

FILED

MAY 02 2008

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY **E. SCRIVNER**
DEPUTY CLERKLuis Gordiano Vergara

(Present and Prior Names)

94358-008

(Institutional Register No.)

FCC Coleman-MediumP.O. Box 1032, Coleman, FL

(Address and Name of Institution

Where Presently Incarcerated)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIALUIS GORDIANO VERGARA

(Full and Correct Name)

Plaintiff,

v.

D. DATRAY, LT. COBBS, COLE,OROSCO, SILVA, SHANK

Defendant(s)

CASE NO. 1:08 CV 00509 LJO D-LB PC(To be supplied by the
Clerk)COMPLAINT PURSUANT TO
BIVENS

A. JURISDICTION

(PC) Vergara v. Datray et al

Doc. 10 Att. 1

- 1) Luis Gordiano Vergara, presently resides at
(Plaintiff)
Coleman Federal Correctional Complex-Medium Facility.
(Mailing address or place of confinement)
P.O. Box 1032 Coleman, Florida 33521-1032
- 2) Defendant Orosco (do not have first name)
(Name of first defendant)
presently resides at (unable to obtain personal address) can be
reached at the USP Atwater, California
and is employed as a Unit manager for USP Atwater, California:
(Position and title, if any)
At the time and claim(s) alleged in this complaint arose, was this defendant acting in
his official capacity as an employee of the United States?
Yes ☒ No ☐ Explain: Was acting in her position as Unit
Manager for the Federal Bureau of Prisons, USP Atwater,
California

- 3) Defendant Lt. D. Datray presently resides
(name of second defendant)
at (cannot obtain personal address) but can be reached at
(present address) USP Atwater, California
and is employed as a Lieutenant for BOP, Atwater, California.
(Position and title, if any)
At the time the claim(s) alleged in this complaint arose was this defendant acting in his
official capacity as an employee of the United States? Yes ☒ No ☐ Explain: Was
performing his duties as a Lt. for the Fed. Bureau of Prisons

(Use the back of this page to furnish the above information for additional defendants.)

- 4) Jurisdiction is invoked pursuant to BIVENS if you wish to assert jurisdiction
under additional statutes, you should list them below, and explain their significance.)
28 USC §1915A, Where prison officials were deliberately
indifferent to Plaintiff's need for reasonable safety needs.

B. NATURE OF THE CASE

1) Briefly state the background of your case. On April 13, 2007, Plaintiff was severely assaulted by inmates at the USP Atwater, California Facility. Prior to this incident Plaintiff had spoken with his Unit Manager and Unit Team (Orosco) these transactions were made verbally and in writing about a problem that was continuing to go on in the present unit that plaintiff was assigned to (Unit 3 A, that other inmates in that unit were trying to get me to participate in unauthorized acts in and around the compound.

3) A. Defendant Lt. Cobbs

presently resides at (unable to obtain personal address) but, can be reach at the United States Penitentiary Atwater, California under the authority of the Federal Bureau of Prisons.

And is employed as a Lieutenant in the Federal Bureau of Prisons USP Atwater california.

B. Defendants Cole, Silva, and Shank,

presently resides at (unable to obtain personal address) but can be reached at the United States Penitentiary Atwater, California under the authority of the Federal Bureau of Prisons.

And are all employed as officers with the Federal Bureau of Prisons USP Atwater, California.

C. CLAIM(S)

- 1) *I allege that my claim(s) arises under the Constitution or laws of the United States and that the following facts form the basis for my allegations: (If necessary you may attach up to two additional pages (8½" x 11") to explain any allegation or to list additional supporting facts. Do not attach copies of pleadings, or briefs from other cases or other memoranda unless requested by the Court.*

A) (1) Count I: Plaintiff's Eighth Amendment Rights were Violated when Defendants acted with deliberate indifference for the reasonable safety of the inmate.

(2) *Supporting Facts: (Include all facts you consider important, including names of persons involved, places and dates. Describe exactly how each defendant is involved. State the facts clearly in your own words without citing legal authority or argument.)*

See, herewith supporting facts of the incident.

B) (1) Count II: N/A

(2) *Supporting Facts:*

SUPPORTING FACTS

ATTACHMENT C. CLAIMS

Plaintiff, was continuing to asked for help from his Unit team with no responses, he then went to Lt. Datray, and Lt. Cobbs, And SIS Officer Cole and one other officer from the Lieutenant's office. They told Plaintiff that they were going to help with the situation and get Plaintiff moved from his current housing unit 3-A to 2-B. Thereafter Lt. Datray informed Orosco know about the complaint from Plaintiff about being moved to a different housing unit because of the threats being made by certain inmates. Orosco was still continuing to be unwilling to move Plaintiff even after Lt. Datray had informed her about the situation of the potential danger that Plaintiff was in. Furthermore, Plaintiff spoke with Lt. Cobbs and he informed plaintiff that Orosco was not going to move him. I talked with another officer within the Lieutenant's office about the situation and he wrote down my name and register number, and he replied that "I going to send Ms. Orosco an E-Mail to let her know about the seriousness of you problem".

After a few days Plaintiff heard nothing from any of the officers involved with the situation and he still was not being moved to a safer unit. I attempted to make more requests to have this situation taken care of but had no luck in doing so.

Due to the Deliberate Indifferences and actions of these officers I was severely assaulted by inmates from unit 3-A in front of a guard tower and other corrections officers did not respond in institutional emergency situation. I then tried to submit a BP-8 an informal resolution form and Mr. Herrera refused to take the form after he had read it, his reply was he was not

CONTINUATION OF SUPPORTING FACTS

the person to handle this form, he then told plaintiff to give it to his counselor. One week later Mr. Herrera gave the paper work back (BP-8), and he left quickly saying I will see you tomorrow. The very next day he came by saying that he sent my paper work to region for transfer (Holding my paper work on his desk for one month after the investigation was done). I asked Herrera what are you trying to say on the BP-8? And he responded by saying "I don't know nothing about it aske your counselor", and left. A few days later my counselor came and I asked him (Mr. Scot) what are you trying to say on the BP-8?, and he responded by saying asked Mr. Herrera he is the one who must give you an answer not me.

Therefore, all of the Defendants were well informed of the circumstances and they knew or have should have known, but for their deliberate indifferences, that Plaintiff would be in danger if they continue to leave him at his current housing unit (3-A). Specifically, the danger being assaulted by other inmates that are affiliated with different prison gangs. Furthermore, Plaintiff asserts that Defendants, Ms. Orosco, Lt. Cobbs, Lt. Datray knew or should have known, but for their deliberate indefference that there was a substantial likihood of Plaintiff being attacked if not allowed to be moved to another unit within the compound.

C) (1) Count III: N/A

(2) Supporting Facts:

D. PREVIOUS LAWSUITS AND ADMINISTRATIVE RELIEF

1) List all other lawsuits you have filed in any federal or state court as well as any criminal action which in any way relates to the claim(s) involved in this action.

a) Parties to previous lawsuit

Plaintiffs: No other law suits have been filed in this matter.

Defendants: _____

b) Name of court and docket number _____

c) Disposition (for example: Was the case dismissed? Was it appealed? Is it still pending?) _____

d) Issues raised _____

e) Approximate date of filing lawsuit _____

f) Approximate date of disposition _____

I have previously sought informal or formal relief from the appropriate administrative officials regarding the acts complained of in Part C. Yes ☒ No ☐ If your answer is "Yes," briefly describe how relief was sought and the results. If your answer is "No," briefly explain why administrative relief was not sought.

See all attached administrative remedy responses herewith.

E. REQUEST FOR RELIEF

1) I believe that I am entitled to the following relief: To be awarded a monetary sum of 200,000 dollars for pain and suffering and punitive damages where defendants acted with recklessness and deceit.

Signature of Attorney (if any)

DECLARATION UNDER PENALTY OF PERJURY

I declare (or certify, verify, or state) under penalty of perjury that the foregoing [Complaint] is true and correct. 28 U.S.C. §1746; 18 U.S.C. §§1621, et seq.

Executed at FCC Coleman-Medium on April 15 2008
(Location) (Date)

Luis J. Vergara
(Signature of Plaintiff)

**United States Penitentiary
Atwater, California**

ADMINISTRATIVE REMEDY PROCEDURE FOR INMATES
INFORMAL RESOLUTION FORM

NOTE TO INMATE: You are advised that prior to receiving and filing a Request for Administrative Remedy Form BP-9 [BP-229(13)], you **MUST** attempt to informally resolve your complaint through your Correctional Counselor. Briefly state **ONE** complaint below and list what efforts you have made to resolve your complaint informally and state the names of staff contacted.

Issued By: GA (Initials of Correctional Counselor)
Date Issued To The Inmate: 5/8/07

INMATE'S COMMENTS:

1. Complaint: ON 4-13-07 I WAS SEVERELY ASSAULTED BY INMATES. I SPOKE WITH UNIT TEAM VERBALLY AND WRITTEN VIA-COP CONCERNING PROBLEMS IN THE UNIT. I WAS IGNORED AT ALL LEVELS AND MY LIFE WAS PLACED IN DANGER. AND I SPOKE TO MANY OTHERS STAFF OFFICIALS
2. Efforts you have made to informally resolve: I SPOKE WITH UNIT Manager, Case Manager, and nothing was done I WAS IGNORED BY OROSCO
3. Names of staff you contacted: ALL CONCERNED IN CHARGE OF MOVING ME TO ANOTHER UNIT TO AVOID PROBLEMS. UNIT TEAM O. DATTROY, COBBS, COLE, OROSCO, SILVA AND SHANK

Date Returned to Correctional Counselor: 7-13-07

Luis A Vergara
Inmate's Signature

94358008
Reg. Number

7-13-07
Date

CORRECTIONAL COUNSELOR'S COMMENTS:

1. Efforts made to informally resolve and staff contacted: _____

Date BP-9 Issued: _____

Correctional Counselor

Unit Manager (Date)

Distribution: If complaint is **NOT** informally resolved - Forward original attached to BP-9 Form to the Executive Assistant.

Inmate Request to Staff - Response

NAME: VERGARA, Luis Gordiano *LA*
REG. NO.: 94358-008

This is in response to your Inmate Request to Staff in which you would like to let me know that you have never received the proper and legal response from staff. Specifically, you state that your Case Manager and Counselor have not provided you with a response to your BP-8.

A review into this matter revealed that your Unit Team indeed provided you with a response to your BP-8 on August 2, 2007. At which time you were also provided a Request For Administrative Remedy (BP-9).

This response is for informational purposes, and I trust your concern has been addressed.

D. Smith

D. Smith,
Warden

8-28-07

Date

UNICOR FEDERAL PRISON INDUSTRIES
LEAVENWORTH, KANSASU.S. DEPARTMENT OF JUSTICE
Federal Bureau of PrisonsREQUEST FOR ADMINISTRATIVE REMEDY *US/**8/2/07*
Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.From: VERGARA Luis G 94358008 A 104 ATWATER
LAST NAME, FIRST, MIDDLE INITIAL REG. NO. UNIT INSTITUTION

Part A- INMATE REQUEST

ON 4-13-07 I was severely assaulted by inmates on compound and C/O's did not respond in front of a Tower. I requested help from unit team to move me from unit to avoid any serious problems and I was ignored. I requested assistance several times via cop-out and verbally and I did not receive the proper and legal response and I was assaulted because the unit team "Orosco" ignored my serious request and problem and my life was placed in danger and also she ignore Lt. Datray, Lt. Cobbs, SIA cde. and 1 more person from the LT office she was advice by all this people about my serious problem.

August-16-07
DATELuis G Vergara
SIGNATURE OF REQUESTER

Part B- RESPONSE

DATE

WARDEN OR REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE

CASE NUMBER: _____

CASE NUMBER: _____

Part C- RECEIPT

Return to: _____

LAST NAME, FIRST, MIDDLE INITIAL

REG. NO.

UNIT

INSTITUTION

PART B - RESPONSE TO REQUEST FOR ADMINISTRATIVE REMEDY

A/R # 463873-F1

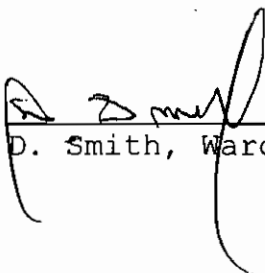
VERGARA, Luis Gordiano

Reg. No.: 94358-008

This is in response to your Administrative Remedy, dated August 16, 2007, where you indicate you were assaulted on April 13, 2007, by several inmates. You state you requested help from your Unit Team to move you from one housing unit to another, to avoid problems with inmates in the housing unit you were assigned to. Moreover, you allege the assault was due to the Unit Team's negligence who did not heed your request.

An investigation into this matter revealed the Unit Team's judgment, not to move you from one housing unit to another, did not bring forth the assault on April 13, 2007. Specifically, the reason surrounding your assault, stems from your lack of participation in illegal activities in which other inmates were coercing you to take part in.

This response is for informational purposes only. If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.



D. Smith, Warden

8-28-07
Date

Type or use ball-point pen. If attachments are needed, submit four copies. One copy of the completed BP-229(13) including any attachments must be submitted with this appeal.

From: VERGARA LUIS G 94358008 A104 SHU Atwater
LAST NAME, FIRST, MIDDLE INITIAL REG. NO. UNIT INSTITUTION

Part A - REASON FOR APPEAL

I send COP OUTS TO OROSCO SAING "IM HAVING PROBLEMS IN UNIT 3A AND IF I GET MOVE FROM 3A TO 2B I KNOW THAT IN 2B I WASN'T GOING TO HAVE ANY MORE PROBLEMS I WAS IGNORED BY OROSCO WHO WAS IN CHARGED TO MOVE ME AND I WAS SEVERALLY ASSAULTED IN FRONT OF THE CENTRAL TOWER AND NONE OF THE STAFF RESPONDED TO THE ASSAULT. IT IS THE MISSION OF THE FEDERAL BUREAU OF PRISONS AND USP ATWATER TO MAINTAIN AND PROMOTE A SAFE ENVIRONMENT FOR INMATES AND STAFF THE FEDERAL BUREAU OF PRISONS IS CHARGED BY STATUTE TO PROVIDE FOR THE SAFEKEEPING, CARE, AND PROTECTION OF FEDERAL PRISONERS IN FULFILLING ITS MISSION THE BUREAU IS LIKEWISE OBLIGATED TO PROTECT FEDERAL PRISONERS. NOW AFTER ALL THIS IM TAKING MEDICINE FOR NERVOUS SYSTEM AND SPINAL CORD PAINS.

SEP-02-07

DATE

Luis G Vergara

SIGNATURE OF REQUESTER

Part B - RESPONSE

RECEIVED

SEP 05 2007

REGIONAL DIRECTOR
WRO

DATE

REGIONAL DIRECTOR

If dissatisfied with this response, you may appeal to the General Counsel. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE

CASE NUMBER:

463873-1A1

Part C - RECEIPT

CASE NUMBER:

Return to:

LAST NAME, FIRST, MIDDLE INITIAL

REG. NO.

UNIT

INSTITUTION

SUBJECT:

DATE

SIGNATURE, RECIPIENT OF REGIONAL APPEAL



463873-R1
FCI Herlong

VERGARA, Luis

94358-008

This is in response to your Administrative Remedy Appeal of the Warden's decision dated August 16, 2007, in which you allege staff failed to transfer you to another unit when you so requested, and thereby caused you to be assaulted by other inmates at United States Penitentiary (USP) in Atwater, California.

Your appeal has been investigated. Our review of this matter reveals the Warden adequately addressed your complaint in his response. You were assaulted at USP Atwater by others as a result of failure to participate in illegal activities. The persons who assaulted you are unknown at this time. Although, you allege staff did not protect you, our investigation reveals that you at no time requested protective custody, or otherwise indicated to staff that you were in danger, prior to the assault.

Program Statement 5270.07, Inmate Discipline and Special Housing Units states, staff may consider inmates as protective custody because of alleged pressures from other unidentified inmates. You have an obligation to request protective custody when you have good reason to believe you are in serious danger. Our review indicates you have been transferred as a protection case due to being a victim of an inmate assault. Consequently, this response is provided as informational purposes only.

If dissatisfied with this response, you may appeal to the Office of the General Counsel, Bureau of Prisons, 320 First Street, N.W., Washington, D.C., 20534. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.

10-10-07
DATE


Robert E. McFadden, Regional Director

*Inmate did not receive
copy until 10/17/07.*

*Whelan, Counselor
FCI Herlong*

Federal Bureau of Prisons

Type or use ball-point pen. If attachments are needed, submit four copies. One copy each of the completed BP-DIR-9 and BP-DIR-10, including any attachments must be submitted with this appeal.

From: VERGARA, LUIS G. 94358-008 C-4 FCC Coleman-Med.
LAST NAME, FIRST, MIDDLE INITIAL REG. NO. UNIT INSTITUTION

Part A—REASON FOR APPEAL This appeal is being made in good faith. Inmate Vergara has pursued his attempts for administrative relief from his assault by other inmates at the U.S.P. Atwater through the administrative remedy procedure.

Thus, the untimely filing of this appeal is due to the intransigent position that inmate Vergara has been in, please see attached memorandum herewith.

On April 13, 2007, inmate Vergara was severely assaulted on the compound at Atwater U.S.P., during the assault Corrections Officers failed to respond to the incident until inmate had sustained permanent injuries. Prior to the assault inmate Vergara made numerous requests to his unit team specifically Mr. Orosco who ignored all of inmate Vergara's requests. Inmate Vergara had informed unit team that he was in fear for his safety, that certain inmates were trying to get him to participate in illegal activities, and after inmate Vergara relayed this information to unit team they still failed to remove inmate Vergara from the unit, 3-A to 2-B where inmate Vergara assured unit team that this move would take care of any further problems from the inmates pressuring him.

Deliberate indifference to a prisoner's manifest need to be reasonably safe violates the Eight Amendment prohibition against cruel and unusual punishment

1-24-08
DATE

Luis G Vergara
SIGNATURE OF REQUESTER

Part B—RESPONSE**RECEIVED**

FEB 01 2008

Administrative Remedy Section
Federal Bureau of Prisons

DATE

GENERAL COUNSEL

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 463873-A1**Part C—RECEIPT**

CASE NUMBER: _____

Return to: _____
LAST NAME, FIRST, MIDDLE INITIAL REG. NO. UNIT INSTITUTION

SUBJECT: _____

DATE

SIGNATURE OF RECIPIENT OF CENTRAL OFFICE APPEAL

USP LVN

BP-231(13)
APRIL 1982

Administrative Remedy Number 463873-A1

Part B - Response

You contend staff refused to move you to another housing unit, which resulted in you being assaulted by other inmates.

Our review of this matter reveals both the Warden and Regional Director have adequately addressed your concerns. Review of the record reveals you were assaulted by other unknown inmates when you did not participate in their illegal activities. There is no evidence you made any request for protective custody or indicated to staff you were in danger prior to the assault. You offer no credible evidence to support any conclusion to the contrary.

Inasmuch as you request no specific relief in this appeal, this response is for informational purposes only.

March 19, 2008

Date

Harrell Watts
Harrell Watts, Administrator
National Inmate Appeals

JS