IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-00605-RM-MJW

JOSHUA LAMONT SUTTON,

Plaintiff,

v.

COLORADO DEPARTMENT OF CORRECTIONS (CDOC),
VAUGHN, Mrs.,
BOLTON, Mrs.,
GRANT, Mrs.,
HEALY, Mrs.,
O'BRIAN, Mrs.,
GEBHART, Mr.,
JASON LENGERICH,
BRUNELL, Mr.,
GILLIS, Mr.,
SCAMPA, Mrs.,
LAGUE, Mr.,
WOOD, Mrs.,
LORENZE, Mrs.,
LONG, Mr.,
FOWLER, Mr.,
JIMERSON, Mr.,
OWENS, Mr., and
LISAC, Mr.,

Defendants.

REPORT AND RECOMMENDATION ON PLAINTIFF'S EMERGENCY MOTION FOR T.R.O. (TEMPORARY RESTRAINING ORDER) AND/OR PRELIMINARY INJUNCTION; ALTERNATIVELY, WRIT OF HABEAS CORPUS AND TESTIFICANDUM AND/OR SUBPOENA(S) - DUE TO CONTINUOUS RETALIATION (Docket No. 2)

Entered by Magistrate Judge Michael J. Watanabe

This case is before the Court pursuant to an Order of Reference to Magistrate Judge issued by Judge Raymond P. Moore on March 13, 2017. (Docket No. 8.) Now

before the Court is Plaintiff's filed an "Emergency Motion for T.R.O. (Temporary Restraining Order) and/or Preliminary Injunction; Alternatively, Writ of Habeas Corpus Ad Testificandum and/or Subpoena(s) – Due to Continuous Retaliation" (the "Motion"). (Docket No. 2.) Defendants filed a Response (Docket No. 15) and Plaintiff filed a Reply. (Docket No. 19.) The Court has considered these motion papers as well as the Court's file and applicable Federal Rules of Civil Procedure and case law. The Court now being fully informed makes the following findings, conclusions of law, and recommendation that the Motion be denied.

The *pro se* plaintiff is in the custody of the Colorado Department of Corrections ("CDOC") and is currently incarcerated at the Buena Vista Correction Complex ("BVCC"). The operative pleading is the Amended Prisoner Complaint (Docket No. 18). Plaintiff asserts that Defendants have violated his constitutional rights, including his Eighth Amendment right to humane conditions, his constitutional right to bodily privacy, and his Fourteenth Amendment due process and equal protection rights. The crux of Plaintiff's Amended Prisoner Complaint (Docket No. 18) is that inmates in Plaintiff's housing unit are forced to undress and use the toilet in their cells in full view of female staff because their cells have bars instead of walls and their privacy curtains have been removed. Plaintiff also alleges that he has received threats from other inmates because he has complained about these problems.

Plaintiff is proceeding *pro se*. The Court, therefore, reviews his pleadings and other papers liberally and holds them to a less stringent standard than those drafted by attorneys. *Trackwell v. United States Government*, 472 F.3d 1242, 1243 (10th Cir. 2007). *See also Haines v. Kerner*, 404 U.S. 519, 520–21 (1972) (holding allegations of

a *pro se* complaint to less stringent standards than formal pleadings drafted by lawyers). However, a *pro se* litigant's conclusory allegations without supporting factual averments are insufficient to state a claim upon which relief can be based. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir.1991). A court may not assume that a plaintiff can prove facts that have not been alleged or that a defendant has violated laws in ways that a plaintiff has not alleged. *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983). *See Whitney v. New Mexico*, 113 F.3d 1170, 1173–74 (10th Cir.1997) (court may not supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on plaintiff's behalf); *Drake v. City of Fort Collins*, 927 F.2d 1156, 1159 (10th Cir.1991) (the court may not "construct arguments or theories for the plaintiff in the absence of any discussion of those issues").

Plaintiff claims in the Motion that he is housed in the only one of the three medium security level units that has no visual obstruction to prevent female staff from watching the male inmates use their cell toilets. The door and walls of the cells in this unit are made of steel bars rather than non-transparent walls. When Plaintiff arrived at BVCC, the front wall of the cells in his living unit had black privacy curtains, but there was no privacy curtain on the cell door. The existing privacy curtains were removed by staff in November 2016; female staff members now have a completely unobstructed view into Plaintiff's cell when he uses the toilet or undresses. Plaintiff states that female staff members have repeatedly seen him using his cell toilet, in violation his constitutional rights. He asks the Court to enter a preliminary injunction ordering the

Defendants to provide privacy curtains or to otherwise "substitute, restore, and maintain the full function of the non-transparent cell door and front wall of the other medium security level cells and units within the facility." (Docket No. 2 at 16.)

Injunctive relief is an extraordinary remedy that should be granted only when the moving party clearly and unequivocally demonstrates its necessity. *See Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258 (10th Cir. 2005). In the Tenth Circuit, the party requesting a temporary restraining order ("TRO") or a preliminary injunction ("PI") must establish that: (1) the party will suffer irreparable injury unless the injunction issues; (2) the threatened injury outweighs whatever damage the proposed injunction may cause the opposing party; (3) the injunction, if issued, would not be adverse to the public interest; and (4) there is a substantial likelihood of success on the merits. *See id.*; *Brode v.. Chase Home Finance, LLC*, 2010 WL 1258066, *2 (D.Colo. Mar. 25, 2010).

It is well established that "[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. v. Echostar Satellite Corp*., 356 F.3d 1256, 1260 (10th Cir. 2004) (citations omitted). "[A] plaintiff satisfies the irreparable harm requirement by demonstrating 'a significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages. . . . Purely speculative harm will not suffice . . .." *RoDa Drilling Co v. Siegal*, 552 F.3d 1203, 1210 (10th Cir.2009). *See also Sims v. New*, 2008 WL 5044554, *2 (D. Colo. Sept. 2, 2008) (inmate's speculation that

he may suffer acts of retaliation, including placement in segregation or a transfer, without more does not establish irreparable harm for purposes of imposing injunctive relief).

Furthermore, because the limited purpose of a PI is merely to preserve the relative positions of the parties until a trial on the merits can be held, the following three types of "specifically disfavored preliminary injunctions" are "closely scrutinized": "(1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that [he] could recover at the conclusion of a full trial on the merits." *Schrier*, 427 F.3d at 1258–59 (citations omitted). Finally, the Court is reminded that it is "well-established law that prison management functions should be left to the broad discretion of prison administrators to enable them to manage prisons safely and effectively. . . . Courts should grant injunctive relief involving the management of prisons . . . only under exceptional and compelling circumstances." *Walker v. Meyer*, 2009 WL 1965493, *4 (D. Colo. July 8, 2009) (citations omitted).

Turning to the Motion at issue, the Court finds that Plaintiff is not entitled to a PI or TRO because he has not established that he will suffer irreparable injury unless an injunction issues. First, he has failed to demonstrate that his current conditions do not meet applicable privacy standards. Second, he has not demonstrated that he is in danger of suffering imminent, irreparable harm.

Had Plaintiff filed this motion a year ago, a different result may have been warranted. A Prison Rape Elimination Act ("PREA") audit was conducted at BVCC in May 2016. (Docket No. 15-3.) Although the subsequent report found that BVCC met the

standard for cross-gender viewing and searches, it noted that the unit where Plaintiff is housed

> [H]ave open bar cells which provided less than appropriate privacy to offenders from opposite gender/cross gender viewing during restroom use within their cell. BVCF had previously noted this as an area of concern and had started the process of receiving quotes to place an order for privacy screens. Auditor required BVCF administration to take immediate action to allow offenders to cover the area from opposite gender view when using the restroom until they are able to receive the appropriate privacy screens.

(*Id.* at 10.) BVCC administration apparently allowed offenders to cover the bars on their cells until PREA-compliant screens could be installed. (*Id.*) According to the Affidavit of David Lisac (Docket No. 15-1), who serves as BVCC's PREA coordinator, offenders were permitted to use sheets or towels to obstruct the view of their cells prior to the audit as well. (Docket No. 15-1 ¶ 8.) However, after the PREA-compliant screens were utilized in July 2016, it was determined that the dark sheets that offenders were hanging in front of their bunks constituted a safety hazard and the sheets were removed. (*Id.* ¶ 13.) The PREA-compliant screens, which are opaque rather than completely dark (again, for safety purposes), remained in the cells. (*Id*. ¶¶ 9, 13.) Moreover, Major Lisac states that when a female staff member enters the unit, they first turn a key that activates an automated voice announcement warning that female staff members will be entering the cell. (*Id.* ¶ 14.)

Based upon the documentation provided to the Court, the Court finds that Plaintiff has not demonstrated the existence of exceptional and compelling circumstances at BVCC that mandate injunctive relief. Although Plaintiff contends that

the public announcement system is not used, he admits that screens are present in his cell (Docket No. 19 at 1.) Plaintiff argues that these sheets are small, "completely transparent," and were not installed until October 2016. (*Id.*) However, the screens are undoubtedly there now, and Plaintiff does not argue that they are not in compliance with the PREA. Thus, Plaintiff has not met his burden of irreparable harm based on an unreasonable and unconstitutional invasion of privacy.

Further, the Court agrees with Defendants that Plaintiff has failed to provide specific instances showing that his mental and physical well-being is at imminent risk. Plaintiff's claim that PTSD treatment has been affected by his living conditions in conclusory and devoid of details or supporting documentation. Similarly, Plaintiff states that he has been threatened and suffered a shoulder injury after another inmate attacked him. However, Plaintiff provides no details as to how he is currently in danger. In a January 20, 2017 Grievance, which was attached to Plaintiff's Complaint (Docket No. 1-2 at 14), Plaintiff states that he was threatened by other offenders "starting on 10-25-2016 through 12-3-2016," but he makes no reference to any more recent threats indicating he is in certain, imminent danger of physical harm. Thus, any harm is wholly speculative in nature, and cannot support Plaintiff's request for injunctive relief.

In light of Plaintiff's failure to establish irreparable harm, the Court need not analyze the three additional elements that must be established to obtain a preliminary injunction. *See Caught Fish Enters., LLC v. Action Mfg.*, *LLC*, 2010 WL 2508397, *2 (D. Colo. June 17, 2010).

Plaintiff has failed to carry his burden of establishing that the circumstances under which he is currently incarcerated give rise to a substantial risk of serious harm or place him in imminent danger. Accordingly, as Plaintiff has failed to satisfy the four prerequisites for obtaining a preliminary injunction, the undersigned respectfully **RECOMMENDS** that Plaintiff's Emergency Motion for T.R.O. (Temporary Restraining Order) and/or Preliminary Injunction; Alternatively, Writ of Habeas Corpus Ad Testificandum and/or Subpoena(s) – Due to Continuous Retaliation (Docket No. 2) be **DENIED**.

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b)(2), the parties have fourteen (14) days after service of this recommendation to serve and file specific written objections to the above recommendation with the District Judge assigned to the case. A party may respond to another party's objections within fourteen (14) days after being served with a copy. The District Judge need not consider frivolous, conclusive, or general objections. A party's failure to file and serve such written, specific objections waives de novo review of the recommendation by the District Judge, *Thomas v. Arn*, 474 U.S. 140, 148-53 (1985), and also waives appellate review of both factual and legal questions. *Makin v. Colorado Dep't of Corrections*, 183 F.3d 1205, 1210 (10th Cir. 1999); *Talley v. Hesse*, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Done this 7th day of April 2017.

BY THE COURT

s/Michael J. Watanabe
MICHAEL J. WATANABE
U.S. MAGISTRATE JUDGE