants submit evidence that defendant  
20 Bradford escorted Plaintiff to Defendant Perry's office, where Plaintiff claimed that he had blacked  
21 out in front of the classroom. (Doc. 20, Perry Decl. ¶5, 10, 11; Bradford Decl. ¶5.)

22 Defendants Perry, Bradford and Chalabian attest that on August 4, 2005 they had no prior  
23 knowledge that Plaintiff's safety was at risk because of his involvement in the August 2, 2005  
24 incident. (Doc. 20, Perry Decl. ¶8; Bradford Decl. ¶11.) Defendants Perry and Bradford further attest  
25 that on August 4, 2005 they were aware only that Plaintiff denied any involvement in the August 2,  
26 2005 incident. (Doc. 20, Perry Decl. ¶9; Bradford Decl. ¶12.) Defendant Chalabian further attests  
27 that on August 4, 2005, he was unaware that Plaintiff had been involved in the August 2, 2005  
28 incident. (Doc. 20, Chalabian Decl. ¶4.)

1 The Court may not grant Plaintiff's motion for summary judgment where Defendants have  
2 submitted evidence bringing into dispute plaintiff's version of events. The evidence of defendants,  
3 as the opposing party, is to be believed, Anderson, 477 U.S. at 255, and all reasonable inferences that  
4 may be drawn from the facts placed before the court must be drawn in favor of defendants.  
5 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (citing United States  
6 v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam)). Defendants' declarations create triable  
7 issues of fact as to whether any of the defendants had reason to believe that Plaintiff was involved  
8 in the August 2, 2005 incident; whether any of the defendants had any knowledge that Plaintiff was  
9 at risk of physical harm based on the August 2, 2005 incident; and whether Plaintiff was assaulted  
10 on August 4, 2005. Consequently, there is a triable issue of fact as to whether any of the defendants  
11 were deliberately indifferent to a substantial risk of serious harm to Plaintiff's safety. The Court  
12 cannot choose to believe Plaintiff's version of events over Defendants' version of events on  
13 summary judgment. It is for the trier of fact to weigh the evidence and make credibility  
14 determinations. Accordingly, Plaintiff is not entitled to judgment as a matter of law on his failure  
15 to protect claim against defendants Perry, Bradford and Chalabian.

16 || III. Conclusion

17 Based on the foregoing, Plaintiff's motion for summary judgment, filed April 15, 2009, is  
18 HEREBY ORDERED DENIED.

20 || IT IS SO ORDERED.

Dated: September 17, 2009

/s/ Dennis L. Beck  
UNITED STATES MAGISTRATE JUDGE