IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 08–cv–00487–WYD–KMT

DERRICK L. ARANDA, #99396,

Plaintiff,

v.

L.T. MCCORMAC,
L.T. STRODE,
SGT. P. ADERSON, and
LENORD VIGIL,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Kathleen M. Tafoya
United States Magistrate Judge

This case comes before the court on Plaintiff's "Cause for Preliminary Injunction" (Doc. No. 57) and "Declaration" in support of the motion (Doc. No. 58) filed June 25, 2009. Defendants filed their response on July 21, 2009 (Doc. No. 65), and Plaintiff filed his reply on July 28, 2009 (Doc. No. 69.) This court held an evidentiary hearing on the motion on September 18, 2009. This matter is ripe for review and recommendation.

Background

The following facts are taken from Plaintiff's original Complaint, amended Prisoner Complaint, and the parties' submissions with respect to this Recommendation. Plaintiff currently is an inmate at the Colorado State Penitentiary ("CSP"), Colorado Department of

Corrections ("CDOC"). (Am. Prisoner Compl. at 2 [hereinafter "Am. Compl."] [filed June 11, 2008].) Plaintiff names as defendants Lieutenant M. McCormac, Lieutenant Strode, Sergeant P. Aderson, and Lenord Vigil[1], all employees of the CDOC. (*Id.* at 1–3.) At some point Plaintiff was an inmate in the CDOC and granted parole but was incarcerated again due to a revocation complaint. (Compl. at 16 [hereinafter "Doc. No. 3"].) It appears Plaintiff was charged and pled guilty to one charge of "Robbery/Agg-Menace victim w/deadly weapon" that occurred on June 13, 2005. (*Id.* at 15.) On March 17, 2006, Plaintiff was sentenced to twenty-five years in the CDOC. (*Id.*) On July 12, 2006, the state sentencing court recommended placement in an out-of-state facility because of danger to him as elaborated *infra*. (*Id.*) Plaintiff states he was placed at the Buena Vista Correctional Facility ("BVCF") on August 8, 2006. (Compl. at 5.)

It appears that from the time of Plaintiff's arrest in 2005 on robbery charges until approximately July 2007, Plaintiff cooperated with the Adams County Sheriff's Office in providing information on attempted robbery at a motel in Adams County. (Doc. No. 3 at 30.) With the information provided by Plaintiff, two GKI (Gallant Knights Insane) gang members were arrested for the attempted murder and robbery of the hotel clerk. (*Id.*) Plaintiff testified in the criminal trials against the two known gang members in approximately mid- to late-2007. (*Id.* at 32; Am. Compl. at 3.)

[1]Plaintiff misspells Defendant Anderson's name as "Aderson" and Defendant Leonard Vigil's name as "Lenord Vigil." The court hereinafter will refer to this defendant with the correct spelling of "Anderson" and "Leonard Vigil."

In spite of the state sentencing court's recommendation and the known danger to Plaintiff, upon his arrival at BVCF, obviously an in-state facility, he was placed in the Admission and Orientation ("A/O") Unit before being allowed into a general population unit. (Doc. No. 3 at 24.) On August 14, 2006, six days after his arrival at BVCF and while Plaintiff was still in the A/O Unit, it is undisputed that Plaintiff was assaulted by his cellmate, a GKI gang member. (Am. Compl. at 4–7; Doc. No. 3 at 24.) Plaintiff states he suffered injuries that needed medical attention. (*Id.* at 4.) Plaintiff contends that Defendants "have a duty to review records in their custody when determining how to house a prisoner." (*Id.*) He alleges the Defendants failed to look into ways to protect him and that their failure constitutes a violation of his Eighth and Fourteenth Amendment rights. (*Id.*) He also alleges Defendants have "failed to supervise." (*Id.*)

Motion for Injunction

Plaintiff requests injunctive relief pursuant to Fed. R. Civ. P. 65(b). Specifically, in his motion Plaintiff originally sought an order enjoining the defendants from housing Plaintiff with known GKI members and from putting Plaintiff in a situation that might cause him injury at the hands of GKI members. (Doc. No. 57.)

At some point after Plaintiff's placement at BVCF, Plaintiff was transferred to San Carlos Correctional Facility and was placed in administrative segregation for admitting he had sexual relations with a DOC staff member. (Doc. No. 71 at 20.) According to Defendant Leonard Vigil, who testified at the preliminary injunction hearing, Plaintiff had been accepted for placement at an out-of-state facility, and Plaintiff would have been transferred in a matter of

days; however, upon Plaintiff's placement into administrative segregation, Plaintiff was taken off of the list for transfer to an out-of-state facility. Defendant Vigil testified that it is difficult to place an inmate in another state if he is in administrative segregation because the interstate transfer is a trade-off between two state facilities, and the other state has to be willing to accept the offender.[2]

On January 22, 2008, Plaintiff was transferred to the Colorado State Penitentiary ("CSP") on Removal from Population ("RFP") status. (*Id.)* Plaintiff was transferred to Centennial Correctional Facility ("CCF") on February 4, 2009, and placed in maximum administrative segregation. (Doc. 65-4, ¶¶ 11, 16.) On February 19, 2009, Plaintiff was transferred to another pod at CCF to allow his participation in the Progressive Reintegration Opportunity Unit ("Pro Unit") program, a transition program designed to prepare offenders coming from administrative segregation at CSP for placement in the general population. (*Id.*, ¶¶ 14, 19.) Plaintiff was transferred back to maximum administrative segregation on April 21, 2009, as a result of a disciplinary conviction. (*Id.*, ¶¶ 20.) On May 4, 2009, Plaintiff was placed in Pod E at CCF, awaiting an opening in the Pro Unit program. (*Id.*, ¶ 21.)

Witness James Olson, a DOC case manager supervisor, testified at the preliminary injunction hearing that the Pro Unit, Level IV, has four phases. Mr. Olson stated that it takes an inmate approximately seven months to progress from level IV, phase 1 to Level V. Mr. Olson

[2]At the preliminary injunction hearing, Witness James Olson testified that Plaintiff, as of July 24, 2009, has an active referral for out-of-state placement, that this placement is contingent on an out-of-state facility accepting him, and that his placement in the other state is currently under consideration by that state.

explained that at Level IV, phase 3, offenders are allowed to go to the recreational yard and common areas and to have contact with other offenders. Mr. Olson stated that once an offender completes the Pro Unit, a classification review is conducted and offenders generally are transferred out of CCF, although on rare occasions it is recommended that an offender be held in a permanent party pod at CCF. At the hearing Plaintiff changed the nature of the injunctive relief sought, and now requests placement in permanent party status at CCF upon his transfer out of the Pro Unit while he awaits out-of-state placement.

To obtain a preliminary injunction, a plaintiff must show:

> (1) a substantial likelihood of success on the merits; (2) irreparable harm to the movant if the injunction is denied; (3) [that] the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) [that] the injunction, if issued, will not adversely affect the public interest.

Gen. Motors Corp. v. Urban Gorilla, LLC, 500 F.3d 1222, 1226 (10th Cir. 2007). Mandatory injunctions and injunctions that would disturb, rather than preserve the status quo, are "specifically disfavored"; a party seeking such an injunction bears a "heightened burden" to show that "the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course." *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (*en banc*), aff'd, 546 U.S. 418 (2006). "Because a preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal." *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1256 (10th Cir. 2003).

Plaintiff seeks a preliminary injunction requiring Defendant to transfer him to another correctional facility or to house him in permanent party placement at CCF. The relief sought

would alter the status quo rather than preserve it. For these reasons, the injunctive relief sought by Plaintiff "constitutes a specifically disfavored injunction" that "must be more closely scrutinized." *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1259, 1261 (10th Cir. 2004).

First, Plaintiff must show that he will suffer irreparable injury if his request for preliminary injunction is denied. "To constitute irreparable harm, an injury must be certain, great, actual and not theoretical." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (internal quotation marks omitted). "'[B]ecause a showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction, the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered.'" *Dominion Video Satellite, Inc*, 356 F.3d at 1260 (quoting *Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 907 (2d Cir.1990)).

Plaintiff asserts that if he is housed with other GKI members he will face irreparable harm. Defendants argue that Plaintiff has failed to show he faces immediate and irreparable harm, and that any possible harm Plaintiff faces is speculative because of the restrictive setting of the Pro Unit and CCF general housing. This court disagrees. Plaintiff has been assaulted at least once by a GKI member. At the preliminary injunction hearing, Lieutenant Chris Barr testified that he is aware Plaintiff is on a "green light list" — essentially a GKI order to all of its members to do a "hit" on Plaintiff. The statistics given at the preliminary injunction hearing reveal that GKI, a local Colorado gang, are very numerous within the CDOC. Defendants do not dispute that Plaintiff, if he is housed with or allowed in common areas with other GKI members,

would be in danger. Defendants assert, however, that they are able to prevent Plaintiff from coming into contact with other GKI members. The court disagrees. Plaintiff asserts, and the court finds, that the CDOC, although they undoubtedly will attempt to prevent this contact, have not done so in the past and likely will be unable to do so in the future when Plaintiff progresses out of the Pro Unit program and into the general population. The court finds this factor weighs heavily in favor of the plaintiff.

Next, Plaintiff must show that he has a substantial likelihood of success on the merits of his claim. Plaintiff's Complaint alleges, *inter alia*, that CDOC officials have failed to protect him from other inmates in violation of his Eighth Amendment right to be free from cruel and unusual punishment. In order for Plaintiff to succeed on a claim for failure to protect, he must show that he is incarcerated under conditions posing a substantial risk of serious harm (the objective component), and that the defendants acted with "deliberate indifference" to that danger (the subjective component). *Farmer v. Brennan*, 511 U.S. 825, 833-34 (1994); *Verdecia v. Adams*, 327 F.3d 1171, 1175 (10th Cir. 2003). "[A]n Eighth Amendment claim could be made out on evidence showing that officials transferred a protective custody inmate to a facility knowing that the inmate could not be protected there." *Chavez v. Perry*, 142 Fed. App'x 325, 333 (10th Cir. July 13, 2005). Defendants' motion to dismiss Plaintiff's claims was denied by Chief District Judge Wiley Y. Daniel on June 18, 2009. (Doc. No. 54.) Although the circumstances under which Plaintiff is currently incarcerated do not give rise to a substantial risk of serious harm or place him in imminent danger of serious harm, as noted above, those conditions may change at any time. If Plaintiff is in contact with or in close physical proximity

to other GKI inmates, there is a risk that Plaintiff may be harmed. However, prison is an inherently dangerous place. There is no evidence that Defendants placed Plaintiff in a cell knowing that he could not be protected or that the defendants deliberately placed him in harm's way. The evidence presented at the preliminary injunction hearing reveals that since the initial assault, Defendants have done everything they can to assure that Plaintiff is not housed with any GKI members and that they have accommodated Plaintiff's requests to be moved away from other inmates when the Plaintiff has notified defendants of a potential danger or threat. The court finds this factor does not weigh in favor of either Plaintiff or the Defendants.

Plaintiff must also show that any threatened injury to him does not outweigh the injury to the Defendants under the preliminary injunction. Defendants argue that Plaintiff fails to provide any support whatsoever that the alleged harm to him in his current facility outweighs the potential damage the injunction may cause Defendants or CDOC. Inmate placement decisions are made for numerous reasons including security, protection of inmates, provision of medical and mental health services, education or vocational program access, and custody (separation) issues. (*See* Doc. No. 65, Ex. D, AR 600-1 at 7.) Defendants assert that ensuring Plaintiff is not housed with any gang member would be nearly impossible, as of the approximately 336 offenders housed at CCF, approximately 256 of those offenders are gang members, and of the approximately 756 offenders housed at CSP, approximately 516 of those offenders are gang members. (*Id.* at 7, Ex. C, ¶ 5.) The court agrees with the defendants that Plaintiff has failed to articulate how his request not to house him with any gang members could be carried out with minimal impact on Defendants' day-to-day decisions. The court also does not understand how

housing Plaintiff in permanent party placement at CCF would prevent him from injury at the hands of other gang members also placed in population at CCF. Furthermore, interference with Defendants' placement decisions would significantly undermine the CDOC's discretion and autonomy. *See Taylor v. Freeman*, 34 F.3d 266, 269–70 (4th Cir. 1994). The Tenth Circuit has stated that it "abhor[s] any situation or circumstance requiring the intervention of the federal courts in matters involving the administration, control, and maintenance by the sovereign states of their penal systems. It is a delicate role assigned to the federal courts to display that restraint so necessary 'in the maintenance of proper federal-state relations.'" *Battle v. Anderson*, 564 F.2d 388, 392 (10th Cir. 1997) (citation omitted). As such, "intervention in the management of state prisons is rarely appropriate when exercising the equitable powers of the federal courts . . . . [This] is especially true where mandatory injunctive relief is sought and only preliminary findings as to the plaintiff's likelihood of success on the merits have been made." *Taylor*, 34 F.3d at 269 (citations omitted). This factor weighs heavily in favor of the defendants.

Finally, Plaintiff must show that the requested injunction is not adverse to the public interest. Defendants argue that the CDOC has an interest in ensuring that its prisons remain as safe as possible for staff as well as often dangerous inmates, and also that inmates are provided with necessary medical care and programmatic access. (Doc. No. 65 at 8.) Indeed, the public has an interest in ensuring that its prisons remain safe for all inmates and staff. Defendants contend that Placement decisions are made by the office of Offender Services after considering numerous factors such as provision of medical and mental health services, providing appropriate programmatic services, age, security issues and custody issues an offender may have with other

inmates, and that the CDOC should not be precluded from making these decisions based upon review of these and additional inmate specific information it has in its files. (*Id.*) Defendants aver that precluding the CDOC from making these types of informed decisions is adverse to the public interest. (*Id.*) The court agrees and finds this factor weighs in favor of the defendants.

Accordingly, as Plaintiff has failed to satisfy the four prerequisites to obtaining a preliminary injunction, this court respectfully

RECOMMENDS that Plaintiff's "Cause for Preliminary Injunction" (Doc. No. 57) be DENIED.

ADVISEMENT TO THE PARTIES

Within ten days after service of a copy of the Recommendation, any party may serve and file written objections to the Magistrate Judge's proposed findings and recommendations with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *In re Griego*, 64 F.3d 580, 583 (10th Cir. 1995). A general objection that does not put the District Court on notice of the basis for the objection will not preserve the objection for *de novo* review. "[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review." *United States v. One Parcel of Real Property Known As 2121 East 30th Street, Tulsa, Oklahoma*, 73 F.3d 1057, 1060 (10th Cir. 1996). Failure to make timely objections may bar *de novo* review by the District Judge of the Magistrate Judge's proposed findings and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings and recommendations of the

magistrate judge. *See Vega v. Suthers*, 195 F.3d 573, 579-80 (10th Cir. 1999) (District Court's decision to review a Magistrate Judge's recommendation *de novo* despite the lack of an objection does not preclude application of the "firm waiver rule"); *One Parcel of Real Property*, 73 F.3d at 1059-60 (a party's objections to the Magistrate Judge's report and recommendation must be both timely and specific to preserve an issue for *de novo* review by the District Court or for appellate review); *International Surplus Lines Insurance Co. v. Wyoming Coal Refining Systems, Inc.*, 52 F.3d 901, 904 (10th Cir. 1995) (by failing to object to certain portions of the Magistrate Judge's order, cross-claimant had waived its right to appeal those portions of the ruling); *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (by their failure to file objections, plaintiffs waived their right to appeal the Magistrate Judge's ruling). *But see*, *Morales-Fernandez v. INS*, 418 F.3d 1116, 1122 (10th Cir. 2005) (firm waiver rule does not apply when the interests of justice require review).

Dated this 1st day of October, 2009.

BY THE COURT:

Kathleen M. Tafoya
United States Magistrate Judge